ANNOTATIONS INCLUDE 173 N. C.

NORTH CAROLINA REPORTS

VOL. 118

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1896

REPORTED BY

ROBERT T. GRAY

ANNOTATED BY

WALTER CLARK

(2 ANNO ED.)

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1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
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3 " "	"	25	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
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CRIMINAL COURT OF HERTFORD COUNTY:

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FEBRUARY TERM, 1896

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HARRISON BROWNLOW BROWN.....Buncombe.
TOM HENRY CALVERT.....Chatham.
JAMES BRYAN CONNELLY.....Iredell.
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CASES REPORTED

CASES CITED IN THIS VOLUME

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1896.

JACOB WOOL v. H. A. BOND.

TRIAL—ISSUES—VERDICT DIRECTED BY JUDGE—INSTRUCTIONS.

1. Where, in the trial of an action for trespass on land, the sole inquiry was whether the land described in the complaint was the same as that involved in a former case between the same parties (the judgment in the former being pleaded as an estoppel in the pending action) and the witnesses for the plaintiff, as well as the defendant, testified that the land was identically the same, it was proper for the trial Judge to instruct the jury that, if they believed the evidence, they should answer the issue "Yes," and if they did not believe it or had any doubt, to answer the issue "No."

2. In civil actions the trial Judge may direct the jury's verdict where there is no conflict of evidence or where a party fails to make out his case or sustain his defense by evidence.

APPEAL from Fall Term, 1894, of CHOWAN, *Graham, J.*

There was a verdict for the defendant, and from the judgment thereon plaintiff appealed. The facts are concisely stated in the opinion.

Shepherd & Busbee and J. H. Sawyer for planitiff. (2)
W. M. Bond for defendants.

CLARK, J. The sole inquiry in this action was whether the land sued for was the same as that described in the pleadings and judgment in a former action brought by the defendant in this case against the plaintiff here, which was tried at Fall Term, 1892, of the same

court, the judgment in that action being pleaded as an estoppel. All the plaintiff's witnesses, who professed to know, testified that the land in question was the identical land embraced in the pleadings and judgment in such former action, and all the witnesses for the defendant testified to the same effect, and three of these were members of the jury in the former action. There being no conflict of evidence, his Honor properly instructed the jury, if they believed the evidence, to answer the issue "Yes," and if they did not believe it, or if the matter was in doubt, to answer the issue "No." *Chemical Co. v. Johnson,* 101 N. C., 223; *Holding v. Purifoy,* 108 N. C., 163. In fact, the court might have gone even further and have directed a verdict for the defendant. *State v. Riley,* 113 N. C., 648. Nor was it error to refuse to submit an issue on the mere evidential fact as to the location of the beginning corner. The issue submitted, "Does the judgment rendered at Fall Term in the case of *Bond v. Wool* cover the land in controversy?" was the proper issue arising on the pleadings, and did not debar the appellant from presenting any evidence pertinent to the controversy. *Fleming v. R. R.,* 115 N. C., 676; *Humphrey v. Church,* 109 N. C., 132.

Cited: Bank v. School Committee, 121 N. C., 109; *Aiken v. Lyon,* 127 N. C., 177; *Roberts v. Dale,* 171 N. C., 468.

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(3)

STATE EX REL. R. N. HINES v. C. S. VANN.

QUO WARRANTO—TITLE TO OFFICE—PARTY IN INTEREST—PLEADING.

1. Every action must be prosecuted by the party in interest, and, hence, in a *quo warranto,* while it need not appear that the relator is a contestant for the office, it must appear from the complaint that he is an inhabitant and taxpayer of the jurisdiction over which the officer, whose title is questioned, exercises his duties and powers: *Hence,*

2. Where, in an action of *quo warranto,* it does not appear that the plaintiff has any interest in the action, it will, on motion, be dismissed in this Court.

ACTION heard on demurrer and complaint, before *Graham, J.,* at Fall Term, 1895, of CHOWAN.

The complaint was as follows:

The plaintiff, complaining of defendant, alleges:

"1. That on 7 January, 1895, the defendant, C. S. Vann, was elected treasurer of the county of Chowan by the board of commissioners of said county to fill the vacancy and unexpired term of B. F. Elliott in said office, created by the failure of the said B. F. Elliott

to give such bond as said board of commissioners required of him upon his election to said office, in an election held on 6 November, 1894, for the term of two years, and the said defendant gave the bond that was required of him by the said board of commissioners, and was duly qualified and inducted into said office of county treasurer, and is now holding, exercising and performing the duties and functions of said office.

"2. That on 13 May, 1895, said defendant, C. S. Vann, was elected by the board of commissioners of the town of Edenton, a corporation existing under the laws of the State of North Carolina, mayor, of the said town of Edenton for the term of two years from and after the ..... day of May, 1895, under and by virtue of the (4) amended charter of said town of Edenton, ratified 18 February, 1895, by the General Assembly of North Carolina, and set out in sections 2 and 3 of chapter 37, Private Laws 1895, which are made a part of these pleadings, which said office of mayor the said defendant is now holding and exercising, having been duly qualified and inducted into the same.

"3. That said defendant now unlawfully holds and exercises the functions, duties and powers of said office of county treasurer, which was vacated by the said defendant when he accepted and was duly qualified and inducted into the second office, that of mayor of the town of Edenton, in contravention of section 7 of Article XIV of the Constitution of this State, that no person who shall hold any office or place of trust or profit under the State shall hold or exercise any other office of trust or profit under the authority of this State.

"4. That said defendant, C. S. Vann, has been requested to vacate said office of county treasurer, but has declined to do so, and persists in unlawfully holding and exercising the duties, functions and powers thereof.

"5. That this suit is brought in the interest of the people of the State and to prevent the unlawful holding and exercising of the duties, functions and powers of the said office of county treasurer by the said defendant, C. S. Vann.

"6. That the office of county treasurer and mayor of the town of Edenton are offices of trust and profit."

Wherefore, the plaintiffs demand judgment:

"1. That said defendant, C. S. Vann, is not entitled to (5) said office of Treasurer of Chowan County, and that he be ousted therefrom.

"2. For such other and further relief as may be just and proper.

"3. For costs of the action."

The demurrer was as follows:

"The defendant demurs to the complaint in this action and assigns the following grounds:

"1. That the alleged acceptance of the office of Mayor of Edenton did not vacate the office of Treasurer of Chowan County.

"2. The office of Mayor of Edenton is not such an office as is contemplated by section 7, Article XIX of the Constitution of North Carolina, and the holding of that office and the office of treasurer are not prohibited by the same.

"3. It does not appear that at the time the defendant was qualified as mayor he was qualified and acting as treasurer aforesaid.

"4. It does not appear that this action is brought by leave of the Attorney-General or that bond has been given as required by section 608 of The Code.

"5. It is not alleged that the office of Mayor of Edenton is an office 'of trust or profit under the United States or any department thereof, or under this State or any other State or government.'

"6. It appears from the complaint filed that the defendant was not elected Mayor of Edenton by any authority known to the law having power to elect a mayor."

The demurrer was sustained and plaintiff appealed. In this Court the defendant moved to dismiss upon the ground that it does not appear from the complaint that the plaintiff has any interest in the action.

(6) *Shepherd & Busbee for plaintiff.*
W. M. Bond for defendant.

CLARK, J. Every action must be prosecuted by the party in interest. The Code, sec. 177. In *Foard v. Hall,* 111 N. C., 369, it was held that in a *quo warranto* to test the right of an incumbent to hold office, it is not necessary that the relator should be a contestant for the office, but that it is sufficient if he is an inhabitant and taxpayer of the jurisdiction over which the officer exercises his duties and power. It is not alleged in the complaint in the present action that the relator is a citizen and taxpayer of the county of which the defendant is treasurer and it does not appear that he has any other interest which authorizes him to maintain this action.

It does not appear from the leave granted by the Attorney-General to bring the action that he found that the relator was a citizen and taxpayer of the county of Chowan, but, if he had done so, this would not have cured the defect of jurisdiction, for the cause of action and the right of the plaintiff to maintain it must appear upon the face of the complaint. So true is this that exception on those two grounds—

and those only—may be made in the Supreme Court when not made below. Rules of Court, 27. Had the point been raised and passed upon by the Attorney-General that the relator was, or was not, a citizen and taxpayer of the county no exception could be taken for review in this Court. The defendant was entitled to have the allegation showing the relator's interest which would entitle him to maintain the action set out in the complaint so that, by proper denial or demurrer, the defendant could have the fact found by the jury or the ruling on the law reviewed by appeal. The relator is the real party plaintiff and the courts have never gone to the extent of permitting him to maintain an action in which he has no interest. (7) *Warrenton v. Arrington,* 101 N. C., 109. *Baruch v. Long,* 117 N. C., 509, relied on by appellant, has no bearing, for there the plaintiff's interest appeared and he could have sued even if a nonresident of the State, *Thompson v. Tel. Co.,* 107 N. C., 449, and the objection to the venue (unlike the plaintiff's want of interest in the action) was waived because not made in apt time. The Code, sec. 195.

It not appearing that the plaintiff relator had any interest which would authorize him to bring this action, the motion to dismiss made in this Court must be allowed. *Nicholson v. Comrs., post* 30. Indeed, the Court could dismiss *ex mero motu. Hagins v. R. R.,* 106 N. C., 537; *Nash v. Ferrabow,* 115 N. C., 303.

Action dismissed.

Cited: Houghtaling v. Taylor, 122 N. C., 145; *Barnhill v. Thompson, ib.,* 495; *Mott v. Comrs.,* 126 N. C., 877; *McDonald v. MacArthur,* 154 N. C., 125; *Jones v. Riggs, ib.,* 282; *Midgett v. Gray,* 158 N. C., 135.

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

DEALINGS BETWEEN FATHER AND SON—BURDEN OF PROOF—FRAUD.

1. Whenever the fraudulent character of a deed depends upon a variety of facts and circumstances connected with the transaction, involving the motive and intent of the parties, the general question of fraud must be left to the jury with instructions as to what constitutes fraud in law.

2. A father purchased property belonging to his son at a mortgage sale and left it in the possession of the son, who subsequently mortgaged it to plaintiff, who brought an action to recover the same, in which the father interpleaded: *Held,* that there was no presumption of fraud requiring the father to show by a preponderance of evidence that the transaction between himself and son was *bona fide.*

(8) APPEAL from *Brown, J.*, at Special Term, 1894, of PASQUOTANK.

There was judgment for the plaintiff, and defendant (interpleader) appealed. The facts appear in the opinion.

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

FAIRCLOTH, C. J. This is an action of claim and delivery for personal property. The plaintiff claims under a mortgage dated 16 June, 1893, made by H. F. Greenleaf and wife. The defendant interpleader claims under a mortgage dated 17 March, 1883, made by the same party to A. F. Conklin. Defendant, W. A. Greenleaf, interpleader, took up said mortgage, and afterwards, when the mortgagors failed to pay the debt secured therein, caused the mortgagee Conklin to sell under the power in the deed, when the interpleader became the purchaser and allowed the furniture to remain in the possession of his son, H. F. Greenleaf, and wife.

The verdict was in favor of plaintiff and defendants appealed from the judgment.

His Honor charged the jury that "Dealings between father and son, where the rights of the son's creditors are affected thereby, should be scrutinized carefully by the jury, and the burden is on the interpleader to show by a preponderance of evidence the *bona fides* of this transaction, and if you believe," etc. In this there was error as to the burden of proof.

Generally, he who alleges fraud must prove it, to which rule there are exceptions. Where an embarrassed father conveys property to his son or other near relations, fraud is presumed, which may be rebutted by evidence submitted to the jury under proper instruc-
(9) tions by the court. There is, however, a class of cases in which the fraudulent character of the deed depends upon a variety of facts and circumstances connected with the transaction involving the motive and intent of the parties. In such cases, the general question of fraud or otherwise is left to the jury with instructions as to what constitutes fraud in law. To this class this case belongs, without any presumption of fraud, but depending upon the proofs.

There is no evidence that the conveyance to Conklin by H. F. Greenleaf and wife was in *bad faith*, nor does their relation raise any such presumption. W. A. Greenleaf was a purchaser at the sale, and if he acquired title he had a right to allow the furniture to remain with his son without prejudice to his rights, as there is no question

as to his creditors. These questions are discussed in the cases cited in *McCanless v. Flinchum,* 89 N. C., 373.

Reversed.

Cited: Jordan v. Newsome, 126 N. C., 556.

STATE ON THE RELATION OF J. H. BLOUNT, SOLICITOR, v. W. S. SIMMONS.

PRACTICE—COSTS OF ACTION IN NAME OF STATE—COUNTY NOT LIABLE.

Where, in an action by the solicitor in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action.

ACTION heard before *McIver, J.,* at Fall Term, 1894, of PAMLICO, against the defendant, W. S. Simmons, and 693 (10) other defendants in separate actions, upon the same causes of action, under and by virtue of chapter 287, Laws 1893, sec. 4, to vacate the said 694 entries in said chapter and section. His Honor having intimated that, under the case of *S. v. Spencer,* 114 N. C., 770, said cause of action could not be sustained, it appearing to the court that the same facts are involved in said 694 actions as recited in said case, the solicitor on behalf of the State submitted to a nonsuit, and, upon motion of said solicitor, a judgment for the costs of the said 694 actions was rendered against the county of Pamlico.

From so much of said judgment as taxed the cost against the county of Pamlico the Board of Commissioners of Pamlico County appealed.

F. M. Simmons and T. B. Womack for defendant.

No counsel contra.

FAIRCLOTH, C. J. This is an action by the State, on relation of the solicitor of the district, to vacate an oyster-bed entry, under Laws 1893, ch. 287, sec. 4, and upon the hearing his Honor being of opinion, on the authority of *S. v. Spencer,* 114 N. C., 770, that the plaintiff is not entitled to recover, the plaintiff submitted to a nonsuit, and, on motion of the solicitor, judgment was entered against the county of Pamlico for the costs of the action, said county not being then a party to the action, but was allowed to become a party for the purpose of an appeal. The plaintiff assigns no reason or authority why the county should be taxed with the costs, and we can see none. The defendant refers to The Code, secs. 536 and 537, and *Bunting v.*

(11) *Comrs.*, 74 N. C., 633, in its behalf.
Judgment Reversed.

Cited: *S. c.*, 119 N. C., 51; *S. v. Horne, ib.*, 855; *Garner v. Worth*, 122 N. C., 255; *Loven v. Parson*, 127 N. C., 302; *Summerlin v. Morrisey*, 168 N. C., 410.

MOSES WEISEL, SURVIVING PARTNER, ETC., v. G. W. COBB, ASSIGNEE, ETC.

PARTNERSHIP—SURVIVING PARTNER—DUTY AND LIABILITY OF ASSIGNEE—SALE OF NOTES AND ACCOUNTS BY ASSIGNEE OF DEBTOR—SALE OF GOOD NOTES, ETC., BELOW THEIR VALUE—INTEREST—COMMISSIONS—REFEREE'S REPORT.

1. An assignee is chargeable with the full value of good and solvent notes and accounts sold by him at auction for much less than their value, when he might have ascertained the financial condition of the debtors.

2. Where the surviving partner of a firm conveyed the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the business has been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the copartnership, and is liable to the surviving partner for his failure to do so.

3. Where the assignee of a surviving partner collected about $14,000 within six months after the assignment, and large additional sums within the next six months, and within the year paid out only about $4,200 on an indebtedness of $18,000, much of which was drawing interest, and knew or might easily have ascertained who were the creditors of the partnership: *Held*, that the assignee was chargeable with interest on the moneys he kept after twelve months from the time he assumed the trust until he disbursed it.

4. The assignee of a surviving partner who was appointed to settle the estate, had ten days' public sale and four months' private sale of the stock of goods, from which he realized $13,200, and collected, without suit, notes and accounts amounting to $6,400; he unnecessarily and negligently delayed the payment of debts and the settlement of the estate: *Held*, that two and one-half per cent. commissions on receipts and disbursements is enough to be allowed the assignee for his services, under the circumstances.

5. The report of a referee should not be argumentative.

(12) ACTION heard before *Green, J.*, on the report of a referee, at Fall Term, 1895, of PASQUOTANK.

Various exceptions of the plaintiff, some of which are referred to in the opinion of *Associate Justice Montgomery*, were overruled, and plaintiff appealed. The facts sufficiently appear in the opinion.

E. F. Adylett for plaintiff.
J. H. Sawyer for defendant.

MONTGOMERY, J. Upon the dissolution of the partnership composed of S. Weisel & Son, the son being Moses Weisel, the plaintiff in this action, by the death of S. Weisel, it appears that the surviving partner, the plaintiff, was told by the defendant, who knew that the plaintiff was a partner of his deceased father, that the best thing and the only thing for the plaintiff to do was to administer upon his father's estate, or get some one else to do so. The plaintiff, on 14 June, 1886, called upon the clerk of the Superior Court to qualify as administrator of the deceased father, and offered a bond with the defendant as one of the sureties, which seems to have been intended to cover not only the individual estate of the deceased partner, but also his interest in the partnership property. The clerk declined this bond. The plaintiff then remarked to the clerk that he (plaintiff) had some interest in the firm property, and that he would open the store and run it on his own responsibility, where- (13) upon the clerk, according to Weisel's testimony, told him: "If you do, I will have it closed as you have no right to open the store without first becoming an administrator." The clerk denied that he threatened to close the store in case Weisel opened it. Two days after this conversation between the clerk and the plaintiff, the defendant was appointed administrator of the deceased partner. At the time of the qualification of the defendant as administrator and just after the bond had been signed, the plaintiff being one of the sureties, the defendant took from his pocket a paper-writing, remarking at the same time to the plaintiff: "Here is something else for you to sign." This document was an assignment by the plaintiff, as surviving partner, to the defendant as administrator of the deceased partner, of all of the stock of goods, all notes and accounts and choses in action, and all of the property of said firm, and to sue for and collect all notes and accounts, and to legally account for all amounts and moneys so collected and received by virtue of said assignment. The defendant then proceeded to reduce the partnership assets to cash, and to pay from this source the debts of the firm and the individual debts of the deceased partner, without discrimination.

The suit was brought by the plaintiff against the defendant for an accounting of the defendant's actions under the assignment. At the September Term, 1892, of the Superior Court, the case was by consent referred to W. J. Griffin, and upon the coming in of the report his Honor, being of opinion that the action could not be maintained against the defendant individually, but that he must be sued as administrator and his liability adjusted according to the laws applicable to an administrator, granted defendant's motion to dismiss, from which judgment the plaintiff appealed.

(14) The appeal was heard by this Court at February Term, 1894, *Weisel v. Cobb,* 114 N. C., 22. It was decided there that the action was properly brought, could be maintained against the defendant individually, and that he must account for his trusteeship. The Court said: "If George W. Cobb, administrator, had applied those assets, as they were legally and properly applicable, all well. That will protect George W. Cobb. If either George W. Cobb, or George W. Cobb, administrator, has misapplied them, it is not well, and George W. Cobb must answer for the breach." When the case was sent back to the court below, the exceptions which had been filed to the report of the referee by the plaintiff were heard before *Judge Armfield.* The exceptions were overruled, but his Honor remanded the report to the referee with instructions "to ascertain and state the account between the members of the late firm and Moses Weisel, and to find and report the interest of each in the business; to ascertain and report the value of the services of the defendant assignee and what services were performed; that under the assignment described in the pleadings the defendant assignee is required to apply the assets of the firm assigned to him, first, to the payment of the debts of the firm; second, to the cost of settling its business; third, to account for and pay over to Moses Weisel his interest in the assets for his own use and benefit," and sustained the plaintiff's exception as to this.

The plaintiff excepted to the overruling of the exceptions. The exceptions were so numerous and many of them of so trivial a character that the plaintiff could not have anticipated a favorable ruling of the court thereon; but some of them, involving serious matters, were well taken, and ought to have been sustained. (1) The referee found that at the second sale of the notes and accounts of S.
(15) Weisel & Son by the defendant at public auction, several of them against good and solvent debtors were sold for sums greatly below their value, and that because the defendant was ignorant of the financial condition of the debtors, and because the plaintiff did not inform him that they were solvent, the defendant was chargeable only with the sums actually collected from the sale of such notes and accounts and not with their full value. The plaintiff excepted to this ruling as to matter of law. His Honor overruled the exception, and in that there was error. The defendant ought to have been charged with the full value of such notes and accounts. (2) The defendant failed to collect interest on the accounts due to the firm, delaying to collect the principal even, in many cases, for six, twelve and eighteen months, and the referee held that there was a custom in Elizabeth City that open accounts on merchants' books carried no interest. However that may be, the defendant was not put in charge

of this estate to continue the business of the partnership, but to settle it, and he should have charged and collected interest on all good accounts from the end of 1886, the year in which the partnership was dissolved. This exception of the plaintiff ought to have been sustained, and his Honor committed error in overruling it. (3) The defendant took posssession of the firm assets on 16 June, 1886. The names of the creditors of the firm appeared on the firm books, and no other debts than those were ever presented to the defendant for payment. The indebtedness of the partnership amounted to about $18,000, with interest on certainly some of it, probably all of it. During 1886, the defendant collected more than $14,000 from the sale of goods and from other sources, and paid out during that time only about $4,000, not including his commissions. Up to (16) 15 June, 1887, twelve months from the time he took charge of the estate, he had not paid $200 more, though he had collected large sums in addition to the $14,000 collected in 1886.

It is a fact admitted, and so found by the referee, that all of this money was deposited in the name of George W. Cobb, administrator of S. Weisel, with the banking concern of C. Guerkin & Co., of which concern the defendant was one. The plaintiff insisted that the defendant should be charged with interest on the amounts he had on hand or in his bank after a reasonable time allowed to him for the settlement of the debts of the partnership. The referee held that he was not chargeable with interest, and that he ought to be allowed the same time to execute the trust in his hands as is allowed to administrators (two years) to settle estates. His Honor sustained the referee's ruling, and in so doing we think there was error. We are of the opinion that defendant ought to be charged, under the circumstances of this case, with the interest on whatever sums he kept after twelve months from the time when he assumed the trust, that is, on whatever amount he kept after 15 June, 1887, until he disbursed it. He knew who the creditors of the firm were, and if he did not, he ought to have found out by reasonable means within the twelve months after he took upon himself the trust, and should have paid to them their debts. The referee in his report allowed the defendant $1,824.85, 10 per cent on receipts and disbursements, and also $773 to various persons, several of whom were in his own employment on salary, for clerical and other services connected with the trust, making in all $2,597.85 to execute the assignment. He had ten days of public sales and four months of private sales of the goods. From these sales he realized $13,207.46, and he collected, without suit and at the store or at the bank from notes and accounts, $6,415.53, mak- (17)

ing a total of cash from assets of $19,632.99. The plaintiff excepted to the amount allowed the trustee as excessive. His Honor overruled the exception, and we think he committed error therein. For the reasons set out in this opinion, we think that 2½ per cent on receipts and disbursements is enough to be allowed the defendant for his superintending the execution of this trust. The amount paid for clerical aid is large, but we will not disturb that.

This case is remanded to the court below, to the end that an order be made that the referee conform his report according to the decision of this Court as to the exceptions herein discussed and passed upon.

In this connection it may be remarked that the former reports of the referee are subject to the criticism of being too argumentative—a fault that ought to be avoided.

Modified and Remanded.

In defendant's appeal.

MONTGOMERY, J. For reasons given in the opinion in the plaintiff's appeal there is

No Error.

FURCHES, J., dissenting: In 1886 a mercantile copartnership existed between the plaintiff, Moses Weisel, and his father, S. Weisel, when the said S. Weisel died, leaving the plaintiff the sole surviving member of this partnership.

Upon the death of S. Weisel, the defendant G. W. Cobb was appointed and qualified as his administrator; and the plaintiff M. Weisel executed to the defendant Cobb, as administrator, an assignment of the partnership effects in trust for the purpose of enabling the defendant Cobb to pay the partnership liabilities and
(18) also the individual indebtedness of the said S. Weisel. This assignment was construed by the defendant Cobb as authorizing him to use the assets of this partnership in payment of the debts and liabilities of the partnership and the individual indebtedness of S. Weisel indiscriminately. But this was afterwards held not to be the proper construction of this assignment; that it authorized the defendant to take charge of this partnership estate, to close out and settle the same, and out of the proceeds to pay off and satisfy the liabilities of the partnership and costs incident thereto; and then, if there should be a surplus remaining, this should be divided between the plaintiff and the defendant as the administrator of S. Weisel. *Weisel v. Cobb,* 114 N. C., 22.

But before this decision of the court, *Hoke, J.,* at Fall Term, 1892, made the following order in the cause: "By consent the account involved in this case and all matters of fact and law are referred to W.

J. Griffin, who will consider the same and make his report to the next term of this court—his findings of fact to be final—conclusions of law subject to review upon exceptions filed. Referee shall give ten days' notice of any hearing under this reference to the parties hereto." Under this order the referee proceeded to take and state the account and to report the same to Spring Term, 1893. To this report the plaintiff filed 32 exceptions, to which he afterwards added some twenty-odd more.

This report had been made upon the idea that the defendant had the right to use the proceeds of the partnership in payment of both partnership liabilities and individual indebtedness. And this made it come on before *Armfield, J.*, at Spring Term, 1894, for hearing upon the report and exceptions, when he made the following order: "On motion to remand the case, defendant having moved to confirm the report, it is adjudegd, (1) That the case be remanded to the referee, to ascertain and state the account between the mem- (19) bers of the late firm of S. Weisel & Son, and to report the interest of each in the business, and to ascertain and report the value of the services of defendant assignee and what services were performed. (2) That under the assignment the assignee is required to apply the assets of S. Weisel & Son assigned to him, first, to the payment of the debts of S. Weisel & Son; second, to the cost of settling the business of S. Weisel & Son; third, to account for and pay over to Moses Weisel his interest in the assets for his own use, and sustained plaintiff's exception as to this. The court ordered that the report of the referee be modified accordingly, and that the same, in all other exceptions, be overruled. Both plaintiff and defendant excepted. On plaintiff's motion he was allowed to amend his complaint so as to demand $6,000 and interest from 1886, instead of $2,000 or some other large sum."

Thus it will be seen that this report of the referee was made to ascertain and find two things only: First, the amount of partnership liabilities the defendant had paid, and the individual liability, so as to separate the two; and, secondly, to ascertain the services of defendant and what said services were worth. This committal was under the *Hoke* order, in which the findings of fact were expressly agreed should be final. All the other exceptions of defendant were overruled by the *Armfield* order.

Under this order of re-submission, the referee took further evidence as to what were the partnership liabilities. And these, when ascertained, taken from the whole amount, showed the amount of individual liabilities paid.

Among the debts paid by defendant was one known as the Goldstein debt of $5,480. This was an individual debt of S. Weisel,

(20) made a year or more before the formation of the partnership of S. Weisel & Son, and was so reported in the first report of the referee Griffin. In that report it was not material, as was considered, to separate the partnership liabilities from the individual indebtedness. But under the *Armfield* order it became necessary to do so. And the referee, upon the additional evidence taken by him, finds *as a fact* (and we think he was justified in so finding from the evidence) that the Goldstein debt, though an individual indebtedness, was for money used in the store, and that it was recognized as a part of the partnership liabilities on the 18th of August, 1885, when the partnership was entered into and formed a part of the $18,476.72, which the new partnership assumed and undertook to pay; that, this being so, it became a part of the liabilities of the partnership, although it was an individual indebtedness. The facts found by the referee we have no right to review, and we sustain him in holding that this debt constituted a part of the partnership liabilities of S. Weisel & Son.

The other question that arises, under the re-submission of *Judge Armfield*, is as to the amount of services performed by defendant and his pay therefor. Upon this matter the referee has taken a great deal of evidence and has fully reported the same with his findings thereon. There is some conflict as to the value of this service. The submission of such inquiry without objection is an admission that defendant was entitled to pay for this service. And the only question to be determined is the amount the defendant shall be allowed to retain for the same. There is some conflict of evidence upon this question, but the referee finds that the great weight of the evidence sustains the finding of five per cent on receipts and five on disbursements. And whether there is a great preponderance or not, it must be admitted that there is much evidence tending to sustain this finding of fact, which we cannot review. The allowance of commissions to (21) an administrator within the limits allowed by law (5 per cent) is a matter of judicial discretion, and this Court will not undertake to review the court below unless it clearly appears there has been an abuse of discretion. *Walton v. Avery,* 22 N. C., 405. And we see no reason for distinguishing other trustees from the principle above enunciated.

There are some objections made as to some of the testimony received by the referee upon this question of value of services and amount of commissions (which is only a convenient method of determining the defendant's pay). But we see no grounds upon which these objections should be sustained. It was not an *issue* either for the court or jury, but a *question* for the determination of the commissioner and the court. And in such matters it has always been the

practice of the court to obtain information from any reliable source, as if the court was going to pronounce judgment upon a defendant convicted of an offense that allowed the court a discretion within prescribed limits. The court is bound to pronounce the judgment, but as to the extent of the judgment, this is a matter of judicial discretion in the exercise of which the Judge derives his information from the best sources he can, and is not bound by the strict rules of evidence necessary to be observed upon the trial of an *issue* of fact. As this matter had been specially submitted to the referee by the order of *Judge Armfield*, he was authorized in using the means to inform himself that a Judge would have been if he had undertaken the inquiry himself. We ought, therefore, to sustain the ruling of the court as to the amount of service and commissions allowed the defendant and overrule plaintiff's exceptions.

The other exceptions insisted on by plaintiff, made to the first report, were passed upon by *Judge Armfield* and overruled by him. But as plaintiff noted his exceptions, they were (22) brought forward, and in this way are presented for our consideration. The plaintiff has over fifty exceptions. But those yet to be considered, being those argued before us and discussed in plaintiff's brief, may be considered in three classes:

The sale of what is called insolvent claims, the failure of defendant to collect interest on open accounts due the partnership, and the failure of the referee and the court to charge defendant with interest on the amount of money in his hands from the time it was collected until it was paid out. It must be kept in mind, in the consideration of these questions, that under this submission to the referee every finding of *fact* by him is *final* and could not be reviewed by the court below, and cannot be reviewed by this Court.

Then, as to these debts and the sale of the same by defendant: It is found as a fact that three or four of the debts sold by defendant as insolvent debts were solvent, but it is found that defendant believed them to be insolvent; that holding them as he thought as administrator by virtue of his appointment as such, and the assignment of the plaintiff, he made application under the statute and obtained an order to sell; that those sold at the first sale were thus sold with the knowledge and assent of plaintiff, and that plaintiff had knowledge of the second sale, and was present at this sale; that said sales were fair and open, and that defendant received no benefit therefrom. And, though the plaintiff suggested a want of good faith in these sales and collusion with one Bell, who became a purchaser of some of them, Bell positively denied this charge, and upon the whole of the evidence the referee finds as a *fact* that this allegation is not true, that there was no

(23) collusion between the defendant and Bell, and that defendant acted in good faith.

If these debts had in law belonged to the estate of S. Weisel, this finding would have discharged him from any liability, except for the money he received for these claims. The Code, sec. 1412; *Gray v. Armistead,* 41 N. C., 74. And the fact that he held them as the assignee of plaintiff, as surviving partner of the firm of S. Weisel & Son, as well as by virtue of his administration, will, in our opinion, make no difference. It is true that in technical law the plaintiff became the owner of the partnership effects upon the death of his father for the purpose of enabling him to close out the concern. But still the estate of S. Weisel was interested in the same to the extent of S. Weisel's stock, and a Court of Equity would have protected it from mismanagement in the hands of M. Weisel, if necessary.

But, treating it as under the assignment of Moses Weisel, and that defendant was the assignee or agent of Moses in these sales—and this is the strongest view of the matter that can be presented for the plaintiff, as it will be observed that it is he alone who sues—who complains of any wrong or injury? And he sues upon the assignment for an account and settlement of the trust estate under the assignment. This being so, the plaintiff has made defendant his trustee or agent to do what, under the law, he had the right to do. And all he can require of defendant is *good faith* and reasonable diligence and care in making the sales complained of. Mechem Agency, sec. 495; Lewen Trusts, p. 294, and note 1, p. 295. The commissioner has found all this—good faith, ordinary care and diligence. So these exceptions should be overruled, and the ruling of the court below sustained.

The commissioner finds as a *fact* that it was not the custom in Elizabeth City to charge interest on open accounts, and that (24) neither S. Weisel nor S. Weisel & Son did so. And this being found as *a fact,* and it being found that defendant acted in good faith, and for what he thought to be the best interest of the concern, for the reasons assigned for not charging the defendant with the solvent notes sold by him, we do not charge him with this interest which he did not collect. This exception should be overruled, and the ruling of the court sustained.

The only remaining exception we think it necessary specially to consider is that as to whether the defendant should be charged with interest on the money he collected from the time it was collected until the time it was paid out. We do not think he should. This money was collected in different amounts—much of it in small sums for the sale of goods. Under the statute, if he was acting as administrator, he would not be. A large indebtedness was to be paid *pro rata,* and

the same was the case under the assignment from the plaintiff to the defendant. It is true that it appears that S. Weisel had a considerable individual estate, all of which would eventually have been liable for the firm debts as well as his individual debts. But the firm assets were first liable to the payment of the firm liabilities. Within a few days over two years from the date of the administration and the date of the assignment, the defendant had sold out this large stock of goods, collected in all the assets, and paid all the liabilities of the partnership and individual indebtedness, and accounted for every dollar that came into his hands. He did this in the time the law allows, if it had been strictly an administration. It is not shown that he made a dollar out of the money. It is true it was deposited in a banking house in which the defendant was interested; and it may possibly be true that something was made that defendant was interested in, but it is not shown and we think is rebutted by the findings (25) of the referee, that he failed to act in good faith and for the best interest of the estate in all he did. Such diligence, such promptness to settle, and such good faith as is found by the referee in this case, ought to count for something. Therefore, we should sustain the ruling and judgment of the court on this exception. The other exceptions were virtually abandoned on the argument, or are covered by those we have specially considered. I think the judgment should be Affirmed.

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

W. H. FULLER v. ELIZABETH CITY.

TITLE—TRIAL—EVIDENCE—BURDEN OF PROOF—ADVERSE POSSESSION.

1. In an action against a municipality for damages for the appropriation of plaintiff's land for a street, the defendant denied plaintiff's title: *Held*, that the burden of proving his ownership is upon the plaintiff.

2. In order that adverse possession may ripen into a perfect title against the true owner, it must be such a possession and exercise of dominion as would subject the claimant to an action of ejectment.

3. The mere fact that a person claims land, offers it for sale and lists it for taxes, is not evidence to show title.

ACTION tried before *Green, J.*, and a jury, at Fall Term, 1895, of PASQUOTANK.

The plaintiff sought to recover damages for the condemna- (26) tion and appropriation of a parcel of land alleged to belong to him, for the purpose of a street, and alleged that by reason of the

manner in which the street was laid out his adjoining land was rendered worthless and unsalable.

The defendant denied plaintiff's title and averred that the opening of the street enhanced the value of the plaintiff's adjoining land.

The issues submitted to the jury and the responses were as follows:

"1st. Is the plaintiff the owner of the land described in the complaint? Answer: Yes.

"2d. What damage has plaintiff sustained by reason of said street described in the pleadings? Answer: $295."

The plaintiff introduced deed of trust covering the land in controversy, from C. M. Laverty and John C. Ehringhaus, dated 3 December, 1858.

He next offered in evidence record of an equity proceeding, covering the *locus in quo*, copies of which are made a part of this case on appeal. Defendant requested plaintiff's counsel to read the same. Plaintiff's counsel read the petitions without objection, and then proceeded to read the entries on the back thereof. Here defendant objected. Court ruled that the objections had not been made in time. Entries read and defendant excepted. Plaintiff's counsel then proceeded to read the other papers constituting the record, and defendant objected to each. Each objection was overruled by the court on the ground above indicated, and defendant excepted. The entire record was read.

Plaintiff next introduced deed from commissioners of the court in said proceedings, covering the land in controversy to plaintiff, dated 4 July, 1870.

M. B. Culpepper, a witness for plaintiff, testified: That he had known the plaintiff for twenty-five years, and the land in con-
(27) troversy for a much longer time. That the land was situated on Road Street, in the town of Elizabeth City, N. C., not far from the courthouse. That S. S. Fowler was plaintiff's agent. That plaintiff personally, and through his said agent, had listed and paid taxes upon said land ever since he got his deed for it in 1870. That plaintiff had sold off portions of the land he bought in lots to different people, and was offering the balance of it for sale. That a few years ago there was a house upon the land he purchased. The land in controversy is laid out, no fence around it, and portions of it is swamp. That the land in controversy was a portion of the land described in said deed and equity proceeding, and also in the complaint.

F. Vaughan, a witness for defendant, was next introduced, and stated that he knew the land; that the plaintiff had opened a street

through it since he bought it, and had sold off part of it in lots. It is not enclosed by fence; grown up in weeds and laid out.

G. M. Scott was next introduced for defendant. He testified that he knew the land in controversy; that plaintiff asked fifteen hundred dollars for the swamp portion of it.

Defendant requested the court, in writing, to put his charge to the jury in writing, which the court did in words and figures, to-wit:

"1. The plaintiff claims title as follows: Deed of trust from C. M. Laverty and John C. Ehringhaus, dated 3 December, 1858, and a decree in equity, by which the land was sold and the deed of trust foreclosed and a deed made to the purchaser, the plaintiff in this action, by the commissioners appointed by the court, and dated 4 July, 1870.

"The burden of proof in this action is upon the plaintiff to satisfy the jury by the preponderance of evidence, first, (28) that he is the owner of the land described in the complaint. If he had so satisfied you that he has been in possession of the land, either in person or by his agent, for twenty-one years or more, under color of title, then you will answer the first issue 'Yes.' But if the plaintiff has not so satisfied your minds, you will answer the issue 'No.' (Defendant excepted.)

"2. The jury are instructed that actual possession of land may arise in any of the different ways of improving it, and which are open and notorious in their character, and which show an intention to appropriate it to some useful purpose, and indicate an exclusive use and control of the property by the persons claiming possession. The possession of land may be by different modes, by inclosures, by cultivation, by the erection of buildings or other improvements, or in any other manner that clearly indicates an exclusive appropriation of the property by the person claiming to hold it. The deed of plaintiff having been executed 4 July, 1870, if he had possession under his deed for twenty-one years then he is the owner of the land, and he is not required to show any grant from the State." (Defendant excepted.)

Defendant asked the court to charge the jury as follows:

"The plaintiff has failed to show title to the property through which the street is cut. No title has been shown out of the State. The deed from commissioners to Fuller is only color of title, and no possession under it has been shown, and you will answer the first issue 'No.'

"That there is no grant from the State shown here for the land in controversy, and the plaintiff, before he can recover, must show a continuous adverse possession for twenty-one years under a color of

title. Plaintiff has shown no possession, and you must answer the first issue 'No.' ''

(29) The court declined to give these several instructions, and the defendant excepted to his refusal so to do.

Upon a verdict of the jury, the court rendered judgment for the plaintiff, and defendant appealed. Defendant asked for a new trial. Motion overruled, and defendant excepted.

J. H. Sawyer for plaintiff.
E. F. Aydlett for defendant.

FURCHES, J. It appears from the pleadings that the defendant, exercising the right of eminent domain as an incorporated town, has taken and appropriated a portion of land within its corporate limits, opposite Cedar Street and east of Road Street, as one of the public streets of the town. Plaintiff claims that said street is located on his land, by reason of which he has sustained damage to the amount of $400, which he has demanded of defendant, and which defendant has refused to pay or any part thereof. Defendant answers and, among other things, denies that plaintiff is the owner of the land so taken and appropriated. This puts in issue the title to the land, and the burden is on the plaintiff to show that he is the owner before he can recover damage. Plaintiff, for the purpose of showing title, put in evidence a deed to him executed in 1870, based upon a deed of trust made in 1858, and a decree in equity and sale thereunder; and the appropriation complained of did not take place until 1893.

Twenty-one years' possession under color of title is sufficient to ripen the title, whether it is shown that the land has been granted by the State or not. And seven years' possession under color of title will perfect the title if it is shown that the State has granted the same. Plaintiff showed color of title for a greater length of time than was necessary to ripen into a perfect title against the State and

(30) all persons not under disability, if it had been accompanied by adverse possession. And this possession may be constituted in different ways—as by residing upon the land by himself or by his tenants, by fencing or by cultivation. But we are unable to see from the evidence that plaintiff has been in possession of this land at all, under any of the rules laid down by the law. The fact that he claimed it and offered it for sale, or that he paid taxes on it, is no possession. It must be such possession and exercise of dominion as would subject him to an action of ejectment.

The defendant asked the court to charge the jury that from the evidence in the case the plaintiff had failed to show title in himself.

This the court refused to do. This was error, for which the defendant is entitled to a new trial. It may be that, with more preparation than seems to have been had on the other trial, the plaintiff may be able to complete his title. But whether he will or not, there must be a new trial, and it is so ordered.

New Trial.

LOVEY NICHOLSON v. COMMISSIONERS OF DARE COUNTY.

LEGACIES—SUIT BY LEGATEE TO RECOVER A DEBT CONSTITUTING LEGACY—RIGHT OF ACTION IS ONLY IN PERSONAL REPRESENTATIVE OF TESTATOR.

1. Personal legacies, whether general or special, can only vest in the legatee by the assent of the personal representative in whom the law vests the title to all the personal estate of the deceased, for payment of debts and necessary expenses of administration: *Hence,*

2. The legatee of a judgment debt against a county cannot enforce its payment by an action thereon, *mandamus,* etc., when the personal representative is not a party and when it does not appear that there is fraud or collusion between the debtor and personal representative of the deceased.

MANDAMUS to enforce payment of plaintiff's interest in a judgment rendered in favor of Commissioners of Currituck (31) against Commissioners of Dare, which belonged to the testator and others, tried at Fall Term of CURRITUCK before *Green, J.*

There was no judgment in favor of plaintiff against the Commissioners of Dare and no evidence of assignment of the judgment or any interest therein to plaintiff by the Commissioners of Currituck, but there was evidence of such assignment to C. W. Nicholson and others.

There was verdict and judgment for the plaintiff; from the judgment thereon the defendants appealed.

W. B. Shaw for plaintiff.
E. F. Aydlett for defendant.

FURCHES, J. Plaintiff claims that the county of Currituck was largely indebted to C. W. Nicholson, who was plaintiff's husband, and who died about the first of June, 1880, leaving a last will and testament in which he bequeathed this debt on Currituck County to her—which last will and testament has been duly admitted to probate.

The county of Currituck, having a large debt against the county of Dare which had been reduced to judgment in September, 1881, assigned $712.77 in the Dare County judgment to the said C. W. Nicholson, in part satisfaction of the indebtedness of Currituck to said C.

W. Nicholson. That neither the county of Dare or Currituck has paid this $712.77 so originally owing by Currituck to C. W. Nicholson. And this action is brought by plaintiff to recover this claim and for mandamus.

(32) The will of C. W. Nicholson is not made a part of the record, nor are we informed, by allegation in the pleadings or otherwise, whether there was an executor named in said will, and if so, whether he ever qualified or not, or whether there has been an administrator with the will annexed or not. So far as we are advised from the pleadings or otherwise, there has never been a personal representative of the estate of C. W. Nicholson.

Personal legacies, whether general or special, can only vest in the legatee by the assent of the personal representative in whom the law vests the title to all the personal estate of the deceased for the payment of debts and necessary expenses of administration. Williams on Executors (5 Ed.), pp. 567 and 1235; *Scott v. McNeill,* 154 U. S., 34. Until there is a personal representative (administrator or executor) there is no one authorized to receive payment and to give a receipt that would discharge the debt and protect the debtor. And had defendant paid the plaintiff this demand and she had receipted for the same, this would not discharge the liability nor protect defendant, if there should be an administration and a suit thereon by the administrator or executor.

This being so, it cannot be that plaintiff will be allowed to compel defendant to pay against its consent. There are a few cases to be found where a legatee has been sustained in suing the debtor of the testator or intestate. But these are equitable actions where there are allegations of fraud and collusion between the personal representative and the debtor to cheat and defraud the legatee. And in these cases it is necessary to make the personal representative a party. *Fleming v. McKesson,* 56 N. C., 316; *Spack v. Long,* 22 N. C., 60.

(33) But there are no allegations in this case to bring it within this exception, and it must be governed by the general rule as stated above.

Defendant asked the court to charge the jury that there was no evidence of the assignment of any judgment or the interest of any judgment to the plaintiff by Currituck County. This prayer the court refused, and in this there is error.

There were other questions discussed as to the assignment, statute of limitations, etc., but as plaintiff cannot sustain her action, for the reason we have stated, we do not consider any other question. There is

Error.

Cited: Hines v. Vann, ante 7; *Nicholson v. Comrs.,* 119 N. C., 22; *Nicholson v. Comrs.,* 121 N. C., 28; *Hamer v. McCall, ib.,* 197; *Nicholson v. Comrs.,* 123 N. C., 15.

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

ESTOPPEL—JURISDICTION—DECREE OF SALE—JURISDICTION—VOID JUDGMENT—COLLATERAL ATTACK.

1. A judgment is void, not voidable, if the court has no jurisdiction of the subject-matter of the action, and the assent or neglect of a person cannot confer on the court power to render the judgment.

2. A judgment void for want of jurisdiction of the subject-matter cannot conclude any person, whether a party or stranger to the proceeding, and may be attacked collaterally.

3. Where administration was granted upon the estate of a living man, supposed to be dead, and a decree for the sale of the supposed decedent's land was made in a proceeding to which all the children and heirs at law were made parties and the death of the supposed decedent was alleged and admitted in the pleadings: *Held,* that the decree was void for want of jurisdiction as against both the supposed decedent and his heirs who were made parties to the proceeding, and the latter are not estopped from attacking the decree in a collateral proceeding.

PETITION to rehear the case between the same parties decided at February Term, 1895, *Springer v. Shavender,* 116 (34) N. C., 12.

Shepherd & Busbee, W. B. Rodman and J. H. Small for (41) *petitioners.*

Chas. F. Warren and J. W. Hinsdale contra.

AVERY, J. The basis of the application to rehear and reverse the former ruling of this Court (116 N. C., 12) is the contention that there was error in holding that the children of George W. Dixon were not concluded by the finding in the special proceeding instituted by his administrator to sell the land in controversy, and to which said heirs were parties, that he was then dead, though it is now found by the jury that he was in fact alive when the administrator issued the summons and when the land was sold under the decree for assets. The question presented is whether the doctrine of estoppels applies to and binds the children, who since Dixon's death have brought suit to recover possession from those claiming through the purchaser at the sale, and it depends for its solution upon the answer to the prelimi-

nary question whether the judgment is in law utterly void or only voidable. The contention of the defendant rests upon the erroneous assumption that a judgment void for want of jurisdiction of the subject-matter is *prima facie* conclusive on the parties and protected from collateral attack, as it is where the authority to deal with the subject-matter is conceded and it is proposed to impeach the decree, because of an incorrect finding in the record that a party waived personal service by appearance or otherwise, submitted to the authority of the court. The fundamental and inherent difference between the two kinds of judgments grow out of the fact that the right to be
(42) present in court and have an opportunity to defend an action, where it is proposed to adjudicate one's title to property, is a personal one, and a party may waive by acquiescence, or by neglect even, the requirement of the statute that notice or summons shall be actually served, or served in a specified manner or within a given time, while the authority of the court to take jurisdiction of the subject-matter is derived from an express grant by the sovereign State in the Constitution and laws made in pursuance of it, and, like any other agent acting under a power, a judicial tribunal is not warranted in going beyond the limits of "the law of its creation" fairly construed. *Thomas v. the People,* 107 Ill., 517; *Melia v. Simmons,* 45 Wis., 334; *Scott v. McNeill,* 154 U. S., 34, 46. The law under which the jurisdiction of a clerk is exercised is the provision of the Constitution (Art. IV, sec 12) which empowers the Legislature to allot and distribute the jurisdiction conferred by the organic law amongst those courts inferior to the Supreme Court, and the statute (Code, sec. 1436) which in pursuance of the provision of the Constitution authorizes the institution of a special proceeding. "When the personal estate of a *decedent* is insufficient to pay all his debts . . . to sell the real property for the payment of the debts of such *decedent.*"

In discussing the contention that such judgments as that rendered in the special proceeding are liable to collateral attack, the Supreme Court of Texas gives its sanction to the principle upon which the former opinion in this case rests, as follows: "This [the rule that judgments cannot be collaterally impeached] cannot be universally true, because in the case of an administration upon the estate of a living man the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of
(43) the judgment, and *in such case* although every step in the proceeding by which the man's estate is sold may have been *taken with the most perfect regularity,* and although the purchaser buys in good faith, *no title passes or can pass.*" *Withers v. Jackson,* 27 Texas, 497. But the learned counsel for the petitioner intimated

that the court of Texas was out of line with the current of authority in holding such decrees void for want of power in the court to pronounce them, without actually acquiring jurisdiction over the subject-matter in the manner prescribed by law. It would seem, therefore, but proper that somewhat extended quotations and numerous citations should be made to show that the contention is not well founded.

"Jurisdiction," said the Supreme Court of Illinois, in *Thomas v. People, supra,* "in the general and most appropriate sense of that term, as applied to the subject-matter of a suit, is always *conferred by law,* and it is a fatal error to suppose the power to decide in any case rests solely upon the averments of a pleading." Quoting from *Melia v. Simmons,* 45 Wis., 334, the Court said of the appeal before it: "If this case falls within any class of cases, it is a class in which no court has any right to deliberate or render any judgment, and in which every *conceivable act is an absolute nullity.* The only jurisdiction the county court has in respect to the administration of estates is over the estates of *dead* persons. It would seem that the bare statement of such a proposition is enough without citing authority."

In enumerating the classes of cases in which decrees of probate courts are utterly void and those where the court has jurisdiction of the subject-matter, but by some mistake issues letters testamentary irregularly or illegally, the Court of New Hampshire classified our case among those void for want of jurisdiction. "So," said the Court, "where a will is proved or letters granted, when the person supposed to be dead is still living, the powers of the courts (44) being limited to the estates of *deceased* persons." *Morgan v. Dodge,* 44 N. H., 259. An examination of the authorities cited in *Scott v. McLean,* 154 U. S., at page 47, to sustain the proposition that where a probate court adjudges that a man is dead when he is alive, the judgment is invalid, shows that in the following cases such a decree was held to be *"absolutely void for all purposes and ab initio." Melia v. Simmons, supra; Thomas v. People, supra; Stevenson v. Superior Court,* 62 Cal., 60; *D'Arnsment v. Jones,* 4 Lea (Tenn.), 251; *Perry v. R. R.,* 49 Kan., 420.

In the case of *Scott v. McLean, supra,* the only question presented was whether the alleged intestate was bound by the probate proceeding to which his heirs were parties and in which the court had found that he was dead, when he appeared in person before the court, and of course it was only adjudged that he was not estopped from denying the title of the purchaser under a decree to sell his lands for assets. But on page 43 the Court said: "The *absolute nullity* of administration granted upon the estate of a living person has been directly ad-

judged or distinctly recognized in the courts of many other States." The second authority cited in support of the proposition was *S. v. White,* 29 N. C., 116, where the obligor on a bond executed as administrator of an alleged intestate, not the intestate himself, was allowed to impeach the grant of letters collaterally. The Court, after citing an array of authorities, call attention (as did this Court in the former opinion) to the fact that the case cited in the petition from 63 N. Y., 460, is not sustained by authority elsewhere, was seriously criticized by *Chief Justice Redfield,* and subsequently ex-
(45) plained by the Court which rendered it, as governed by a statute somewhat peculiar in its terms.

No man can put himself in the place of the sovereign and make the adjudication of a court valid by ratifying an unauthorized exercise of power by its agent when the law of the land, which is the agent's power of attorney, declares that the court has no authority to render the judgment. It was upon this principle that this Court, in *S. v. White, supra,* allowed the obligor upon the plea of the general issue to show that the alleged intestate of the plaintiff to whom letters of administration had been issued was alive when the letters were granted. If he was alive the subject-matter was wanting and there was no jurisdiction in the probate court. This Court may be supposed to have known that the facts in London against Railroad were not such as to make it direct authority to support this principle, but it is authority to show that the Court there (88 N. C., pp. 588, 589) cited *S. v. White, supra,* with approval, and distinguished London against Railroad from it, as subsequently the same principle was adverted to in *Garrison v. Cox,* 95 N. C., 353, and other cases cited for the purpose of distinguishing them and not in support of the opinion. After citing *S. v. White* with approval, p. 89, the Court said: "If the person on whose estate the court undertakes to grant letters testamentary of administration *be dead,* and at the time of his decease have his domicile or have *bona notabilia* to be administered, it matters not how irregular may be the proceedings of the court, or how obscured and incomprehensible its conclusions, they afford sufficient authority to cover the *bona fide* transaction of its appointees." The Court thus clearly sustained the doctrine already stated, that irregularities in appointing administrators would not invalidate their acts where it appeared that there *was a dead man,* and jurisdiction conse-
(46) quently of the subject-matter—his estate—and, on the other hand, by citing with approval *S. v. White* to sustain the proposition, that whenever it appeared, even by way of collateral attack, there was *no dead man,* the jurisdiction would be declared defeated and the decree treated as void.

Upon examination it will be found that this distinction has been followed by all text writers and all the appellate courts of this country that have had occasion to discuss the subject, with the single exception of the Court of New York, which rests its ruling, as has been stated, upon the peculiar provisions of the Code of that State.

This Court, in *Collins v. Turner,* 4 N. C., 541, sustained the principle upon which the decision in this case rests by holding that the grant of letters of administration on the other hand in a county where the court had no jurisdiction of the subject-matter was utterly void and might be attacked collaterally, thus marking the distinction between that and the case where, dealing by proper authority with the subject-matter, the court has inadvertently deprived the lawful claimant of the administration. In the early case of *French v. Frazier,* 7 J. J. Marshall (Ky.), 425, the Court, upon the principle that an administration upon the estate of a person then alive was void for all purposes and could be impeached collaterally, held, as did this Court in *S. v. White, supra,* that a debtor of the alleged decedent could set up the plea that the plaintiff was not administrator.

The distinction which seems to have been overlooked by the petitioner in this case is that, while none but parties are bound by a decree, and while the want of actual service may be waived, a judgment where there is want of jurisdiction of the subject-matter is void as to all persons, and consent of parties can never impart to it the vitality which a valid judgment derives from the sovereign State, the court being constituted by express pro- (47) vision of law its agent to pronounce its decrees in controversies between its people. *S. v. White, supra.*

It seems needless to pile up other authorities to sustain the proposition that where a court rests its right to jurisdiction of the subject-matter upon a grant of power to deal with the estates of *dead men,* its decrees are absolutely void when the administration is by mistake upon the effects of a *living* person. Yet it is respectful to notice and follow the line of the argument on behalf of the petitioner, and to discuss the leading authority relied upon to support his contention. The Supreme Court of Washington rested its decision in *Scott v. McNeill* upon the New York case, cited for the petitioner, but the Supreme Court of the United States on appeal pronounced it, as we have stated, insufficient authority. The Court of Washington also held that the judgment was good even against the alleged intestate on his reappearance, on the ground that the probate court was required to find that a person was dead before the grant of letters, and the proceeding was therefore in effect one *in rem,* but this reason was also declared wholly insufficient. The Court, in *Scott v. McNeill,* laid

down the proposition (p. 46) that "to give such proceeding any validity there must be a tribunal competent by its constitution—that is, by the law of creation—to pass upon the subject-matter of the suit." The Court go on to say (p. 47) that the death of the owner of an estate is "a *fundamental* prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his land for the payment of his debts." If the death was a fundamental prerequisite to the exercise of jurisdiction, it was because, until the death oc-
(48) curred there was no subject-matter. If there was no jurisdiction for the want of authority over the subject-matter, the decree was void, and consent or acquiescence in the decree could not impart vitality to it so as to estop any one. Grant that the precise application of the governing principle had never been made before the decision of this case, still, if a court cannot render a valid judgment without jurisdiction of the subject-matter of the action, and nothing but a valid judgment will operate as an estoppel upon any one, it would seem that this Court might safely rest its opinion upon principle without waiting to find a precedent. It is preferable always to rely rather upon a substantial reason or a fundamental principle than upon an ill-considered precedent, but, in fact, the research of counsel has not enabled them to find a single authority in conflict with the opinion which they ask the Court to modify.

The reasoning of the petition rests upon the idea that the same rule as to the binding effect of judgment is applicable where there is a defective service on some of the persons interested, as where there is a want of jurisdiction of the subject-matter; and the petition is based upon a false construction of section 364 of 1 Herman on Estoppels, where the author is treating the questions of personal service. In the succeeding section (365) the same writer explains that where there is no service at all, the judgment is void and subject to collateral attack, but "if the court to which the process is returnable adjudges the service to be sufficient and renders judgment thereon, such judgment *is not void*, but only subject to be set aside by the court which gave it, upon reasonable and proper application or reversed upon appeal. The rule, therefore, deducible from the authorities (says the same author in the section referred to) may be thus stated:
(49) *Where jurisdiction is acquired* no irregularity in the mode of exercising it can affect the judgment when collaterally attacked," etc. The foregoing quotation shows as plainly as it is possible to prove it that the author relied upon to sustain the petition to rehear was in the very section cited, discussing a finding by a court, not that it had jurisdiction of the persons of the parties when no

service at all had been made, but a finding where the service was only apparently irregular, that there had been in fact no defect.

But the section relied upon is authority for the position that a void judgment is not protected from collateral attack and works no estoppel even on a party to the proceeding in which its purports to have been rendered. The same author (1 Herman, section 364) says that the necessary elements of a good plea of *res adjudicata* are not only that there should have been a final judgment between the same parties for the same cause of action, but "the principal element is that it must be a valid judgment. That is, it must be rendered by a court legally constituted, having jurisdiction of *the cause and the person.* Without jurisdiction there is no *validity or vitality to the judgment.* In order to give *validity* to a judgment of a court there must be jurisdiction of the cause and of the person."

The question here is whether the judgment operated as an estoppel upon the heirs because of the declaration and finding of the court that their ancestor was dead, when he was in fact alive, and because they did not appeal from that finding and have it reversed or institute a direct proceeding to set it aside. The author relied upon, as appears from citations already made, declared that such findings are conclusive as to the fact of service, when collaterally attacked, not where there was no service and no jurisdiction of the person at all. Of course, the inference would be, if nothing further appeared, (50) that no such finding could give jurisdiction of the subject-matter because it set forth that a live man was dead, any more than would the finding that service had been had on a party, when no process had been issued against him. But Herman does not leave us to conjecture or to determine by reasoning upon principle what are his views upon this subject. In section 65 he says: "*Jurisdiction is given by law* and cannot be conferred by *consent* of the parties; but a privilege defeating jurisdiction may be *waived* if the court has jurisdiction over the subject-matter. Jurisdiction must either be of the cause, which is *acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty* or of the person, which is acquired by actual service of process or *personal* service on defendant." This is the well-established doctrine that a person may waive the right to demand personal service of process on him because it is a question affecting only his personal rights, and the adjudication of a court that there was no irregularity in service is deemed, *prima facie* only, to be correct.

In stating what is essential in order to give conclusive effect to a judgment, Bigelow in his work on Estoppel, p. 57, says: "In the next place the judgment must have been *valid.* If for want of juris-

diction or for any other reason it was void, it will have no effect, though it was otherwise, as we shall see, if it was only voidable" (citing the opinion of *Judge Cooley* in *Nixon v. Stevens,* 17 Mich., 518). "It is necessary that both the person of the defendant and the subject-matter of the suit should be fully within the cognizance of the court either at the beginning or in the course of the action." As illustrating the principle that only valid judgments work on estoppel, the author cites two leading cases from the courts of New Jersey. In
(51) the first of these (*School Trustees v. Stocker,* 13 N. J., 116) the Court laid down the principle that jurisdiction over the subject-matter of a suit "cannot be conferred by consent, nor can the right to object to a want of it be lost by acquiescence or neglect." The Court said: "If the question were one merely of jurisdiction as to a party defendant not properly brought into court for want of process or for defective service on it the objection would be well taken. This kind of jurisdiction may be obtained by consent, or the want of it may be waived by consent or failing to take advantage of it at the proper time. But in the case before us the difficulty lies much deeper. The question here is not whether a competent court had obtained jurisdiction of a *party triable before it,* but whether the *court itself is competent* under any circumstances to adjudicate a claim against the defendant below." Another authority cited by the author was *Dodd v. Una,* 40 N. J. Eq., 672, where the court held that a petitioner, or one who concurred in the prayer of the petitioners in an equitable proceeding, and who not only acquiesced in but prayed for and invited the action of the court, was not precluded from questioning its jurisdiction to render a decree. The Court in that case cited as the most "concise and complete definition of jurisdiction that of *Chief Justice Beasley,* in *Munday v. Vail,* 5 Vroom, 442, who defined it to be "The right to adjudicate concerning the subject-matter in a given case."

If it were necessary numberless authorities might be added in support of the propositions: (1) That a judgment is void, not voidable, if the court has no jurisdiction of the subject-matter of the action; (2) that where a judgment is invalid for want of jurisdiction of the very subject-matter, its authority over which must be derived
from a grant from the sovereign State, the assent or the neg-
(52) lect of a person cannot confer on it the power which the State has failed to vest in it, though a person may thus waive the assertion of his rights of a purely personal nature; (3) that a judgment void for want of jurisdiction of the subject-matter cannot conclude any person, whether a party or stranger to the proceeding. This position is sustained by the authorities cited by Bigelow and referred to above, if it be necessary to cite additional authority to prove that

there is no estoppel without jurisdiction, and that no individual can exercise the power of the government to give jurisdiction where the law does not confer it, and thereby estop himself, when every other person is left at liberty to plead in avoidance the want of authority in the court.

Upon the former hearing, as upon the rehearing, the conclusion of the court rests upon the two plain propositions, that the judgment in the special proceeding was void for want of power in the court to exercise jurisdiction over the estate of a live man, and the deduction from it that, being void, it worked no estoppel.

If additional reasons are necessary to sustain the opinion on the former hearing, the acknowledged test of the conclusiveness of a decree upon a party in such cases may be applied, and would be involved in the question whether the purchaser through whom the plaintiff claims and by reason of his privity with whom he insists that the heirs of Dixon and their assignees are concluded, would have been estopped by the finding from paying the amount of his bid (30 dollars) had he discovered before payment that Dixon was alive. Estoppels must be mutual, and in order to operate mutually in this case, the decree must have been conclusive as to the very finding insisted upon, both on Windley the purchaser and the heirs of Dixon. This is an action for possession, in which the question whether the purchase-money paid by Windley shall be restored is not (53) raised, and cannot be considered. The heirs of Dixon, who were *sui juris*, might have waived personal service and given the court jurisdiction of their persons, but they could no more impart the vitality which is essential to the operation of the doctrine of estoppel to a judgment rendered against a live man under authority applicable only to *decedents* than they could confer any other authority which the Constitution empowers the Legislature "to allot and distribute" among other courts prescribed in the Constitution, or which may be established by law. Constitution, Art. IV, sec. 12.

If it had appeared upon the record that George W. Dixon was alive when the special proceeding was instituted and when the decree of sale was granted, the judgment would have been pronounced a nullity without proof *aliunds* that he was not dead. There is no sufficient reason to adopt the suggestion of the petitioner and modify the proposition to this effect in the former opinion of the court.

Petition Dismissed.

CLARK, J., dissenting: As to the person erroneously supposed to be deceased, the leave granted to sell his real estate to make assets is necessarily a nullity. He was not a party to the proceeding nor in

privity and can in no wise be bound by the judgment. *As against him* the judgment is a nullity, the Court is careful to emphasize in *Scott v. McNeill*, 154 U. S., 34, 46, and I find no case that goes beyond that. The clerk has general jurisdiction of the subject-matter of winding up dead men's estates, and his finding of fact in a particular case that a man is dead is binding and conclusive on all parties to that judgment, when unappealed from and unreversed. The parties do not give jurisdiction by consent, but the judicial finding by a court
(54) having jurisdiction to make it that a man is or is not dead is just like any other finding by a court having jurisdiction of any given class of cases, conclusive as to all who are parties to the action, and persons buying at a sale under such judgment have the right to be protected from any claim in opposition to the tenor of the judgment by those who were parties to that action. The finding of the court may be incorrect as to the facts and its rulings erroneous in law, but both as to the law and the facts the decision of the court having general jurisdiction of such subject-matter is conclusive on the parties. These defendants were content with the court's adjudication that their ancestor was dead, they did not appeal therefrom, they were benefited to the extent of the purchase-money paid by these plaintiffs, and it does not lie in their mouths now to say that such adjudication is incorrect either as to the law or the facts. If a man stands by at an execution or mortgage sale of property sold as another's, and by his words and conduct makes no claim, but permits the purchasers to pay the purchase-money, he is estopped afterwards to claim such property as his own. For a stronger reason are these defendants estopped, who not only acquiesced in the findings of fact and conclusions of law in ordering a sale of this land, but who were benefited by the application of the purchase-money.

The decree divested no interest in nor title to the land possessed by the ancestor who was erroneously supposed to be dead. But it should estop the plaintiffs ever thereafter to claim as against the purchaser under the decree any interest in land which had been adjudicated (they being parties), to belong to them subject only to their ancestor's debts. I have found no case anywhere which will controvert this proposition. Many cases use the general expression
(55) that such judgments are nullities, but when examined it will be seen that they are held nullities as against the ancestor, who, not being a party to the judgment, could not be bound by it.

The general jurisdiction of this class of cases rested in the court making the decree of sale in this case. Its adjudication of the fact that the ancestor of the plaintiffs was dead was one it had legal authority to make, and must pass upon in all such cases, and its decision

upon that fact, like any other decision either upon the facts or the law, unappealed from, is conclusive as to such fact or ruling as to all parties to the action. If judgments of the courts upon matters within their general jurisdiction do not bind even the parties thereto, but can be upset at any time thereafter by showing by other witnesses that the facts were otherwise, then the stability of judgments and the reliance to be placed in titles acquired under them will be rudely shaken. The death of some witnesses or the failing memory of others will become sufficient, even as to parties to the action, to set aside all judgments based upon the finding of the courts upon the fundamental facts which justify the assumption of jurisdiction in any given case.

Cited: *Boyd v. Redd, post*, 686, 687; *Bernhardt v. Brown*, 119 N. C., 507; *Balk v. Harris*, 122 N. C., 66; *Trimmer v. Gorman*, 129 N. C., 163; *Fann v. R. R.*, 155 N. C., 140; *Batchelor v. Overton*, 158 N. C., 98; *Hobgood v. Hobgood*, 169 N. C., 492.

G. W. WARD, ADMINISTRATOR OF DANIEL BAILEY v. JULIA A. BAILEY.

MARRIAGE, WHEN VOID—DEATH OF ONE OF THE PARTIES TO UNLAWFUL MARRIAGE —DOWER, RIGHT OF.

1. To bring a case of unlawful marriage within the proviso to section 1810 of The Code, which prevents the courts from declaring a marriage void (except for bigamy, etc.), it must be shown and only that one of the parties is dead but that cohabitation and the birth of issue followed the unlawful marriage.

2. The fact that a presumption which had arisen of the death of a woman's husband shields her from prosecution for bigamy upon marrying another, does not render the last marriage any the less bigamous or void if the first husband be, in fact, alive, nor is she entitled to any of the rights of widowhood under the second and unlawful marriage.

ACTION for the recovery of personal property in possession of the defendant and alleged to belong to the plaintiff's in- (56) testate, tried before *Green, J.*, and a jury, at Fall Term, 1895, of PASQUOTANK.

The issues submitted to the jury were, 1st, whether the plaintiff was the owner and entitled to the possession of the property described in the complaint, and, 2d, as to the value of the property.

It was admitted, 1st, That David Allen and the defendant intermarried on 12 March, 1859. 2d, Daniel Bailey, plaintiff's intestate, and the defendant were married 3 April, 1870. Dr. W. J. Lumsden, a witness for the plaintiff, testified that he knew David Allen and that he had seen him in the town of Elizabeth City, N. C., since 1874.

A. L. Jones, also a witness for the plaintiff, testified that he had seen David Allen in the town of Elizabeth City, N. C., since the marriage of the defendant with plaintiff's intestate.

The defendant, on her own behalf, was then introduced, and testified that she knew plaintiff's intestate long before her marriage to him on 3 April, 1870, and that his former wife had died before that date, and that he had no other wife living at the time of her marriage to him.

That her former husband, David Allen, left her in August or September, 1860, and that she heard nothing from him directly or indirectly until after her marriage with Bailey. That she had never seen him nor received any assistance or support from him since the day he left her.

(57) Defendant then introduced the plaintiff as a witness on her behalf and asked him the following question:

"Have you sufficient money in hand belonging to the estate of your intestate to pay debts against his estate and the expenses of administration and the costs of this suit in the event it should be determined against you, outside of the property in controversy in this action?"

Question objected to by plaintiff. Objection overruled, and plaintiff excepted.

Plaintiff answered "Yes."

Defendant next introduced records of Superior Court, showing that the property in controversy had been assigned to her as a part of her year's provision.

At this juncture the court stated to counsel that he should charge the jury, if they should find from the evidence that Allen was living at the time of defendant's intermarriage with plaintiff's intestate, and that he had been continuously absent from her the space of seven years then last past, and that she did not know him to have been living within that time, they should answer the first issue "No."

Whereupon plaintiff submitted to a nonsuit and appealed.

E. F. Aydlett for plaintiff.
J. Haywood Sawyer for defendant.

AVERY, J. The marriage of the plaintiff's intestate with the defendant, she having a husband "living at the time," was, under the plain provision of The Code, sec. 1810, not merely voidable but void, when the rites were performed and the parties undertook to contract in 1870, notwithstanding the fact that the presumption had arisen that the former husband was dead. But plaintiff's intestate being

now dead, it was contended that the courts are now prohibited (58) under the proviso from formally declaring the contract null.
In order, however, to bring the case within the prohibition, it is not sufficient to show simply that one of the parties has died, but it must appear further that issue was born during cohabitation. The latter requirement was not met by the proof; indeed, it is admitted that there was no issue of the bigamous marriage.

We are not at liberty, therefore, to enter upon the discussion of the doctrine upon which counsel for defendant rested his arguments. Whatever might otherwise have been the effect of the presumption of the husband's death, the facts bring this case within the language of the law referred to, but fail to bring it within the exception. Technically, the marriage was none the less a bigamous one because the statute shielded the defendant from prosecution. After the presumption of the husband's death had been rebutted by proof that he was in fact alive, while the law protected her from the prosecution and punishment to which she might otherwise have been liable, it could not be construed consistently with the provisions of the other statute, rendering the marriage void, to give her any of the rights incident to widowhood.

There was error in the ruling of the court below. The judgment of nonsuit is vacated.

New Trial.

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(59)

E. D. CHESSON v. THE JOHN L. ROPER LUMBER COMPANY.

ACTION FOR DAMAGES—MASTER AND SERVANT—NEGLIGENCE OF MASTER—INJURY TO SERVANT—FELLOW SERVANTS—INSTRUCTIONS.

1. A master owes to his servant the duty of using ordinary care to procure sound and safe appliances, and is answerable when the servant is injured by defective ways, implements, machinery or appliances, if a proper inspection could have remedied the defect and prevented the injury.

2. Where plaintiff was injured while loading trucks with lumber because of defective stringers on a platform which he was required to use, and in the trial of an action against his employer for damages there was evidence that the defendant had employed carpenters to inspect and repair the platform, and there was also evidence that an ordinary inspection would have disclosed the defect, it was error to refuse an instruction that it was the duty of the carpenters employed for the purpose to make a reasonably diligent inspection, and, if they failed to do so, defendant was guilty of negligence, and to charge the jury, in lieu of such requested instructions that, if the defendant provided in the beginning a safe and proper platform and appointed competent men to keep it so, it performed its duty to plaintiff unless it actually knew of the defects or might, by reasonable diligence, have known of them.

3. Carpenters employed by a master to inspect and repair, if necessary, a platform used by an employee in loading and unloading lumber, are not fellow-servants of the employee.

4. It is error to leave a jury to determine what is ordinary care or reasonable diligence under any given circumstances, and to decline to give proper instructions which will enable them to apply "the rule of the prudent man" to given phases of the testimony.

5. Where, in the trial of an action involving the question of negligence, the facts are admitted and not more than one inference can be drawn from them, the question whether there has been negligence is for the court; but, where the evidence is conflicting, or where more than one inference can be drawn from it the court should, upon proper request, instruct the jury whether, in any particular aspect of the testimony, there was negligence as alleged.

(60) ACTION to recover damages for an injury alleged to have been caused by the defendant's negligence, and tried at Fall Term, 1895, of WASHINGTON, before *Green, J.*, and a jury.

The issues submitted were: (1) Was the plaintiff injured by the negligence of the defendant as alleged? (2) Did the alleged injury result from the negligence of the plaintiff's fellow-servants? (3) What damage, if any, has the plaintiff sustained?

On the trial before the jury the plaintiff offered the following evidence:

E. D. Chesson, plaintiff, testified as follows: "Prior to 25 September, 1893, I had worked for defendant, and on that day I was loading lumber from a shed on train. There was a platform used as a walkway and for loading trucks. The underneath stringers under the floor were rotten. It fell on that day and broke my ankle. I did not know of the rottenness. I am 35 years old; was earning $1 per day, now cannot earn more than half so much, on account of my broken ankle. It injures me in walking, so much so I can't follow the plow, lift things, etc. A workman could have discovered the defects if examination had been made. I do not say that the defect could have been discovered by ordinary observation. I know that Davenport & Leggett did work on the shed; they did no repairs on the platform as I know of. I was taken home when I was hurt; remained three weeks before I could get out. I commenced working in three months and got eighty cents per day. I left the company in May. Mr. Roper said unless I drew the suit he would have to drop my name from the pay rolls. I had never culled any shingles before. Mr. Roper told me a good shingle culler could get $1.25 per day. Leggett was
(61) there when I went. Davenport came after I went there. I am not a carpenter. The defect could have been discovered."

L. B. Marriner testified: "I saw the walkway the day after the

accident; it was rotten; it was attached to two-by-four scantling. Any ordinary examination would have discovered its defects. I could have discovered the rottenness if I had been sent to examine it; looks to me like a man might have discovered it by examination with a hatchet. I saw six trucks. They would not have broken it if it had been sound. Leggett & Davenport were engaged to make repairs for the company. If there was neglect to repair, it was the fault of Davenport & Leggett. Mr. Savage was the general manager. Davenport & Leggett were carpenters."

Charles Spencer testified: "I saw the platform after it fell; it was rotten. If a plank had been taken up, the rottenness could have been discovered. By tapping it underneath with a hammer, the defect could have been discovered—by use of a hatchet or by knocking it. By a person going under and looking slightly, it could not have been discovered. Nobody could have seen it from the top without taking up the plank. There was no cover over platform. Plaintiff knew it was not covered."

The plaintiff here introduced evidence as to the extent of his injury, and rested his case.

The defendant introduced no evidence.

Besides the issues set out in the record, the defendant tendered one as to contributory negligence on the part of the plaintiff, but in their argument to the jury their counsel admitted that the plaintiff was not guilty of contributory negligence, and this issue was therefore withdrawn from the jury, by request of defendant's counsel and consent of plaintiff's counsel. The court charged the jury as follows: (62)

"The burden of proving negligence rests on the party alleging it, and where a person charges negligence on the part of another as a cause of action he must prove the negligence by a preponderance of evidence. The jury are instructed that in determining the question of negligence in this case they should take into consideration the situation and conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if the jury believe from the evidence that the injury complained of was caused by the negligence of defendants, as charged in the complaint, and without any greater want of care and skill on the part of the plaintiff than was reasonably to be expected from a person of ordinary care, prudence and skill, in the situation in which he was placed, then the plaintiff is entitled to recover."

First exception: To this part of the charge the plaintiff excepted: "The carpenters employed to repair the shed or walk-way are not

fellow-servants with the plaintiff in this action, and the defendant would be liable for their negligence, if they were negligent." To this part of charge the plaintiff did not except.

The plaintiff requested the court to charge the jury that reasonable care would require the defendant to do more than look. It was the duty of their carpenters to make such an examination as would reasonably discover whether the walkway was sound, and if they failed to do this the defendant would be guilty of negligence. The court refused to so charge, and the plaintiff excepted.

At the request of the defendant, the court charged the jury as follows: "If the defendant provided in the beginning a safe and proper platform and appointed competent and proper servants to keep it so, it performed its duty to the plaintiff, unless it
(63) actually knew of the alleged defects, or by reasonable diligence might have known of them, or, knowing, failed to remedy them." To this part of the charge the plaintiff excepted.

The court further charged, at the request of the defendant: "That the defendant did its duty if it had the platform inspected by competent persons, and it was not necessary for it to tear up the platform or to cut into it, unless it had reason to suspect the defect, in order to ascertain the defect." To this part of the charge the plaintiff excepted, and this is his fourth exception.

The court further charged, at the defendant's request: "That a latent defect is one which is hidden or concealed, so as not to be apparent to ordinary observation and examination. If the accident which caused the injury in this case resulted from a latent defect in the platform, then the defendant is not liable to the plaintiff, unless it knew of said defect or could have known of it by ordinary care and diligence, and the burden is upon the plaintiff to show that it did know of it or, by the exercise of ordinary care, might have known of it, or, knowing, failed to remedy it. The law presumes that the defendant has done its duty to the plaintiff in these respects." To this part of the charge the plaintiff excepted.

The court further charged the jury as follows, as requested by the plaintiff:

"1. It was the duty of the defendant to use proper care and diligence to keep the platform described in the pleadings in safe and secure condition, and it owed this duty to the plaintiff as one of its employees, and if you find from the greater weight of testimony in this case that the defendant neglected to discharge this duty it would be guilty of negligence.

"2. The plaintiff charges in his complaint that the de-
(64) fendant furnished and used an insecure, unsafe, rotten and

defective platform, and that it had notice, or by reasonable care and diligence, could have had notice of this defect. The burden of proof is upon the plaintiff to satisfy you by the greater weight of testimony that the platform was insecure, rotten, unsafe or defective, and that the defendant had notice or by reasonable care and diligence could have had notice of these defects, and that his injuries were caused by it, and if you find from the testimony that it was rotten and insecure, and that the defendant had notice of its rottenness and insecurity, or by reasonable care and diligence could have had notice thereof, and that by reason of the insecurity and rottenness the platform fell, and that the plaintiff was injured thereby, without any fault on his part, you will answer the first issue 'Yes.'

"3. If the plaintiff has failed to so satisfy you, you will answer the first issue 'No.' "

The court then charged the jury on the question of damages, to which there was no exception.

The jury answered the first issue "No," and returned their verdict into court.

The plaintiff asked that the verdict be set aside and a new trial granted—

1. Because the verdict is contrary to all the evidence and is not supported by any part thereof.

2. Because the court erred in the first part of its charge, as above set out, in not telling the jury what would in law constitute negligence and what would in law constitute reasonable care and diligence, and in allowing them to pass upon the question of the plaintiff's negligence, when that was not claimed by the defendant.

3. Because the court erred in not charging the jury as requested by the plaintiff, as above set out as his second exception.

4. Because the court erred in charging the jury as requested by the defendant, as above set out in his third ex- (65) ception.

5. Because the court erred in charging the jury as requested by the defendant, as above set out in his fourth exception, as there was no evidence that the defendant had ever had the platform inspected or that it was necessary to tear it up or cut into it to find the defects.

6. Because the court erred in charging the jury as requested by the defendant as above set out in his fifth exception, in that there was no evidence to support the same, and the court failed to charge what would constitute ordinary observation and examination and ordinary care and diligence, and as to the presumption that it performed its duty.

7. Because the court allowed the jury to pass upon the law, as well as the facts, in the charge given, as above set out and excepted to.

Motion for new trial; overruled, and plaintiff duly excepted and appealed.

A. O. Gaylord for plaintiff.
Battle & Mordecai for defendant.

AVERY, J. A master not only owes to his servant the duty of using ordinary care to procure sound and safe appliances and machinery, but also to provide for him a place in which to do his work and a way of access to and departure from it that are reasonably safe. 1 Shearman and Red. Neg., sec. 194, and note; *Buzzell v. Mfg. Co.*, 48 Me., 113. On entering into employment, the servant has a right to assume that the master has discharged this duty (*R. R. v. Hines*, 132 Ill., 161; 22 Am. St. Rep., 515, and note; *Carter v. Oil Co.*, 34 S.
(66) C., 211; 27 Am. St., 817), and may, without culpability, act upon that assumption until some defect becomes so apparent that by exercising ordinary care in the regular course of his employment he might discover it. The employer has a right to have and use imperfect methods and tools and to ask others to enter into his employment to aid him in such use, and in so doing he does not undertake to insure the employee. *Rogers v. R. R.*, 97 Mich., 265. If the appliances or machinery are not the best, the servant contracts in contemplation of the kind or variety used and impliedly assents to their continued use till the courts declare it culpable to fail to procure something better and safer, because it has become reasonable on account of improvements in methods or machinery to require the master to do so. *Mason v. R. R.*, 111 N. C., 482. But the other implication which arises out of such agreements imposes upon the employer the duty of exercising greater care to protect the employee from injury due to the defective condition of appliances than is required of the latter in guarding against accident. The servant is culpable if he fails to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it. The master is answerable, on the other hand, whether the servant is injured by defective ways, implements, machinery or appliances, if a proper inspection could have prevented it. While the master may not be required always to furnish the best machinery, appliances, ways and houses, he is under legal obligations to examine and inspect from time to time all of these things that he may supply for his servant, if the safety of the latter depends upon their condition, and to use ordinary care and skill to discover and repair such defects in them as are

calculated to expose the servant to peril in the course of his employment. Shearman & Red., *supra*, sec. 194; *Vosberg v.* (67) *R. R.*, 94 N. Y., 374; *Gotlich v. R. R.*, 100 N. Y., 467; *Mann v. R. R.*, 111 N. C., 482; *Hudson v. R. R.*, 104 N. C., 491. The employer is chargeable with notice of a disorder or deficiency in anything which it is his duty to keep in reasonably safe condition, if a proper inspection would have disclosed its existence.

The plaintiff was injured while loading trucks with lumber, because the stringers that supported the floor of the platform which he was required to use were rotten, when an ordinary examination would (as a witness testified) have disclosed its defect. The defendant was therefore negligent, in that aspect of the evidence, if it failed to have such inspection made or if it failed to repair the stringers within a reasonable time after discovering their condition. The two carpenters employed to inspect the platform and make needed repairs were, in so far as that duty was concerned, not fellow-servants of the plaintiff, but representatives of the company. *R. R. v. Herbert,* 116 U. S., 642. The plaintiff entered into no contract to incur risks arising from the negligence of the *alter ego* of the company, which is in contemplation of law its own culpability, but only such as were caused by the carelessness of those in a common employment with himself. *R. R. v. Ross,* 112 U. S., 383. The plaintiff asked the court to instruct the jury that it was the duty of the carpenters employed for the purpose to make a reasonably diligent inspection, and if they failed to do so the defendant was guilty of negligence. In lieu of this the court told the jury that "if the defendant provided in the beginning a safe and proper platform and appointed competent and proper servants to keep it so, it performed its duty to the plaintiff, unless its *actually* knew of the alleged defects or by *reasonable diligence* might have known of them, or, knowing, failed to remedy them." (68) The carpenters being *pro hac vice* the embodiment of its authority, the company was negligent if they failed to make an inspection, especially where there was testimony tending to show that an examination would have disclosed the condition of the platform and probably have prevented the injury. When requested to apply the law to the evidence, it was error in the court to refuse the specific instruction asked, and leave the jury to guess or arbitrarily determine what was reasonable diligence on the part of the defendant, and whether it owed its employee the duty of seeing that a proper inspection was actually made by its agents appointed for the purpose. *Emry v. R. R.,* 109 N. C., 589. If the jury believed that a reasonably careful examination of the platform by the carpenters would have disclosed the fact that it was unsafe for the purpose for which it was

used, and would have given the company such timely notice of its condition as would have enabled it by due diligence to have remedied the defects and prevented the injury, they ought to have been made to understand by more specific instruction than was given that such omission of duty was the proximate cause of the accident, because in that view of the testimony it was the neglect to improve the last clear chance to obviate it. *Pickett v. R. R.*, 117 N. C., 616. Whatever may be the rule elsewhere, it is error, according to the settled law of this State, to leave the jury to determine what is ordinary care or reasonable diligence under any given circumstances, and to decline to give proper instructions which will enable them to apply "the rule of the prudent man" to given phases of the testimony introduced by the parties. *Kahn v. R. R.*, 115 N. C., 638; *Haynes v. Gas Co.*, 114 N. C., 203; *Joyner v. Roberts*, 114 N. C., 389. Where the facts are admitted, and not more than one inference can be drawn from
(69) them, the question whether there has been negligence is for the court. *Deans v. R. R.*, 107 N. C., 686. Where the evidence is conflicting, or where more than one inference may be deduced from it, it is the duty of the court, upon a proper request of counsel, to instruct the jury whether in any particular aspect of the testimony there was negligence as alleged in the pleadings. *Knight v. R. R.*, 110 N. C., 58. For the error in refusing the instruction asked, and substituting that given, the plaintiff is entitled to a

New Trial.

Cited: Purcell v. R. R., 119 N. C., 738; *Wright v. R. R.*, 123 N. C., 282; *Bolden v. R. R., ib.*, 617; *Haltom v. R. R.*, 127 N. C., 257; *Myers v. Lumber Co.*, 129 N. C., 253; *Ausley v. Tobacco Co.*, 130 N. C., 38; *Orr v. Telephone Co.*, 132 N. C., 692; *Womble v. Grocery Co.*, 135 N. C., 479; *Clark v. Traction Co.*, 138 N. C., 81; *Horne v. Power Co.*, 141 N. C., 56; *Baker v. R. R.*, 144 N. C., 42; *Marcom v. R. R.*, 165 N. C., 260; *Cozzins v. Chair Co., ib.*, 366; *Smith v. Tel. Co.*, 167 N. C., 256.

JOSIAH MIZZELL ET AL. V. MARY E. RUFFIN, ADMINISTRATRIX OF J. B. RUFFIN.

ACTION FOR BREACH OF WARRANTY—WARRANTY, REAL AND PERSONAL—STATUTE OF LIMITATIONS—PLEADING—PRACTICE—DEFECTIVE STATEMENT OF A GOOD CAUSE OF ACTION.

1. An allegation in a complaint in an action for breach of warranty that "there was and is a breach of defendant's contract of warranty aforesaid" is a defective statement of a good cause of action in that it does not allege in what the breach consisted, as by a specific allegation of ouster.

2. A defective statement of a good cause of action may be taken advantage of by demurrer; if not, it is waived. If demurred to, the court will, in the interest of justice, permit plaintiff to amend. But a statement of a defective cause of action cannot be cured by amendment, and may be taken advantage of by motion to dismiss in the Supreme Court, even when not taken below, or the court may dismiss it *ex mero motu*.

3. Where, in an action for breach of warranty the answer to a complaint containing a defective statement of a good cause of action is framed on the idea that the averment of ouster was sufficiently stated, denies the ouster and pleads the statute, it is a clear case of aider.

4. The warranty in a conveyance of the right to cut standing timber is a real and not a personal warranty, and the breach arises upon the ouster, and not upon the making of the defective warranty.

5. Where, in trial of an action for breach of warratny in a conveyance of right to cut timber, it appeared that the plaintiffs learned of the defect in their title more than ten years before action brought, but were not interfered with, and stopped of their own accord, and afterwards, within a year before bringing the action, they resumed work, but, in obedience to notice from the true owner, desisted, and the owner took possession under his superior title: *Held*, that the ouster took place, not when the plaintiff stopped work of his own accord, but when he did so upon being warned to quit, and the statute began to run from that time.

ACTION to recover damages for breach of warranty, begun (70) 4 September, 1890, and tried before *Boykin, J.*, at Fall Term, 1895, of BERTIE.

On 1 August, 1874, the intestate of defendant conveyed the land described in the complaint, for valuable consideration, to the plaintiff, with general warranty. His title was defective at the time of the conveyance. The plaintiffs learned of this defect more than ten years before the bringing of this action. They worked the timber for a while, the year after the conveyance, and then ceased, of their own accord, till the year this action was begun, when, again commencing work, they were notified to desist by one Wynn, holding a paramount title to theirs, and in obedience to this notice they did desist, and Wynn took possession of the property under his paramount title. Upon these facts appearing, the court intimated that the plaintiff's claim was barred by the statute of limitations and that (71) they could not recover, and the plaintiffs submitted to a nonsuit and appealed.

Pruden & Vann for plaintiffs.
F. D. Winston for defendant.

CLARK, J. The allegation that there "was and is a breach of defendant's contract of warranty aforesaid" states a good cause of ac-

tion, but imperfectly, in that it does not allege wherein, as by a specific allegation of ouster, etc. This is a defective statement of a good cause of action, and not a statement of a defective cause of action. The former must be taken advantage of by a demurrer, whereupon in the interest of justice the court may allow the plaintiff to amend, and if it is not demurred to, the defect is waived. The latter, a defective cause of action, could not be cured by an amendment, since an amendment totally changing the nature of the action (*Ely v. Early,* 94 N. C., 1) or admitting a change into a cause of action, when there was none before (*Richards v. Smith,* 98 N. C., 509; *Kron v. Smith,* 96 N. C., 389; *Clendenin v. Turner, ib.,* 416), cannot be allowed. Clark's Code (2d Ed.), p. 224. A statement of a defective cause of action can be taken advantage of by a motion to dismiss in the Supreme Court, even when not taken below (Rule 27 of this Court), or the court may dismiss the action *ex mero motu* (*Hagins v. R. R.,* 106 N. C., 537; Clark's Code, (2d Ed.), pp. 165, 698); but the insufficient statement of a good cause of action, which is the case here, is cured, if not demurred to. *Knowles v. R. R.,* 102 N. C., 59; *Johnson v. Finch,* 93 N. C., 205. Such defect is cured by answering to the merits. The Code, sec. 242; *Bowling v. Burton,* 101 N. C., 176; *Halstead v. Mullen,* 93 N. C., 252; *Warner v. R. R.,* 94 N. C., 250. Besides, in the present case the answer is framed on the idea that the averment of
(72) ouster was sufficiently stated, and denies the ouster and also pleads the statute of limitations. It is a clear case of *aider. Garrett v. Trotter,* 65 N. C., 430, cited in *Knowles v. R. R., supra; Harris v. Sneeden,* 104 N. C., 369; *Bonds v. Smith,* 106 N. C., 553; Clark's Code (2d Ed.), pp. 172, 173.

According to the evidence, the plaintiffs learned of the defect in their title more than ten years before action was brought, but were not interfered with, and stopped of their own accord. This was not an ouster, and the statute was not set in motion. Within a year before this action was brought they again resumed work, but were at once notified to desist by the owner of the true title, and in obedience to such notice they did desist, and the owner took possession of the property under his superior title. This was an ouster (*Hodges v. Latham,* 98 N. C., 239), and the statute of limitations then first began to run, and his Honor erred in holding that the cause of action was barred.

The warranty in a conveyance of a right to cut standing timber is a real and not a personal warranty, and the breach arises upon the ouster and not upon the making of the defective warranty. The nonsuit must be set aside.

New Trial.

Cited: *Wyche v. Ross,* 119 N. C., 177; *Ladd v. Ladd,* 121 N. C., 120; *Britton v. Ruffin,* 123 N. C., 69; *Bank v. Cocke,* 127 N. C., 473; *Woodcock v. Bostic,* 128 N. C., 248; *Ravenel v. Ingram,* 131 N. C., 550; *Finch v. Strickland,* 132 N. C., 105; *Harrison v. Garrett, ib.,* 178; *Hawkins v. Lumber Co.,* 139 N. C., 162; *Ives v. R. R.,* 142 N. C., 134; *Thomason v. R. R., ib.,* 324; *Blackmore v. Winders,* 144 N. C., 216; *Woodberry v. King,* 152 N. C., 680; *Bank v. Duffy,* 156 N. C., 87; *Dockery v. Hamlet,* 162 N. C., 122.

(73)

W. D. McIVER v. D. W. SMITH ET AL.

MORTGAGOR AND MORTGAGEE—SALE UNDER POWER—NOTICE TO PURCHASER OF EQUITY OF REDEMPTION—PRACTICE—BURDEN OF PROOF.

1. In an action between the purchaser of a mortgagor's equity of redemption and a purchaser at a sale under the mortgage, for an accounting, etc., the plaintiff is not entitled to judgment upon complaint and answer where the answer avers that at the time of the sale there was an amount due on the notes secured by the mortgage equal to the amount bid by the purchaser at such sale.

2. In an action brought by the purchaser of a mortgagor's equity of redemption against a purchaser at the mortgagee's sale, for accounting and to be allowed to redeem, because of the invalidity of the sale, etc., the burden is on the plaintiff to show that at the time of the sale there was nothing due on the mortgage.

3. A mortgage is a contract and the parties may affix such terms and conditions as they see fit, provided creditors or others interested at the time are not affected thereby.

4. The purchaser of a mortgagor's equity of redemption is not entitled to personal notice of a sale under the power contained in the mortgage where the mortgage simply authorizes a sale "after advertising," in case of default.

5. In the trial of such action, hearsay evidence as to the value of the land is inadmissible.

ACTION tried before *Bryan, J.,* and a jury, at May (Special) Term, 1895, of CRAVEN.

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

The facts appear in the opinion of *Chief Justice Faircloth.*

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

FAIRCLOTH, C. J. On 10 May, 1890, the defendants, Smith and wife, executed a mortgage to Nancy Coward on the land in

(74) controversy, to secure several notes mentioned therein, falling due 1 January, 1891, 1892, 1893 and 1894, with power of sale in case of default in payment of either bond or any part thereof. Subsequently, judgments were entered against said Smith, and under executions issued thereon the sheriff sold the land and the plaintiff became the purchaser, and brings this action on 30 June, 1894.

On 16 January, 1893, the mortgagee sold the land under the power in the mortgage, and under that sale the defendants claim title. Thus the plaintiff acquired the mortgagor's equity of redemption, subject to the mortgage debt, and if he had discharged that debt he would have had the legal estate and a complete title.

At the outset, on the trial the plaintiff moved for judgment on the complaint and answer. This motion was in legal contemplation a demurrer to the answer, in which, among other things, it is averred that the amount of the mortgage debt due at the mortgagee's sale was $450 and the cost and expense of sale. Upon this admission the plaintiff was not entitled to judgment on the complaint and answer, and his motion for judgment *non obstante veredicto* was equally untenable.

The plaintiff alleged that at the time of the mortgage sale nothing was due on the mortgage debt, and this is denied by the answer. How that fact was, neither party undertook to show, and we cannot see from the record how it was. The discrepancy between the amount of the last notes, not then due on their face, but which had become so by the default, as averred, and the amount averred to be due, for which the sale was made, may or may not be explained on the ground of credits. The record fails to explain it. The burden of showing that the mortgage debt had been paid was upon the plaintiff on the trial.

The plaintiff also insists that legal advertisement of the mortgage sale was not made, as it was only posted at the courthouse
(75) door, and this is denied, except that it was not advertised in a newspaper. The mortgage fails to specify the manner of advertising, but simply says, "after advertising," the mortgagee may sell on default, etc. A mortgage is a contract, and the parties may affix such terms and conditions as they see fit, provided creditors or others interested at the time are not affected thereby. The registration is notice to all persons who may thereafter become interested.

The plaintiff further says that he had no personal notice of the mortgage sale, and that he was entitled to such notice because he had purchased the equity of redemption, and that the poster at the courthouse door was not sufficient. The authority relied on in the argument failed to satisfy us that he was entitled to personal notice and the plaintiff was unable to cite any decision in support of his contention.

The plaintiff also excepts to the exclusion of *hearsay* evidence "relative to the value of said premises," etc. That exception is overruled.

Affirmed.

Cited: James v. R. R., 121 N. C., 526; *Barbee v. Scoggins, ib.*, 142; *McBrayer v. Haynes*, 132 N. C., 611; *Banking Co. v. Leach*, 169 N. C., 713.

J. P. STANLEY v. W. L. BAIRD ET AL.

EJECTMENT—SALE OF LAND FOR TAXES—TAX TITLE—FAILURE OF SHERIFF TO RESORT TO PERSONALTY.

1. Under the legislation since and including the General Assembly of 1887, relating to sale of lands for taxes, everything is presumed in favor of purchasers.

2. A tax title is good notwithstanding the fact that the land was sold by the sheriff without first resorting to the personalty of the tax debtor as required by the statute.

3. *Semble,* that a sheriff would be liable in damages, as well as to indictment, for his failure to exhaust the personalty of the tax debtor before selling his land.

ACTION for the recovery of land, tried before *Graham, J.*, at (76) February Term, 1896, of CRAVEN.

A jury trial was waived, and his Honor found the following facts:

The facts found by the court upon the trial in this case are as follows, which appear in the record: On 18 May, 1893, T. H. H. Richardson, residing in Craven County, State of North Carolina, city of New Bern, was the owner, and seized and possessed in fee simple of the lot of land described in the complaint and the tax deed hereinafter mentioned, being an unimproved lot, worth about $250, situated in the said city, county and State; and the description of said lot in the complaint, which is identical with the description in the said tax deed and the deed to the plaintiff hereinafter mentioned, is a true and perfect description, fully covering and identifying said lot. During June, 1893, the said Richardson listed said lot for taxation in the Eighth Township, embracing the city of New Bern, said county, in which he resided; and said list was given in, signed, verified and delivered by the said Richardson in person, and all the requirements of the law then in force regulating the listing of property were complied with in the listing of said lot. That the said lot had been duly assessed

in 1891 for taxation, as was provided by the law, by the board of list takers and assessors in said county of said township, and all the requirements of the law then in force, regulating the assessment of real estate for taxation, were complied with in the assessment of
(77) said lot; that the said lot so listed and assessed was placed upon the tax list of Craven County for the year 1893, and the taxes due the State and county for the said year were duly charged up to said Richardson upon said lot, amounting to the sum of $4.59; that the said lot was owned by said Richardson on 7 September, 1893, when the said tax list went into the hands of the Sheriff of Craven County for collection, said list being in due form and properly endorsed, in compliance with the then existing law; that in default of the payment of the taxes aforesaid of the said Richardson upon the said lot, the same being due, the said sheriff, W. B. Lane, duly levied upon the said lot and sold the same, under his tax list, after due personal notice and notice through the mail to said Richardson; that the sale of said lot was duly advertised once a week for four successive weeks preceding said sale by the said sheriff in the New Bern *Journal*, a newspaper having a general circulation and published in Craven County, N. C., and notice duly posted, as required by law, in all respects; that at said sale by the said sheriff, on 2 April, a legal sale day in Craven County, the county of Craven became the purchaser of said lot for the sum of $5.79, being the amount of delinquent taxes and costs due by said Richardson, and the said sheriff duly executed to said county a tax certificate, in the form prescribed by the Machinery Act of 1893, for said lot, with description, the same as the description in the complaint, tax deed and deed of plaintiff; that said tax certificate, after the period of redemption of said lot from sale had expired, to-wit, after April, 1895, was duly assigned, in accordance with all the provisions of the existing law relating to such assignments, to the defendant W. L. Baird by the chairman of the Board of Commissioners of Craven County, by authority of said board; that there-
(78) after, to-wit, on 13 January, 1896, the said W. L. Baird demanded and obtained from the Sheriff of Craven County a deed for the said lot, a copy of which is hereto annexed, marked "Exhibit D," and which is in the form prescribed by law; that said deed has been duly probated and recorded in the records of Craven County, and the defendant W. L. Baird entered into the possession of the premises therein described, being the same described in the complaint, claimed by the plaintiff, Stanley, and is now in the possession of the same by his tenant, Bryce Moore, a copy of the lease from said Baird to said Moore being hereto annexed, marked "E"; that the plaintiff has demanded the possession of the said premises from the defendants,

who refuse to surrender and deliver up the same to the plaintiff; that on 2 January, 1894, the plaintiff, Stanley, purchased by warranty deed said lot for the sum of $250 from T. H. H. Richardson, aforesaid, which deed is duly probated and recorded in Craven County, and claims title to said lot under said deed; that said Stanley is a resident and citizen of said Craven County; that the lot of land conveyed by the tax deed aforesaid from W. B. Lane, sheriff, to W. L. Baird was subject to the taxation for the year 1893, stated in said deed; that the taxes due thereon were not paid or tendered, either by Stanley or Richardson, at any time before the sale; that the said lot had not been redeemed by any person having a lien thereon, or Stanley, or Richardson, or otherwise, from the sale at the date of the deed of the sheriff to said Baird; that the said lot had been listed (79) and assessed, as aforesaid, according to law; that the taxes due thereon were levied according to law; that the lot was sold for taxes, as stated in the deed; that due notice had been given and due publication had, as aforesaid; that the said lot was duly advertised for sale, as required by law; that W. L. Baird, the grantee named in the sheriff's deed, was the assignee, as aforesaid, of the purchaser, Craven County; that the said Richardson at no time tendered to the Sheriff of Craven County any personal property upon which the said sheriff could have levied to satisfy said taxes; that for the purpose of instituting this action said Stanley has paid all taxes due upon said property, in compliance with section 66, Machinery Act, 1895; that said Richardson and his vendee, Stanley, at no time tendered or offered to point out any personal property of said Richardson upon which said Sheriff of Craven County could levy and which he could sell to satisfy the taxes due for said year 1893 by said Richardson.

These facts being found by the court, the plaintiff then offered to prove by himself and other witnesses that T. H. H. Richardson, his grantor, owned and possessed on 1 September, 1893, personal property, to-wit, certain office furniture, situate in the city of New Bern, Eighth Township, Craven County, N. C., and that he owned and possessed said property from said date to the date of the sale of the lot before mentioned, to-wit, on 2 April, 1894, both inclusive; that said property was of value (over and above all tax exemptions) equal to all the taxes for the year 1893, aforesaid, charged against the said Richardson on the tax list of 1893, and more than suffi- (80) cient during the whole period of the time aforesaid, at any and all times, if levied upon, to have paid said taxes, and that said property was unencumbered personalty of the value of $50.

The defendant objected to this testimony as incompetent and inadmissible, under the provisions of the existing law, sections 66 and

74, and other sections of the Machinery Act of North Carolina (acts of 1895) identical with the same provisions of the acts of 1893, known as the Machinery Act, or "Act to provide for the assessment of property and the collection of taxes."

His Honor, being of the opinion that said testimony was incompetent and inadmissible, the tax deed being conclusive evidence that all the prerequisites of the law were complied with by the sheriff, and that all things whatsoever required by law to make a good and valid sale and to vest title in the defendant Baird, the assignee of the purchaser, Craven County, were done, and that said deed was conclusive evidence of the facts stated in subdivisions (1), (2), (3), in the second paragraph, section 66, Machinery Act, 1895, declined to allow said testimony to be introduced by plaintiff. Exception by plaintiff.

The court thereupon found as conclusions of law:

1. That under the provision of the Machinery Act of 1895, section 66 thereof, and similar sections of the same act of the General Assembly of 1893, and prior acts of the same import since 1887, the tax deed under which defendant Baird claims is conclusive evidence of the facts stated in subdivisions (1), (2), (3) of second paragraph of said section 66, Machinery Act of 1895, and presumptive evidence of the other facts stated in said section.

2. That any evidence as to the ownership of personal
(81) property by the plaintiff's grantor, upon which the sheriff failed or neglected to levy to satisfy the taxes due upon the land described in the complaint, is competent and inadmissible, the said tax deed being conclusive evidence that the law was fully complied with.

3. That the change of ownership of the land did not affect the lien of the taxes due thereon, or the sale, or the title of the defendant Baird under his tax deed.

4. That the defendant W. L. Baird is the owner and lawfully in the possession of the premises described in the complaint, and the plaintiff is not entitled to recover said premises in this action.

There was judgment for the defendant, and plaintiff appealed, assigning as error:

1. That his Honor erred in excluding the evidence offered by plaintiff as to the ownership of personal property by Richardson, and in holding that the tax deed is conclusive evidence, and in his first conclusion of law.

2. That his Honor erred in his second conclusion of law, that the change of ownership of the land did not affect the sale and title of defendant Baird.

3. That his Honor erred in his third conclusion.

William E. Clarke for plaintiff.
C. R. Thomas and R. O. Burton for defendant.

FURCHES, J. From the great difficulty in collecting taxes and in sustaining tax titles for land, under the law as it existed prior to 1887, it was necessary that there should be legislation on the subject. But in providing for an admitted defect in the law it may well be considered whether the legislative pendulum did not swing too far the other way, and whether the time for redemption should not be extended and the purchaser be required, at least six (82) months before the expiration of the time at which he will be entitled to demand a deed, to give the owner of the land notice of his purchase, the amount paid and the time when he will be entitled to demand a deed, personally, if the party resides in the State and is known, and by publication if he does not reside in the State or is not known to the purchaser. But this is a matter for the Legislature to determine, and not for us. It is our duty to declare the law as we find it, and not to make the law. And, this being so, we find no error in the judgment appealed from.

Before 1887 the theory was that the sheriff or tax collector acted under a simple legislative power, which had to be strictly pursued to convey title to land, and the burden of showing this was upon the purchaser. There were no presumptions in his favor. *Avery v. Rose,* 15 N. C., 549; *Hays v. Hunt,* 85 N. C., 303. But the Legislature entirely reversed this theory in 1887, and every Legislature since 1887 has substantially re-enacted the legislation of that year. By this legislation everything is presumed in favor of purchasers—some of these are conclusively presumed, while others are not. Section 66, chapter 119, Acts 1895. But those that are not conclusive, with a few exceptions, are declared to be but irregularities, and not to affect the validity of the tax title. Section 74, chapter 119, Acts 1895. The only ground of defense left by this act is to be found in the last paragraph of section 66, chapter 119, on page 158 of the Laws of 1895. And neither of the defendant's exceptions is included in the grounds of defense as there laid down. We will not here enumerate these grounds, as none of them cover the defendant's exceptions. But one of them is fraud on the part of the officer or on the part of the purchaser to defeat the claim of the owner. If this is established it will defeat the tax title. Fraud is not alleged in this case, (83) but it is to be noted that the parties all lived in the same town; that plaintiff's land was sold *for another man's debt;* that the owner was not notified of the sale, and that the man who owed the debt (Richardson) owned and had in the town of New Bern more than five

times as much *personal* property as would have paid this tax, when the act (section 51, chapter 119, *supra*) expressly provides that "no land shall be sold for taxes unless the taxpayer has not sufficient personal property to pay the same situated in the county where the tax is due." It seems that plaintiff has lost his land by the sheriff's failing to discharge his duty. But it does not follow that he has lost its value. *Hollman v. Miller,* 103, N. C., 118; *Young v. Connelly,* 112 N. C., 646; *Thomas v. Connelly,* 104 N. C., 342. It is suggested whether a sheriff, for such neglect of a public duty, is not liable to the plaintiff in damages and also to an indictment. *State v. Hatch,* 116 N. C., 1003. There is no error, and the judgment must be

Affirmed.

Cited: Powell v. Sikes, 119 N. C., 232; *Edwards v. Lyman,* 122 N. C., 746; *Collins v. Pettitt,* 124 N. C., 729, 734, 737; *Geer v. Brown,* 126 N. C., 239; *Montague v. Williams,* 133 N. C., 783; *Turner v. McKee,* 137 N. C., 254.

J. ROSENBAUM v. CITY OF NEW BERN.

INJUNCTION — MUNICIPAL CORPORATIONS — TAXATION — UNIFORMITY — PRIVILEGE TAX ON TRADES—POLICE REGULATIONS—SECOND-HAND CLOTHING—TAX TO ENFORCE POLICE POWER—DISCRETIONARY POWER OF MUNICIPALITY.

1. The requirement of the Constitution that all taxes shall be uniform does not prohibit a municipality, which is empowered to tax persons engaged in mercantile business, from classifying dealers in a particular kind of merchandise, separately from those whose business it is to sell other articles falling within the same generic terms: *Hence,*

2. An ordinance imposing a license tax on all dealing in second-hand clothing is not in violation of section 3 of Article V of the Constitution, requiring such taxes to be uniform between those belonging to the same class. *Furches J.,* dissents, *arguendo,* in which *Faircloth, C. J.,* concurs.

3. The fact that a merchant is liable, under ordinance, to a license tax for the privilege of selling general merchandise, will not exempt him from liability under a subsequent ordinance imposing a privilege tax for selling second-hand clothing, which was included as general merchandise under the prior ordinance, although the aggregate of the two taxes exceeds the limit prescribed by the charter.

4. Under the police power belonging to a municipality by its charter, or under the general law, it may require a dealer in second-hand clothing to turn it over to the city for disinfection, at specified prices.

5. A municipality is not liable for damages caused by the enactment and enforcement of a valid ordinance.

6. An injunction will not lie to enjoin the enforcement of an ordinance on the ground that it shows an abuse by the municipality of a discretionary power with which it is vested.

ROSENBAUM *v.* NEW BERN.

ACTION begun in CRAVEN by the plaintiff against the city (84) of New Bern to enjoin defendant from collecting taxes imposed by ordinance on plaintiff's business, and for damages. A restraining order was granted by *McIver, J.*, upon the motion of plaintiff, the complaint being used as affidavit. The defendant filed answer, and the matter was heard before *Starbuck, J.*, at Chambers, at Durham, on 12 September, 1895, by consent. The restraining order was dissolved, and plaintiff appealed.

The complaint, after alleging plaintiff's residence and occupation as merchant in New Bern, engaged in buying and selling dry goods, notions, etc., furnishing goods and new clothing, and also second-hand clothing, sets forth further:

4. That the plaintiff has two stores or places of business in the said city—one on the east side of Middle Street, adjoining the furniture store conducted by W. P. Jones, and the other at (85) the northwestern intersection of Middle and South Front streets.

5. That the plaintiff buys and sells second-hand clothing only at the said store situated at the northwest corner of South Front and Middle streets, and the said second-hand clothing constitutes only about 10 or 15 per centum of her stock of goods, wares and merchandise in said store.

6. That the said city of New Bern has adopted an ordinance, as follows:

"3 April, 1894.

"CHAPTER 12.

"SEC. 7.—*Be it ordained:* (1st) That all second-hand clothes and bedclothing brought within the city of New Bern shall, before the same shall be offered for sale, be carried by the owners thereof to a receptacle in rear of the city hall to be disinfected by fumigation.

"(2d) It shall be the duty of the city marshal to have all such clothes and clothing disinfected, and he shall stencil or stamp each piece with the word "Fumigated," and charge for said disinfecting and marking as follows: All ladies' dresses, of whatever kind, 15 cents each; all coats and overwraps, large size, 15 cents each; all coats and cloaks, of whatever kind not otherwise mentioned, large shawls, blankets and quilts, 10 cents each; all round-abouts, jackets, overalls, pants, balmorals, 5 cents each; all undergarments not otherwise mentioned, all children's clothes and all other garments not otherwise mentioned, 3 cents each.

"(3d) It shall be the duty of the city marshal to keep an account of all clothes disinfected, and also of all fees collected therefor, 50 per cent of which he will retain for his expense, and convey the residue into the city treasury.

"(4th) Anyone selling or offering to sell second-hand
(86) clothing and clothes without having the same disinfected and marked, as above set forth, shall be subject to a fine of $50 for each and every offense."

7. That, as plaintiff is informed and believes, the prices charged by said city and fixed by said ordinance for such disinfection and fumigation are greatly in excess of the cost thereof, unjust and burdensome; and, as she is informed and believes, that the part thereof allowed to the marshal by said ordinance, to-wit, one-half thereof, is illegal and in violation of the charter of the said city; and that she is informed and believes the cost and expenses of such disinfection and fumigation so required by said ordinance do not exceed more than about one cent for each garment.

8. That all of the second-hand clothing now in the said store of plaintiff has been disinfected and fumigated, as required by said ordinance.

9. That said city of New Bern will not allow plaintiff to bring into said city other second-hand clothing without compelling plaintiff to have same disinfected and fumigated, as required by said ordinance, and compelling her to pay for same, and for the purpose and as stated in said ordinance, the prices fixed therein.

10. That defendant claims that said city of New Bern, by its mayor and board of councilmen, on 4 June, 1895, passed another ordinance (a copy of which is hereto attached, marked "B," and made a part of this complaint) and threatened to enforce the same against this plaintiff; that by said ordinance all merchants whose annual receipts are from $1,000 to $5,000 are taxed $1 per month for said trade and calling, and license for selling "clothing, second-hand, in advance," is $4 per month, as she is informed and believes.

(87) 11. That plaintiff's receipts at each of said stores or places of business does not exceed $5,000 per annum.

12. That plaintiff has tendered to said H. J. Lovick, the tax collector of said city of New Bern, $1 for a license to carry on her business as a merchant, at said store or place of business at southwest corner of South Front and Middle streets, and also $1 for a license to carry on her said business at her store or place of business on the east side of said Middle Street for the month of June, 1895, as she is informed and believes, but the said tax collector, H. J. Lovick, has refused to accept the same and to grant said license, but demands that

the plaintiff pay to him $4 for license to carry on such business in each of said stores, or places of business for said month of June, 1895, and threatens to distrain a sufficiency of the goods and chattels of plaintiff to pay said tax so demanded by said tax collector, as plaintiff is informed and believes.

13. That the city of New Bern, by its mayor and board of councilmen, passed said ordinances, as plaintiff is informed and believes, without authority of law; that the same are not uniform, and that the object thereof is to break up plaintiff's business and to compel plaintiff to leave off dealing in second-hand clothes.

14. That by reason thereof plaintiff has been compelled to stop selling second-hand clothes entirely during said month.

15. Wherefore, plaintiff has been greatly damaged.

16. Plaintiff is advised and believes that said ordinance (marked "B") has never been legally adopted and made a lawful ordinance by said city.

Wherefore, plaintiff demands judgment—

1. For one thousand dollars' damages.

2. That the said H. J. Lovick, tax collector, upon payment to him by plaintiff of $1 for each of said stores or places (88) of business, be required to issue a license to plaintiff to carry on her said business at each of said stores or places of business.

3. That said tax collector be restrained from collecting from plaintiff any further or greater sum than $1 for a license to carry on such business at each of said stores or places of business.

4. That the defendant, the city of New Bern, its officers and agents be restrained and enjoined from collecting from plaintiff more than one cent for each article or garment disinfected or fumigated, by said ordinance, marked "A."

5. That said city of New Bern and said H. J. Lovick, tax collector, be restrained and enjoined from distraining any of plaintiff's property, goods and chattels for failure to pay license for carrying on said business for the month of June, 1895.

6. And for such other and further relief as plaintiff may be entitled, and for costs.

The defendant, answering the complaint, says:

1. That the defendant has no knowledge or information sufficient to form a belief as to the truth of the fifth article thereof, and therefore denies the same.

2. That the defendant is advised, informed and believes that the seventh article thereof is not true.

3. That the defendant is advised and believes that the ninth article thereof is not true.

4. That the defendant has no knowledge or information sufficient to form a belief as to the truth of the eleventh article thereof, and therefore denies the same.

5. That in answer to the twelfth article thereof the de-
(89) fendant says that H. J. Lovick, the tax collector, has not demanded that the plaintiff pay to him $4 for a license to carry on such business in each of said stores or places of business for the said month of June, 1895, and alleges that the said H. J. Lovick demands from the plaintiff the sum of $4 for a license to carry on the business in both of said stores.

6. That the thirteenth article thereof is not true, as defendant is advised, informed and believes.

7. That defendant is informed, advised and believes that the fourteenth article thereof is not true.

8. That the defendant is advised, informed and believes that the fifteenth article thereof is not true.

9. That defendant is advised and believes that the sixteenth article thereof is not true.

And for a further defense to said action the defendant alleges:

1. That the charges made under the ordinance set out in the sixth article of the complaint are not more than sufficient to cover the expenses for the labor performed and the material used in fumigating the articles of clothing therein referred to; that while 50 per cent of the fee so charged is retained by the marshal, said sum is retained by the marshal for the purpose of compensating him for his individual labor in performing the duties required of him under said ordinance; that the balance of said charges, which are accounted for by the marshal to the city, are used by the city for the purpose of employing labor, to assist the marshal in the discharge of said duties and purchasing the material used for the purposes specified in said ordinance.

2. That section 18 of the charter of said defendant, the city of New Bern, confers upon the board of councilmen the following pow-
ers, to-wit: That the board of councilmen shall have the
(90) power to make, and provide for the execution thereof, such ordinances for the government of the city as they may deem necessary, not inconsistent with the laws of the land, and they shall have power by all needful ordinances to secure order, health, quiet and safety within the same and for one mile beyond the city limit, and the powers and privileges of the mayor and justice of the peace to be exercised within the above limits.

3. That said ordinance in reference to the fumigation of second-hand clothing was passed by the board of councilmen of the defend-

ant, the city of New Bern, as defendant is informed, advised and believes, under the power conferred in said section of said charter, to secure the health and safety of the citizens in said city of New Bern.

4. That defendant is advised and believes that the allegations of said complaint, with reference to the charges for fumigating second-hand clothing, the ordinance in reference thereto, and the damage to the plaintiff by reason thereof, do not constitute a cause of action against the defendant, in that it appears from said ordinances that there is no prohibition against the bringing of second-hand clothes and bedclothes within the city of New Bern; and it appears from the allegations of the complaint that the plaintiff has no clothing or bedclothing subject to the provisions of said ordinance which have not been fumigated, and had none within the city limits at the time of the commencement of this action.

5. That under section 32 of the charter of the defendant, the city of New Bern, the said defendant has the power to levy and collect a license tax for the privilege of carrying on any trade, profession or business within the city limits, the amount of said tax to be fixed by the board of councilmen and not to exceed $50 a year.

6. That under the power and authority conferred in said provision of said defendant's charter the board of council- (91) men has duly levied a license tax upon the plaintiff of $4 per month for carrying on business in the city of New Bern as a dealer in second-hand clothing, and an additional tax, as specified in the complaint, for carrying on the business of a general merchant, but that the defendant has not demanded that the plaintiff should pay more than $50 for transacting both of said businesses; that the tax of $4 per month is levied upon all dealers in second-hand clothing, the said dealers having been separately classified for the purposes of taxation by the board of city councilmen of the city of New Bern, under the power and authority conferred in said provision of its charter, and that said classification, as defendant is advised and believes, does not render the tax void for want of uniformity, nor illegal.

7. That defendant is advised and believes that the complaint does not state facts sufficient to constitute a cause of action against the defendant in its allegations with reference to the said license tax for carrying on said business, in that it appears from the allegations of said complaint and from the charter of the city of New Bern that said tax has not been levied for any illegal or unauthorized purpose, and is not illegal and is valid; and that the plaintiff has not paid to the tax collector of the city of New Bern, nor any person for it, the license tax levied by the defendant, as aforesaid, and has not at any time within thirty days after such payment demanded the same in writing

from the treasurer of the defendant, the city of New Bern; and in that it fails to allege that said tax has not, after such demand, hereinbefore referred to, been retained by the treasurer of said city, and said demand refused within thirty days after making such demand.

(92) 8. That the defendant is advised and believes, and so alleges, that the defendant, the city of New Bern, being a municipal corporation, created under and by virtue of the laws and Constitution of the State of North Carolina, is not liable in damages to the plaintiff or any other person for any alleged injury which the plaintiff may have sustained by reason of the passage and enforcement of any ordinance enacted by said city.

Wherefore, the defendant demands judgment that they go without day, and for costs.

W. E. Clarke, M. DeW. Stevenson and W. D. McIver for plaintiff.
W. W. Clark for defendant.

AVERY, J. Where a municipality is clothed with the power to impose a tax upon persons engaged in mercantile business, the authority is subject to the fundamental restriction that it shall not be so exercised as to discriminate between persons of the same class. *State R. R. tax cases*, 92 U. S., 575. "It is unquestionably, however, in the discretion of the taxing power to graduate the tax according to the extent of the business so taxed, or to impose a single tax upon the occupation, without regard to its extent." *S. v. Powell,* 100 N. C., 525.

But the law of uniformity does not prohibit the classification by the municipality of dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same generic term. The term "merchant" embraces all who buy and sell any species of movable goods for gain or profit, but courts everywhere lend their sanction to legislative acts putting dealers in dry goods and dealers in spirituous liquors, drugs or fresh meats into different classes and imposing a license tax upon the one and a tax in proportion to capital employed or sales made on the others, or

(93) a tax or license fee of the same kind, not differing in amount, upon each of the subclasses created. In *S. v. Worth,* 116 N. C., 1007, it was held that the business of manufacturing ice was comprehended under the general term "trade," and that, where a municipality was acting under the grant of authority to impose a privilege tax upon trades and professions, a "levy of $66 per annum for storage, manufacture or sale of ice at wholesale, with the privilege of retailing," was reasonable and constitutional, and provided for no

discrimination between persons engaged in storing, manufacturing or selling at wholesale or retail the particular kind of merchandise upon which the burden was imposed, but fixed the levy upon a class of traders distinctly defined in the ordinance. It was expressly held there that dealers in or manufacturers of different articles of merchandise might in the discretion of the municipal authorities be subjected, in separate classes, to license taxes varying in amount as to each of the classes. Of course, it follows that the overlooking of manufacturers of shoes would not render invalid a tax upon another company whose product was ice, tobacco or cotton goods. It is therefore settled that the only uniformity contemplated in the constitutional restriction (Constitution, Art. V, sec. 3) is that between those belonging to the same class (*State R. R. tax cases, supra*), and it would seem almost needless to cite authorities other than *S. v. Worth, supra,* in support of the proposition that the Legislature had the authority to delegate to the defendant the power to make such levies. Constitution, Art. VIII, sec. 4.

The levy complained of was not imposed upon property, but upon the business of selling second-hand clothing. Had the tax been imposed upon the clothing sold as a property tax, it must have been levied in conformity to the requirements of the Constitution, both as to uniformity and value. But it was within the sound (94) discretion of the municipal legislators, if they were empowered to tax the occupation or business at all, to determine what amount should be paid by every person belonging to a well-defined class pointed out in an ordinance. *S. v. Powell, supra.* It is clear that the city had authority to "levy and collect a license tax for the privilege of carrying on any trade, profession or business" within the limits of the city, not only under the charter, but under the general law. *S. v. Worth, supra;* The Code, sec. 3800. Whatever power the Legislature possesses under the Constitution has been delegated to the municipality, and the question for consideration here is, not whether the court, in the exercise of a sound discretion, will hold the ordinance to be just, resonable or wise, but whether, resolving all doubts as to the exercise of legislative authority by its agent as would be done in favor of a statute enacted by the Legislature itself, it clearly appears that the ordinance is unconstitutional. The authority "to levy and collect a license tax for the privilege of carrying on any trade, profession or business," subject to a prescribed limit as to amount, necessarily carried with it by implication the power to classify the various kinds of business, just as the Legislature might have done. If, therefore, it be conceded that the court can revise the classification adopted by the city, when it does not appear upon its face that there was a purpose

to discriminate in restraint of trade, there is no reason why any one of the taxes imposed in Schedules B and C of chapter 116, Laws 1895, of the Revenue Act, should not be brought before the courts for review, on the ground that it is unreasonable to levy it on that particular class of subjects, though it be admitted that it sometimes constitutes a distinct kind of business because some dealer may have chosen to make his business more general in its character. In the absence of
(95) any evidence of a purpose to break down the sale of this species of goods, courts are powerless. It is the peculiar province of the Legislature to reform the laws so as to make the benefits extend to and the burdens bear equally upon all classes of people.

The plaintiff complains that, in addition to the tax of $4 per month levied upon her as a dealer in second-hand clothing, she is liable under another ordinance to a license tax of $1 per month for the privilege of selling other general merchandise. If the city of Wilmington would have been authorized to levy the tax imposed in *Worth's case* upon a general merchant, notwithstanding the fact that he added to his general business that of wholesale dealer in ice, it is clear that the plaintiff could not evade a tax on one distinct business by combining with it another. Because clothing may be comprehended under general merchandise, the courts cannot question the honesty or the soundness of the discretion of the city authorities in subdividing a larger class of dealers into two or more, distinguished by the lines of goods sold by each. Indeed, it is the duty of the courts to impute to all who exercise legislative authority proper motives, and, as between two constructions of their legislation, to adopt, if possible, that which brings it within the purview of their powers. *S. v. Moore,* 104 N. C., 714. It does not seem to be contended that the municipality is attempting to exact from the plaintiff license taxes greater in the aggregate yearly amount than the limit fixed by the charter, though another ordinance provides that a tax of $1 per month shall be imposed on general merchants and $4 on any dealer whose business, in part or in whole, is selling second-hand clothing, since the limit applies only to the amount of
(96) any single license tax, not to the aggregate amount of two, when they are lawfully imposed. The rule laid down in *S. v. Powell* precludes us from reviewing the exercise of the discretion in classifying those subjected to such burdens or in determining what amount shall be imposed upon each. But the Constitution of North Carolina authorizes the Legislature not only to impose a license tax upon the occupation of selling but a property tax upon the goods sold, provided the statute upon its face allows no discrimination, and, subject to the same restrictions, the Legislature may delegate this power to municipalities. *S. v. Stevenson,* 109 N. C., 730.

The plaintiff, by way of recital, sets forth that the defendant has passed and has already enforced another ordinance which imposes a fine of $50 for selling or offering for sale second-hand clothing without having it disinfected by fumigation, and by paying a price fixed according to the nature of the garment, as set forth in the ordinance. A part of the relief asked is not only that the city authorities be restrained from collecting more than $1 per month as a license tax, but that they be restrained from exacting in future fees so large as plaintiff has paid for disinfecting the clothing now on hand. This ordinance was passed clearly in the exercise of police power claimed to have been delegated by the State, and is an assumption of authority quite distinct from the power to levy license or taxes. Though relating to the same subject-matter, the validity of the two acts is in no way dependent upon the same grants of power (*S. v. Stevenson, supra*), and the passage of the one has no bearing upon the right to enact the other. The previous passing of the ordinance requiring disinfection does not tend to show that the ordinance, the enactment of which was declared in *Powell's case* to be an unreviewable exercise of sound discretion, was unauthorized. The license tax was lawfully imposed, if the municipality was clothed with the (97) power to classify and did not discriminate in the exercise of its delegated authority. The ordinance requiring disinfection was enacted ostensibly and, until direct and unquestionable proof to the contrary is offered, must be deemed in reality to have been passed for the protection of the public health. "The Legislature is empowered under the organic law, in the exercise of its police power, to restrict an individual by direct enactment in the assertion of such dominion or control over his own property or premises as may result in injury to others, provided the prohibitory or restraining statute does not upon its face discriminate in favor of one person or class of persons over another. And though the lawmaking power can create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing." *S. v. Tenant* (28 Am. St., 716, and note), 110 N. C., 609; *S. v. Moore* (17 Am. St., 696), 104 N. C., 714; *Mugler v. Kansas*, 123 U. S., 623. When the municipality, however, attempts to abuse a power, expressly and rightfully granted to it, by restricting the dominion of the owner over his property, not according to a rule general and uniform in its application to a class of persons or to a classification of property, the ordinance imposing such restraint is unconstitutional and void. *S. v. Tenant, supra,* and authorities there cited. But the charter (Private Laws 1879, ch. 42, sec. 18) empowers the municipal authorities, "by all needful ordinances, to secure order,

health, quiet and safety'' within the limits of the city. It was not unreasonable to require one who was engaged in the sale of second-hand clothing to turn it over to the city authorities to be disinfected.

(98) It is a matter of universal knowledge that such clothing is the means often of communicating contagious and dangerous diseases, and it was but a proper and lawful use of the authority to protect the health of the community under local government of the city to use the means adopted to prevent the introduction of disease. The right to sell or to buy such articles is not an absolute one, but may be subjected to such restriction by the lawmaking power entrusted with the authority as may be necessary to make its exercise consistent with the safety and security of others.

The general property tax, being imposed under a distinct grant of authority, must be considered separate and apart from the exercise of any other power, and, so considered, just such an ordinance as that under consideration has been declared to be in conformity with the constitutional requirements and consistent with the *ad valorem* levy on property. *Gatlin v. Tarboro,* 78 N. C., 119.

The plaintiff was not entitled to recover damages from the municipality for passing an ordinance in the exercise of its legislative authority as a branch of the government (*Moffitt v. Asheville,* 103 N. C., 237; 14 Am. St., 810, and note), and cannot maintain her status in court upon any such claim as a cause of action.

The only other remedy which the plaintiff demands, and upon which she bases her claim of right to maintain the action, is an injunction against the collection of the license tax of $4 per month and against collecting the amount now paid for disinfecting. Under the provision contained in section 76, chapter 119, Laws 1895, the injunction will not lie to restrain the municipality unless it appears that the levy or assessment was illegal. If, as has been shown, it was competent to classify dealers in second-hand clothing separately from vendors of other articles of general merchandise, it would follow that

(99) it was no more illegal for the city to exact $1 per month on one class and $4 per month on another as license tax for distinct kinds of business than it would have been to exact $66 per annum and an additional merchant license fee of $1 per month in *Worth's case,* had the wholesale ice dealer's establishment constituted a part of a general merchant's store, or to levy in addition to a particular license tax a uniform *ad valorem* tax on property. *S. v. Stevenson,* 109 N. C., 730. The ordinance imposing a fine for failure to have the clothing disinfected and fixing the cost of fumigating was also within the purview of the powers of the city, and this Court has no authority to review the schedule of charges fixed by it. If the

municipality has abused the powers granted, it is a grievance for which complaint may be made to the Legislature, whose province it is to restrict or withdraw entirely its legislative authority. But it is obvious that the extraordinary power of the courts cannot be invoked to restrain the exercise of a discretionary legislative power, and it is as well settled that the action for damages at law for the alleged wrongful exercise of such powers will not lie. We think, therefore, that there is not in any aspect of the case a statement of a cause of action, since no amendment could be made which would establish an apparent right to either a restraining order now or a verdict for damages on the trial of the action. There was no error in dissolving the restraining order.

No Error.

FURCHES, J., dissenting: The plaintiff is a merchant in the city of New Bern, carrying a stock of about $1,500, one-tenth of which, or $150, is second-hand clothing. The city has one ordinance taxing all merchants $1 per month for the privilege of merchandising within its corporate limits, and another ordinance requiring all merchants dealing in second-hand clothing to submit them to the city authorities for fumigation, to be done at the expense of the owner, and imposing a fine of $50 if this is not done; and a third ordinance (100) imposing another tax on dealers in second-hand clothing of $4 per month.

The plaintiff claims that this legislation on the part of the city is unlawful, unconstitutional and oppressive, and brings this action to enjoin and restrain the city from enforcing these ordinances, which require her to submit the clothing for fumigation and to pay the privilege tax of $4 per month for selling second-hand clothing.

The first of these ordinances, providing for fumigation, falls under the doctrine of police regulations. And it has been held, in *S. v. Taft,* 1190 *post,* that second-hand clothing is not *per se* a nuisance, and their sale could not be prohibited without evidence that they were infected or had been brought from a place known to be infected with contagious diseases; then, under what is known in law as the power of police regulation, they might do so. And as it is known that more than ordinary danger exists in the handling and distribution of this class of goods than in first-hand goods, the city or town might require them to be subjected to a process of fumigation as a kind of quarantine and protection against this extra danger. All this is allowed under what is known as the police power of the government, city or town, and we do not see that plaintiff has any grounds to complain of the second

ordinance, requiring her to submit her goods of this kind to fumigation.

But the next ordinance, requiring her to pay a tax of $4 per month for the privilege of selling these goods, falls under the law of taxation. The police power of the city has nothing to do with it. The power of taxation exists in all municipal governments. They could not exist without this power. Desty on Taxation, 50. But this power is regulated and restricted by the Constitution, and also by
(101) the acts creating municipalities. All taxes levied on property must be *ad valorem* and uniform. Constitution, Art. V, sec. 3. This section also authorizes the taxation of trades, professions, etc., and does not in terms provide that they shall be uniform. But this Court, in construing this section of the Constitution, has held that it means that this tax shall be uniform. *Gatlin v. Tarboro,* 78 N. C., 119. And the question presented is, is this a uniform tax, levied for the purpose of revenue to support the city government, or is it an attempt to do by taxation what it has no right to do under its police power—destroy this business in the city of New Bern? This is a business in which persons of small means are most likely to engage, as it does not require much capital to carry it on. And it is easy to see that a tax upon the privilege of carrying on any mercantile business of nearly one-third of the capital per annum will destroy it. And while it is the duty of the Court to attribute good motives to the city authorities and to put such a construction upon their legislation as to sustain its legality, if it is susceptible of such construction, it is equally the duty of the Court not to sustain them if it appears that their acts are in contravention of the Constitution or of well-defined personal rights. Treating this, as we must treat it, as purely an act for revenue, we cannot see why persons engaged in the sale of this kind of merchandise shall pay four times as much for the privilege as those engaged in selling first-hand clothing.

And taking into consideration the three ordinances referred to above, it is apparent to us that the purpose of this legislation was to run this business out of the trade in New Bern, and in coming to this conclusion we do not attribute bad motives to the city fathers who passed the ordinances. We suppose they thought it would be
(102) a good thing for the city to do so. But we only hold that there are legal reasons why they cannot do so.

But is this tax uniform, as required by the Constitution and construed in *Gatlin v. Tarboro, supra?* It is seriously contended that it is, and *S. v. Worth,* 116 N. C., 1007; *S. v. Moore,* 104 N. C., 714, and *S. v. Stevenson,* 109 N. C., 730, are cited as authorities to sustain this contention. And while this case presents an interesting question, in-

volving constitutional powers and personal rights, it seems to us that it is distinguishable from the cases cited for defendant.

S. v. Stevenson was for not returning purchases, as required by the Revenue Act, for the reason, as he claimed, that he was protected by the law of interstate commerce.

S. v. Moore was an indictment for selling thirteen pounds of cotton after night, without complying with the terms required by the statute, and was sustained by this Court, upon the ground that it fell within the lines of the police powers of the State, which we have seen have nothing to do with the case now under consideration.

S. v. Worth was an indictment for violating an ordinance of the city of Wilmington putting a tax on all manufacturers of ice, who also should have the privilege of selling at wholesale or retail. And this Court held that the ordinance was constitutional; that manufacturers of ice were a distinct class, and that the tax applied to all such manufacturers alike, and, nothing more appearing to the Court, the ordinance was sustained. It was contended in that case that "manufacturer" was a generic term and the same tax should be put on all manufacturers—on the shoemaker at his bench, on the manufacturer of steam engines or of ice—to make the tax uniform. The Court did not agree to this proposition, and it is claimed that the decision in *Worth's case* is in effect an adjudication of this case in favor of the defendant. We do not think so. There must (103) be a line drawn somewhere, or that beneficent provision of the Constitution requiring uniformity of taxation will be emasculated and destroyed. It may be that *Worth's case* is as far as we ought to go. But whether this be so or not, there seems to be quite a distinction between it and the one under consideration. It is true that "manufacturer" is a generic term, but this is subdivided into many kinds of manufacturers, such as a manufacturer of cotton, of tobacco, steam engines, farming implements and so many others that the generic term "manufacturer" does not amount to a definition, and one gets no definite information as to the business in which the party is engaged from this general term.

It is contended that "merchant" is a generic name and includes all persons who buy and sell goods of any kind; that a man who sells liquor or drugs or horses is a merchant. So he may be, in the broad "generic" sense. But they have another well-defined cognomen. If you were asked as to the business of a druggist, you would not be likely to say he is a merchant in Raleigh; if you were to ask as to what business B was engaged in, and he was a liquor dealer, you would not be likely to say he is a merchant in Morganton; or if you were

asked as to the business of C, who owns a livery stable and buys and sells horses, you would not be likely to say he is one of the merchants of New Bern. But if you were asked as to the plaintiff's business, you would most likely say she is a merchant in New Bern. That would convey the business definition as to her occupation. You would be no more likely to go on and say that she has a mixed stock of goods of first-hand clothing and second-hand clothing than you would be likely to say that Sherrill & Co., of Statesville, carry a general line
(104) of merchandise, also ready-made clothing and family groceries. Such definitions as these would not likely be given unless specially called for by some one interested in knowing more about the business than simply to know whether he was a merchant.

It is admitted that in order to sustain this legislation on the part of defendant, treating it simply as a revenue act, they may make the same distinction and discrimination against any merchant in New Bern who sells shoes as a part of his stock or who sells tobacco as a part of his stock, or who sells first-hand clothing as a part of his stock; and, without enumerating further, that they may select any article of merchandise and discriminate against the merchant who sells it 400 per cent if they choose to do so. And it is contended there is no constitution, no law and no power to protect the unfortunate merchant from such unjust discrimination. We cannot give our assent to such a proposition. And as it is admitted that, unless the term "merchant" can be thus *chopped up,* the tax imposed by this ordinance is not uniform, I therefore think that there is error.

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

Cited: School v. Charlotte, post, 735; *Guano Co. v. Tillery,* 126 N. C., 71; *S. v. Irwin, ib.,* 993; *Dalton v. Brown,* 159 N. C., 179; *Mercantile Co. v. Mount Olive,* 161 N. C., 124; *Smith v. Wilkins,* 164 N. C., 140.

J. H. CRABTREE & CO. v. C. J. SHEELKY ET AL.

NEW TRIAL FOR NEWLY DISCOVERED TESTIMONY—DISCRETIONARY POWER OF COURT TO REVERSE JUDGMENT.

APPEAL from CRAVEN. A motion was made in this Court that the case be remanded for a new trial on the ground of newly discovered testimony.

M. DeW. Stevenson for plaintiffs.

O. H. Guion, W. D. McIver and W. E. Clarke for de- (105) *fendants.*

PER CURIAM: Upon reading the affidavit and hearing the motion of defendant for a new hearing for newly discovered testimony, it is ordered, in the exercise of the discretionary power of the Court, that the judgment be reversed and the sale be set aside. *Brown v. Mitchell,* 102 N. C., 347.*

The suggestion is made that the court below inquire whether the true interest of all parties would not be promoted by a sale of the property in separate lots.

New Hearing.

Cited: Chrisco v. Yow, 153 N. C., 536.

CLARENCE DELAFIELD v. LEWIS MERCER CONSTRUCTION COMPANY.

REFERENCE—PRACTICE—DISCRETION OF COURT—PAYMENT BY DRAFT—MERGER OF ACCOUNT FOR MATERIAL IN DRAFT—BURDEN OF PROOF.

1. The refusal of a court to rerefer a case to a referee to hear further testimony is a discretionary matter.

2. Where a creditor, who has been made a party to an action against a corporation in which a receiver has been appointed, fails to prosecute his claim in such action but, instead, institutes separate action, it is not error to order a distribution of the funds in the receiver's hands before such creditor's separate suits are determined, when it does not appear that he could not have had his claim adjusted in the main action.

3. Where a note or acceptance is given on a precedent debt, the presumption is that it was not taken by the creditor in payment of the debt, and the *onus* is on the debtor to show the contrary; otherwise, when the note or acceptance is taken contemporaneously with the contracting of the debt; *Hence,*

4. Where a waterworks construction company ordered pipe from a manufacturer, who replied that he would ship, but terms were "cash; immediate payment," and the company replied that it would pay cash in the following manner—a banking house to which the company had sold the city of New Bern waterworks bonds would accept the drafts of the pipe manufacturer, payable at three months, with interest, for the amount of each month's delivery of pipe; and the terms were accepted by the manufacturer, whose drafts the banking house accepted and deposited bonds as collateral: *Held,* that the company was discharged from liability on the contract for the pipe.

5. The allowance of commissions to receivers appointed by the court, by consent,

* It was held in *Brown v. Mitchell* that the granting of new hearings or new trials by the appellate court in the exercise of its discretion for newly discovered testimony would not be reported as precedents.

to finish uncompleted waterworks, is premature before the work is finished, as it cannot be determined until then whether such allowance is excessive or too little.

(106) ACTION heard before *McIver,* J., at May Term, 1895, of CRAVEN.

From the judgment rendered the Snow Steam Pump Company and Riter & Conly appealed.

The history of the case and the facts pertinent to the appeal are fully stated in the opinion of *Chief Justice Faircloth.*

M. DeW. Stevenson, W. W. Clark and O. H. Guion for plaintiff.
Iredell Meares, C. R. Thomas and W. D. McIver for defendant.

FAIRCLOTH, C. J. If we have been able to read the voluminous record in this case correctly, we find that in January, 1894, the plaintiff, Delafield, instituted this action against the Lewis Mercer Construction Company to recover the amount due on a promis-
(107) sory note, for which he had previously attached defendant's property. Several other attachments had been levied on defendant's property. At February Term, 1894, the several creditors were made parties to this action and filed answers. At the same term the Chattanooga Foundry and Pipe Works was made a party defendant and allowed to interplead and set up its claim against the defendant. At Spring Term, 1894, the Snow Steam Pump Works showed to the court that it had a claim of $92 against defendant company, and it was ordered that said Snow Steam Pump Works be allowed to interplead as to the same and file an answer setting up said claim and be made a party for said purpose.

It is alleged in other parts of the record that the Snow Steam Pump Works had another claim against defendant company, alleged to be secured by a mortgage on some of the property. At February Term, 1895, a motion of said steam pump works "to be stricken out as parties defendant to this action was refused, it appearing to the court that said steam pump works is a necessary party to the action." On 1 June, 1894, on its own application, the Snow Steam Pump Works obtained leave of the Judge presiding to bring an action against the receivers, previously appointed, to recover the machinery alleged to have been conveyed in said mortgage. At Spring Term, 1894, the following order was made: "It is, by consent, ordered that this action be referred to H. G. Connor to hear and consider the claims and demands of all parties to this action and all persons who shall become parties thereto or file claims in said action, and to find his conclusions of fact and law in regard to all contentions of such parties and

claimants, and that he report," etc. After due notice to all parties in interest, the hearing was had before the referee, all parties being represented. The counsel of the Snow Steam Pump Works made a special appearance, "reserving all rights with respect to any (108) motions now pending in said cause," but offered no evidence before the referee.

At May Term, 1895, the Snow Steam Pump Works filed an application to the court that the report of the referee be referred back to him for the purpose of hearing further evidence, etc., which motion was refused. At said term the report was confirmed and judgment rendered, from which only the Snow Steam Pump Works and the Chattanooga Foundry and Pipe Works appealed.

The Snow Steam Pump Works filed no exceptions to the referee's report, either as to his conclusions of fact or law, nor any to the judgment, except (1) the refusal to rerefer the matter, which was a discretionary matter; (2) that there was error in ordering a distribution of the fund in the hands of the receivers until the appellant's separate actions are determined. This must be overruled, as no reason appears why such claims of this appellant could not have been determined in this action.

The Chattanooga Foundry and Pipe Works' claim is for pipes and other material furnished the Lewis Mercer Construction Company for constructing waterworks in the city of New Bern under a written contract. It is admitted and agreed that the correspondence appearing in the record constitutes the whole of the contract entered into in the spring of 1893, under which a large amount of the material was shipped and delivered, and on 11 January, 1894, the Chattanooga company served a notice of stoppage *in transitu* on the railroad company at New Bern, on whose right of way some of the material still remained. In the view we take of this case, the alleged right of stoppage *in transitu* is unimportant.

The contract being in writing, its construction is for the court and not for the jury. *Sellars v. Johnson,* 65 N. C., 104. Looking at the contract, we find that on 3 May, 1893, the Lewis (109) Mercer company sent an order to the Chattanooga company for material to build the New Bern waterworks. On 8 May they replied they would do so, setting forth particulars as to quantity, size, prize, etc., adding "Terms cash; immediate acceptance." On 10 May, 1893, the Lewis Mercer company said: "We can pay you cash in the following manner: We enclose you a card of the banking house to whom we have sold the city of New Bern waterworks bonds. They will accept your drafts on them at three months for all pipe delivered each month at New Bern, N. C. In reference to the firm of John F.

Zebley & Co., we refer you to the Citizens' Bank of New Bern, N. C. John F. Zebley & Co. bought the bonds of the company which we organized, and furnished us with cash to build these works. Kindly advise us at once if you wish to enter order on above-mentioned terms, as we consider that when John F. Zebley & Co. accept your drafts on them at three months it is equivalent to cash. Of course, you understand those acceptances carry 6 per cent interest." After some correspondence about freight, manner of shipping, etc., the Chattanooga company replied: "We wrote you on the 16th of the month, in which we accepted the terms and conditions upon pipe and specials delivered at New Bern, N. C., per your letter of 10 May. These terms were drafts to be made at three months for all pipe delivered each month at New Bern, N. C. I accepted the order by telegraph, but since have thought it would require some little explanation." These mutual statements are repeated in other communications, and instructions given for shipping, invoices ordered, etc. On 20 May, the Chattanooga company inquired of R. G. Dun & Co., a mercantile agency of Baltimore, Md., as to the condition of John F. Zebley & Co., (110) and received in reply: "Lewis Mercer Construction Company and Zebley considered good for drafts referred to." On 22 May, John F. Zebley & Co. replied to Chattanooga company, "Will accept your three-months draft on us for pipe delivered each month to the Lewis Mercer Construction Company at New Bern, N. C.," and gave references to three responsible parties.

On 23 May the Chattanooga company said to the Lewis Mercer company, "We are ready now to commence shipment of pipe to you," stating that Zebley had agreed to accept drafts, etc. A few days later, at the instance of the Lewis Mercer company, Zebley & Co. placed some of the bonds with the Chattanooga company as collaterals, and the shipments commenced. Late in 1893, or early in 1894, it developed that Zebley & Co. and the Lewis Mercer company were insolvent.

Our conclusion is that, by the terms and intent of the contract, the drafts drawn by the Chattanooga company and their acceptance by Zebley & Co., and the deposit of the bonds of the city of New Bern with the former, was a discharge of the Lewis Mercer company from further liability on the contract for the pipe, etc., furnished by the Chattanooga company to the Lewis Mercer company. *Symington v. McLin,* 18 N. C., 298; *Ligon v. Dunn,* 28 N. C., 133; *Sellers v. Johnson, supra.* We find similar conclusions arrived at in the following: *Whitbeck v. Van-Ness,* 11 Johns, 409; *Eaton v. Cook,* 32 Vt., 58; *Noel v. Murray,* 3 Kernan, (N. Y.), 167.

In *Noel v. Murray, supra,* it was held that "where the note is re-

ceived on a precedent debt the presumption is that it was not taken as a payment, and the *onus* is upon the debtor to show that it was taken as a payment; but where it is received contemporaneously with the contracting of the debt the presumption is that it was taken in payment, and the burden of proving the contrary rests on the (111) creditor." This conclusion makes it unnecessary to consider the question of the right of stoppage *in transitu,* and all the exceptions of the Chattanooga company are overruled, as it has no claim against the Lewis Mercer company.

The want of power in the court to appoint receivers, in a case like the present, to take charge of a partially constructed work and finish the enterprise, in which the *public* have no interest, has been suggested, and would present a serious question but for the fact that the receivers were appointed by consent of all interested parties, and there is no exception to that aspect of the order. In any completed enterprise in which the public are interested, and which is called a "going concern," the courts do not hesitate to make such appointments; for example, a running railroad. But how much further the court will go will be reserved for future consideration. The receivers were ordered to file their accounts of receipts and disbursements with the clerk and the cause retained for further hearing. That part of the judgment fixing the per cent of commissions for the receivers was premature, and must be reversed, and that matter will be adjusted when their work is finished. We cannot now see whether the allowance is too much or not. Modified as above stated, the judgment is affirmed.

Affirmed as modified.

Cited: Pump Works v. Dunn, 119 N. C., 79.

(112)

W. H. WORTH, STATE TREASURER, v. COMMISSIONERS OF CRAVEN COUNTY

STATE MILITIA—CALL BY GOVERNOR TO AID IN EXECUTION OF THE LAW—PAYMENT OF EXPENSES INCURRED.

1. The expenses incurred by the State Guard when ordered out by the Governor to aid a sheriff of a county in executing a writ of possession must, in the absence of special provision by law, be paid by the State and not by the county where the writ was served.

2. Section 3245 of The Code, enacted when there was a military organization in every county, provides that the commanding officer of the county may call out the militia on the certificate of three justices of the peace that outlaws

are depredating the county, or that it is necessary to guard the jail, and that the county shall bear the expense; and section 3246, substituting the Governor for the "commanding officer" and authorizing him to order out the militia under the preceding section, and providing that the expense shall be paid by the county, do not apply to cases where the Governor, acting under the discretionary power conferred on him by section 3, Article XII of the Constitution, orders the militia to aid a sheriff in serving legal process on information furnished by such officer (and not by the certificate of three justices of the peace) that the civil authorities in such county are inadequate to enforce the process.

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

ACTION by W. H. Worth, State Treasurer, against the commissioners of CRAVEN, to recover money paid by the State for the benefit of the county, heard on complaint and demurrer, before *Boykin, J.,* at Fall Term, 1895, of CRAVEN.

His Honor sustained the demurrer, and the plaintiff ap-
(119) pealed.

Attorney-General and Shepherd & Busbee for plaintiff.
M. DeW. Stevenson, C. R. Thomas and W. W. Clark for appellee.

FURCHES, J. In April, 1893, a writ of possession was issued from the Superior Court of CRAVEN in favor of J. A. Bryan and wife against Washington Spivey and others, and placed in the hands of the sheriff of the county. The defendants resisted the execution of this writ, and the sheriff was unable to execute the same. He called for the *posse comitatus,* but this failed, not a sufficient number coming to his aid to enable him to execute said process. Failing to get sufficient assistance in this way, he called upon the Governor of the State for assistance. "And it thus appearing to the satisfaction of the Chief Executive that the power of the civil authorities was 'exhausted,' he ordered out and sent *seven companies* of the First Regiment of the State Guard to said county of Craven to aid the sheriff in the enforcement of the process above mentioned. Said companies, together with the proper officers, were engaged in said duty for several days, and the cost of their transportation, maintenance and other necessary expenses amounted to the sum of $6,131.78."

This sum was paid by S. McD. Tate, Treasurer of the State, upon the warrant of the Governor, we suppose. And plaintiff alleges that this $6,131.78 was expended by the State for the benefit of Craven County, and brings this action to recover of Craven County this amount, with interest thereon, so expended, as plaintiff alleges, for the defendants' benefit.

(120) It has been suggested during the investigation of this case

that a decision for the plaintiff might have a wholesome effect in preventing the use of the "home guard," at enormous expense, to *suppress riots* among negroes and to enforce the execution of civil process, as in this case, where this service should be done by the local authorities; that there would not be many requisitions upon the commander in chief for "seven companies" of the State Guard to aid the sheriff in executing a writ of possession, at the cost to the county of $6,131.78. And this, we think, might be the effect of such decision. But this is a matter for the Legislature and not for us. It is our duty to decide it upon the law as we find it.

Article XII, section 2, of the Constitution, provides: "That the General Assembly shall provide for the organizing, arming, equipping and discipline of the militia, and for paying the same when called into active service."

Article XII, section 3, provides: "The Governor shall be commander in chief, and shall have power to call out the militia to execute the law, suppress riots or insurrections and to repel invasions."

This, it seems, in the absence of legislation, gives the Governor, as commander in chief, the "power" to call out the militia. And the State Guard being made a part of the militia, he had the power to call them out. The Code, sec. 2357. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the causes mentioned in the Constitution to authorize the Governor to exercise this constitutional "power." And the Legislature may provide, if it think proper to do so, how and by whom they shall be paid. But the Constitution provides that when they are called out they must be paid. And in the absence of any special provision, we must hold that they are to be paid (121) by the State—the "power" that calls them out. This proposition we do not understand to be denied by the plaintiff. But it is contended that the Legislature has provided that this expense shall be borne by the defendant; and the plaintiff relies on sections 3245 and 3246 of The Code for this position.

Section 3245 provides for the arrest of outlaws who are depredating in any particular county, and, where it may be necessary to guard the jail of any particular county, that three justices of the peace may certify the same to the commanding officer of the county, and upon this request such officer shall act, and the county shall bear the expenses of such militia.

Section 3246 provides that the Governor shall call out the militia under the preceding section (3245), and they shall be paid by the county for whose benefit they were called out.

Section 3245 was section 83 of chapter 70 of The Revised Code, and was enacted when there was a military organization and a commanding officer in every county in the State. But under the present plan of organization this is not the case, and section 3246 was enacted in 1869, substituting the Governor for the commanding officer of the county, that there might be some military officer who had the militia at his command and to whom the application might be made. And guarding the jail and catching outlaws not being enumerated in the Constitution as causes for which the Governor may call out the militia, we hold that, before he is authorized to do so for these causes, he must have the same authority that the commanding officer of the county must have had—a written certificate of three justices of the peace as to the facts and the necessity for calling out the militia. In a case of this kind the county would be liable for the expenses of such
(122) military force. This liability is put upon the ground that the county has accepted through its authorized agency, and that the demand is made for the benefit of the county. But that is not the case here. No one authorized to speak for the county has made this demand; and if it had been made by three justices of the peace it was not for either of the causes mentioned in section 3245 and would not have bound the county. To make the county liable, the county must first act through its authorized agents, and then in the cases specified in the statute. *Manuel v. Comrs.*, 98 N. C., 9.

The Governors did not undertake to act in this case upon any such authority as that provided in section 3245, but under his constitutional "power," upon such information as he had in the exercise of discretion as commander in chief of the militia of the State. And in the exercise of this discretion, unrestricted by legislation, we hold that he had a right to obtain his information from such sources as he thought reliable—from the sheriff or anyone else—just as a judge would have the right to do in exercising a judicial discretion.

It was contended by the plaintiff that the sheriff had attempted to call out the *posse comitatus* of Craven County, which they spoke of as the militia of the county; that they had refused to respond, and, as the militia of the county would not act, that the defendant should be held liable. And while we do not see the force of this argument, if true, we cannot concede that the *posse comitatus* and the militia are the same. The militia, when called out, retains its own officers and organization—is commanded by and acts under its own officers. When the *posse comitatus* is called out by the sheriff he is its head and commander, and it acts under his authority. Besides, its constituency is not the same. The militia is composed of men of military age,

whereas the *posse comitatus* is composed of all able-bodied (123) persons of sound mind and of sufficient ability to assist the sheriff, and may be younger or older than the military age. Abbott's Law Dict. and Rapalje's Law Dict.

But this cuts no figure in the case, whether they are called *posse comitatus* or militia. It does not affect the action of the Governor nor the liability of the defendant.

It must therefore be held that the Governor, acting under his constitutional power, called out this military force, and they must be paid (section 3248 of The Code); that, being called out under the law of the State, the State must pay them, in the absence of any special provision for them to be paid by the defendant. There is no error and the judgment is

Affirmed.

CLARK, J., dissenting: An examination of The Code, sec. 3246, will show that it does not authorize the Governor to call out the militia, under the preceding section or in any case whatever. Its very plain provision is that "in all cases" when the Governor does call out the militia "for the benefit of any particular county" they are to be paid in the manner provided by section 3245, *i. e.*, "by the county commissioners, who may lay a sufficient tax to pay said militia." The power to call out the militia is conferred on the Governor by the Constitution, Art. XII, sec 3, and the Legislature has no authority to restrict the constitutional power thus conferred on the Executive, and has not attempted to do so. The Constitution authorizes the Governor to call out the militia in three cases: (1) to execute the law, (2) to suppress riots or insurrections, and (3) to repel invasion. While the Legislature has no authority to restrict the power of the Governor to call out the militia, it devolved appropriately upon that body (124) to provide for payment of the forces thus called. The law at first (which is now section 3246 of The Code) provided that in all cases the militia, when called out by the Governor for the benefit of a particular county, should be paid by that county (just as when the militia were called out by three justices of the peace, under section 3245). As this might leave it an open question in what cases the call might be said to be for "the benefit of a particular county," the latter act was passed, which is now section 3257 of The Code, which seems to indicate that where the militia or State Guard is called out to resist invasion or suppress insurrection the troops are to be paid by the State, but leaving no provision for their payment in the first contingency provided by the Constitution, *i. e.*, "to execute the law," except that contained in section 3246, which provides for their payment by the county.

And this seems a wise and just discrimination. Local self-government is conferred upon the counties. They build their own bridges, erect their own public buildings, work their own roads, maintain their paupers and "execute the law" by their jurors, sheriffs, and other officers. When the resistance to constituted authority is so great as to amount to invasion or insurrection it is just that the State should come to the aid of the county with the "power of the State" and at the State's expense. But as to the lesser matters of the law, as the simple enforcement of the process of the courts, as, in this case, the mere execution of a writ of possession under a judgment in ejectment, then it is clearly contemplated that it is the duty of the county to execute the process in its own borders, and if the sheriff is resisted the remedy is to call in, not the State, but the "power of the county"

(125) —the *posse comitatus.* This is expressly provided by statute. The Code, secs. 329, 1121 and 1643. The sheriff did call for the *posse comitatus,* and there was ample power, of good and lawful men, in the county to enable the sheriff to execute the writ. Had the *posse comitatus* responded, the cost thereof would have been charged in the bill of costs and would have fallen on the wrongdoers—the defendants in the execution. But the *posse comitatus* failed to respond. It was thereupon made to appear to the satisfaction of the Governor that it had become necessary to send troops to Craven County "to execute the law," and under his constitutional authority he did so. But as to the payment, the occasion not being "to repel invasion or suppress insurrection," there is no authority for the payment of the troops by the State, under section 3257, but payment is imposed on the county, as provided by section 3246. Why should the citizens of Iredell or Wayne or Wake County be taxed to execute a writ of ejectment in Craven County, when it is the duty of the citizens of that county to aid the sheriff to do so, and there is no invasion or insurrection which is beyond the power of the county? The legislative discrimination as to the cases in which pyament should be by the State (invasion or insurrection) and when by the county (to execute process) is eminently just. The first two cases may be beyond the reasonable power of a county. The latter is always within its power. If this discrimination were not made, the citizens of a county may always refrain from aiding the sheriff to execute any process, and throw the duty of doing so upon citizens of other counties and the enormous expense entailed by this mode of "executing the law" upon the people of the whole State. If there is invasion or insurrection the whole State is interested, and will cheerfully aid both with men and money.

But if the people of Craven County are too indifferent to aid

(126) the sheriff of their county to execute a simple writ of eject-

ment, and the Governor has to be called on for men from other counties to do it, ought the people of Craven to pay the expenses which their failure to support the execution of the law has caused or should other counties not only furnish the men to do the work for them, but be taxed for the privilege of doing it? It is enough that men of other counties should be called on to execute a writ of ejectment in Craven County. That county, and not the State, should pay the expenses of furnishing men to perform a duty which devolved properly on the citizens of that county. Invasion or insurrection is a State matter. The statute so contemplates. But the execution of process is a county matter, and if there is resistance the men of the county (the *posse comitatus*) should aid the sheriff to execute the law, and if they fail to do their duty, then the troops are sent there to do it for them "for the benefit of the particular county," and the expense justly and by the plain provision of the statute in all such cases falls upon that county. The Code, sec. 3246. If this were not the law the number of instances would greatly multiply in which some locality would fail to aid the sheriff to execute the law, and would leave it to the military and the public treasury to execute the law for them.

MONTGOMERY, J. I concur in the dissenting opinion.

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MARY L. TAYLOR ET AL. v. SARAH SMITH ET AL.

PRACTICE—REFERENCE—FORFEIT OF RIGHT OF TRIAL BY JURY.

The demand for trial by a jury made when excepting to a referee's report must be confined to issues raised by the pleadings, and must specify the issue demanded to be tried by a jury, either by tendering a formal one or stating as clearly what it is as if it had been formally drawn and tendered, otherwise such right to a trial by jury will be forfeited.

ACTION tried before *Boykin, J.*, at Fall Term, 1895, of CRAVEN.

The purpose of the action (begun in the year 1869) was to subject the lands described in the complaint to the operation of a parol trust, in favor of the plaintiff and others, in the hands of Thompson G. Lane (now deceased), under the deed held by him, purporting to convey the same to him in fee, the declarations of the trust being that the legal estate should be held by said Lane, subject to a charge of $950 due to one John T. Lane, upon the payment and discharge of which, with the aid of the sisters and brothers of Thompson G. Lane, said land should be held in common by all the children of Spicer and Ada Lane, to-wit, Thompson G. and his brothers and sisters.

The case had been referred to O. H. Guion, Esq., and to his report both plaintiffs and defendants excepted. The first exception of the defendants referred to in the opinion was as follows: "The defendants B. J. Smith and wife, Sarah, except to the findings in article 4 as contrary to law and evidence, in that it finds that Thompson G. Lane, Mary Lane, Daniel Lane and Mason Lane worked on the lands described in the pleadings, and jointly paid off and discharged
(128) the indebtedness due John T. Lane, or that said payments were made from the rents, issues and profits of the land, and also that the value of the same was the sum of $125 per annum during the period stated in said findings, and also that such occupation began on 21 October, 1849, and continued up to and including 21 August, 1853, and said defendants demanded a trial by jury of these issues and questions of fact."

The exceptions of the plaintiffs were overruled, and his Honor "ordered and adjudged that the issues raised by the pleadings on the exceptions filed to said report by B. J. Smith and wife be submitted to a jury, and that the action be continued for that purpose." From this judgment the plaintiffs appealed.

W. D. McIver for plaintiffs.
DeW. Stevenson and Shepherd & Busbee for defendants.

AVERY, J. The first exception of the defendants B. J. Smith and wife was not sufficiently specific to entitle them to a trial by jury. Although a party may not have waived his demand for a jury at any previous stage of the proceedings, yet he may forfeit it by failing to indicate in his exception the particular issue as distinguished from the question raised by the pleadings, and which he demands shall be tried by a jury. The demand must be confined to issues thus raised, and must specify the issue, either by tendering a formal one or stating as clearly what it is as if it had been formally drawn and tendered. *Driller Co. v. Worth,* decided at this term, and same case, 117 N. C., 515. The right of other parties to a speedy trial, and to such notice as will enable them to prepare for it, is as much a fundamental one as that to a trial by jury, and the courts must so administer
(129) the law as to make the two consistent. One party cannot be allowed negligently or purposely to assert his right to trial by jury in such a way as unnecessarily to cause delay in meting out justice to his adversary. *Driller Co. v. Worth, supra.* For the error in ordering a jury trial as to the questions raised by the first exception, the case must be remanded. The duty will now devolve upon the judge of determining whether he will adopt the findings of the ref-

eree upon the questions as to which the first exception relates or substitute others for them. The other exceptions discussed may come up for hearing upon appeal, after all of the questions of law and of fact have been passed upon by the court below.

Error; remanded.

HENRY THURBER v. EASTERN BUILDING AND LOAN ASSOCIATION.

ACTION FOR MALICIOUS PROSECUTION—DEFENSE—PROBABLE CAUSE—APPEAL—DISMISSED FOR FAILURE TO PRINT JUDGMENT.

1. The defendant in an action for malicious prosecution may protect himself by any additional facts tending to show that the plaintiff was guilty of the crime charged against him, although defendant may not have known such facts when he began the prosecution.

2. Where, in the trial of an action for malicious prosecution, it appeared that defendant had prosecuted plaintiff for forgery in inserting his own name in an assignment of stock intended and understood to be made to one Smith, so as to enable him (the plaintiff) to claim the stock as a *bona fide* purchaser, and to prevent the defendant from recovering the same for fraud of S. in procuring the assignment: *Held*, that the question of probable cause for the prosecution was rightly left by the court to the jury, instead of an instruction to find the issue in the negative.

3. An appeal will be dismissed for failure of appellant to comply with the rule of court requiring the judgment to be printed in all cases except pauper appeals.

ACTION to recover damages for malicious prosecution for (130) forgery, tried before *Boykin, J.*, and a jury, at Fall Term, 1895, of CRAVEN.

There was judgment for defendant, and plaintiff appealed.

The pertinent facts are stated in opinion of *Associate Justice Clark.*

W. W. Clark and W. D. McIver for plaintiff.

M. DeW. Stevenson for defendant.

CLARK, J. When this case was here before (116 N. C., 75), the evidence was merely that, when the stock was assigned to Smith, "Thurber's name was not mentioned, and the assignor did not know at the time that he was transferring the stock to Thurber, though it so appears now on the back of the certificate." From this it did not appear that Thurber's name was not in the assignment when it was signed, but merely that his name was not mentioned, and it would seem that the assignor mistakenly had supposed he was assigning the

stock to Smith. The Court held that such evidence was not probable cause to justify suing out a warrant for forgery against Thurber, for there was in this evidence nothing to indicate a fraudulent alteration, or, indeed, any alteration, of the writing by Thurber.

(131) On the second trial below, it appears as a fact that Thurber's name was not in the transfer when signed by the assignor of the stock, and that it was afterwards written in such assignment by Thurber himself. Forgery is "the fraudulent making or altering of a writing, to the prejudice of another man's right." As Thurber made the alteration, the assignor claims that, the stock having been procured to be assigned by the fraud of Smith, the real assignee, the alteration to Thurber, if undetected, would have enabled the latter to claim the stock as an innocent purchaser, without notice of any fraud, and therfore that it was a fraudulent altering and to the prejudice of the assignor's rights. It is unnecessary to go further in discussing the merits of the proceeding against Thurber than to say that the judge committed no error in leaving to the jury the issue as to whether there was probable cause, and in refusing, when requested, to instruct the jury that they should respond to this issue in the negative. 14 Am. and Eng. Enc., 67. The defendant is entitled to protect himself by any additional facts tending to show that the plaintiff was guilty, though he may not have known them when he began the prosecution. *Johnson v. Chambers,* 32 N. C., 287.

The appeal must be dismissed for failure to observe the rule, which now requires that the judgment shall be printed in all cases except pauper appeals. 117 N. C., 869. It so happens that in this case the dismissal works no hardship, as the merits of the appeal are held to be against the appellant, and the Court, departing from its usual practice, has passed upon the points raised, though dismissing the appeal. *S. v. Wylde,* 110 N. C., 500; *Walters v. Starnes, post,* 842. This, however, may serve to call the attention of the profession again to the requirement that the judgment must be printed, and

(132) avoid any possible complaint upon a dismissal for failure to observe the rule in future cases, in which there may be merits in the appeal. The Court must observe and enforce the rules which it has found necessary to make for the orderly dispatch of the business coming before it.

Appeal Dismissed.

Cited: Smith v. Montague, 121 N. C., 94; *Fleming v. McPhail, ib.,* 185.

CHRISTIANNA F. WILLIS v. CITY OF NEW BERN.

ACTION FOR DAMAGES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—MUNICIPAL CORPORATIONS, LIABILITY OF, FOR INJURIES CAUSED BY INSUFFICIENT PROTECTION AT EXCAVATION OF LOT ADJOINING STREET.

1. A municipality is liable for any injury caused by want of ordinary care and skill in making improvements to its streets and sidewalks, and for failure to exercise reasonable diligence to protect the owner of the abutting lot and the public against danger to which they might reasonably be expected to be exposed: *Therefore,*

2. In the trial of an action against a city for personal injuries, it appeared that defendant ran a pipe, from a ditch in the street, under the sidewalk, into plaintiff's lot by her gate, where it excavated a sink hole and placed a board cover over the hole. The plaintiff in passing out to her lot stepped on the board which gave way, and she was precipitated into the excavation and injured: *Held,* that it was for the jury to say whether plaintiff exercised reasonable care in venturing on the plank.

ACTION to recover damages against the defendant for the injury set out in the complaint, tried before *Boykin, J.,* and a jury, at Fall Term, 1895, of CRAVEN.

Upon the trial the plaintiff introduced witnesses who testified as follows:

Christianna F. Willis: "I lived on South Front Street (133) in 1893—on the north side of the street. About 15 May the defendant hauled dirt and raised the sidewalk in front of my house as far west as the railroad. My lot was, and still is, above the sidewalk. The sidewalk was raised one and a half feet. They put pipes under the sidewalk. It went into the ditch. The pipe extended under the sidewalk into my lot, near and by the side of my gate. At the point in my lot near and by the side of my gate an excavation was made for a sink hole, into which the water flowed and was carried by the pipes into the street. I was passing over the sink hole, through the gate, to the pump on the street, and fell in the sink hole. The cover to it was not sufficient. The cover broke and I fell in. The defendant dug the hole there. I kept a boarding house, and sewed, etc., for a living. I was hurt in May, 1893. The sinews on my left side were strained, erysipelas followed, and I was confined eight or ten days; then was not able to get around to do anything. The suffering was very severe. I was in good health before. Afterwards people said they would not board with me because they were afraid I would overexert myself. I did all my own work. I can stand a little while now, but soon get weak and stumble and fall. There is a dividing line between Mrs. Holland's and my place. I knew the defendant's ser-

vants had dug the sink hole, though I did not know it was unsafe. I fell in the morning. It was covered with plank. If I had thought it was unsafe I would not have gone on it. I did not look to see what was over the sink hole. Dr. Primrose attended me after the erysipelas set in. The hole had been dug several days and had been partially covered over. I had passed over it before, several times. The town has fixed it since."

S. H. Lane: "A fence divides my lot from the plaintiff's.
(134) The city was doing work on the sidewalk in May, 1893. The sidewalk was raised and the sewer pipe was run from the different lots to the street, attached under the sidewalk. The sink hole is on the line between the plaintiff's and my lot, and about on the sidewalk. It is just inside the plaintiff's gate. I do not know that it is 15 inches from the sidewalk. None of it is on the sidewalk; have not noticed carefully. It is under the dividing fence."

The defendant then offered the following evidence:

William Ellis: "I am mayor of the defendant city. In 1893 I was chairman of the Committee on Streets and Pumps. The drain was put in to drain the lots. The sink hole is 12 inches square and 12 inches deep; was right on a line with the two lots. A stone 22 x 28 inches was put over the hole; it was put there the same day the hole was dug; it is there now; it was put there two hours after it was dug. The sink hole is from 16 to 18 inches from the sidewalk."

Mr. Williams: "I did work for the city—constructed the sink hole; did it in one and three-quarter hours; put the rock over it at once. The rock was about 20 inches wide. It took two or three of us to put it there. It has been there ever since. The sink hole is 8 or 9 inches from the sidewalk. The sides of the sink hole were bricked up and the hole covered with the rock. We put a stone over it. We got stone from the city hall."

H. A. Brown: "Am a civil engineer. I laid out the plans for the work and gave the hands the grade. I made this map. It is correct. The sink hole is 15 or 18 inches from the edge of the sidewalk. It is covered with the rock."

S. H. Lane was recalled for the plaintiff, and testified as follows:
"I think they dug the hole, laid the pipes, etc., and went off,
(135) and several days thereafter came back and put a rock over it. It was covered with planks in the meantime."

Upon the close of the evidence the defendant asked his Honor to charge the jury that, upon the evidence in this case, as it appeared that the sink hole which it was alleged was the cause of the injury to the plaintiff was on the plaintiff's lot and not in the streets of the city,

the plaintiff cannot recover damages. This request was refused. (Exception by the defendant.)

After the argument his Honor charged the jury, among other things, as follows: "That if the plaintiff walked over the sink hole in a reasonably proper and careful manner she would not be guilty of contributory negligence; that the plaintiff was bound only to use ordinary care, and was not bound to use more than ordinary care, because she may have possibly discovered that the defendant had carelessly left planks over the place and exposed her to danger, for if she knew said parties were repairing the sidewalk in the yard on her premises, and as part of said construction excavated the drain opening upon her premises and had placed a plank over the same, she was not required to keep a constant lookout for danger, but was only required to use such care as a prudent person under the circumstances would have used in crossing the planks; and that if the jury believe from the testimony, and find that the plaintiff was passing over the sink hole, as described, through the gate to the pump in the street, and that the sink hole was covered with planks, and that the plaintiff had passed over the same place several times before without suffering any injury; and that if the jury should believe and find that she had no reason to consider the place unsafe, and in passing over the plank she did so in a manner in which an ordinarily prudent (136) person would have passed over the same, and had no notice of any defect in the covering, then she would not be guilty of contributory negligence, and you will answer that issue 'No.'"

The defendant excepted to this portion of the charge, assigning error in law in said portion of said charge as herein set forth.

His Honor also charged the jury that the owner of private property or premises owed no duty to his guests, whom he had invited on his premises, to keep his premises in safe condition. The defendant excepted to this part of the charge, and assigned error in law, (1) for that the said charge does not properly state the law; (2) for that the said charge was upon a proposition of law not involved in the controversy.

Verdict for the plaintiff, and from the judgment thereon the defendant appealed.

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

AVERY, J. The defendant, in any view of the testimony, was making an improvement in its streets. Whether the purpose was to drain the sidewalks or the plaintiff's lot more perfectly, the work might well

have been undertaken, as we must assume that it was, either to better the condition of the sidewalks as highways or in discharge of the duty of looking after the sanitary condition of the city. The municipality was liable for any injury caused by want of ordinary care and skill in carrying out its plans, or for failure to exercise reasonable diligence to protect the owner of the lot or the public against danger, to which its authorities had reasonable ground to believe she or other persons would be exposed. *Russell v. Monroe,* 116 N. C., 720. The
(137) opening in the ditch into which the plaintiff fell was inside her front gate and beside the walk that led to it. It was the duty of the city to cover the hole, so as to protect persons who passed along the walk against the danger of falling into it. This was but a prudent precaution to avert accident that might be justly apprehended, if the opening was insufficiently covered or not covered at all. *Bunch v. Edenton,* 90 N. C., 431. But the city placed a board cover over the sink hole, which, according to the plaintiff's evidence, was insufficient, and in passing over it to go to the pump on the street the plank gave way, so as to precipitate her into the hole and seriously injure her. It was the duty of the municipality to provide against accident to persons that its governing authorities must have expected to pass in and out of plaintiff's gate, and the failure to place a covering over the sink hole that was sufficient to sustain the weight of the plaintiff was culpable negligence. *Nathan v. R. R., post,* 1066. She had a right, not only to demand and expect that the city would discharge its duty by putting a cover over the hole, but when the plank was placed upon it she was warranted in assuming and acting upon the idea that the duty had been properly performed. *Russell v. Monroe, supra; Thompson v. Winston, post,* 662. The city was authorized to improve the streets and sidewalks; and by the plaintiff's license, if not empowered to do so by its charter, it could open the drains or sewers into plaintiff's lot. Whether acting under its delegated authority or under a license from the abutting owner, a municipality is answerable in making such improvements as that described by the witnesses for such injury to persons or property as are caused by want of care in doing the work. *Meares v. Wilmington,* 31 N. C., 73; *Wright v. Wilmington,* 92 N. C., 156; *Moffit v. Asheville,* 103 N. C., 237; *Love v. Raleigh,* 116 N. C., 394. If the city undertook to extend its
(138) drain into the plaintiff's lot, and its agents in charge of the improvements carelessly left it open, it was justly held answerable for the natural consequences of such conduct. There is no merit in the exception to the refusal of the court to give the instruction asked, or the substitution of that given. The court left the jury to determine whether, in view of all the surrounding circumstances,

the plaintiff exercised reasonable care, or such as would have characterized a person of ordinary prudence in venturing upon the plank. This was a compliance with the rule laid down, *post,* 1098, in *Hinshaw v. R. R., post,* 1047, and *Russell v. R. R., post,* 1098. For the reasons given, we hold that there was

No Error.

Cited: Sheldon v. Asheville, 119 N. C., 609; *Fisher v. New Bern,* 140 N. C., 510.

T. P. OUTLAND v. W. C. OUTLAND ET AL.

WILL, CONSTRUCTION OF—DEVISE—CHARGE ON LAND—LIABILITY OF PURCHASERS FROM DEVISEE—LIMITATIONS—EXCESSIVE ATTORNEY'S FEE.

1. Where a father, after providing by devise of lands in fee for several children, devised other lands to each of two remaining children, in consideration of which they were to have the care of and support an imbecile brother, not otherwise provided for in the will: *Held,* that the lands devised to the two sons were charged with the support of the imbecile brother.

2. In such case purchaser of the lands from the devisees took the same subject to the charge, whether they had actual notice or only the constructive notice of the will under which they derive title.

3. The statute of limitations does not run against an idiot, by reason of the excepting clause in section 163 of The Code.

4. An allowance of $200 as attorney's fee in an action by the next friend of an idiot to have land charged with his support sold declared subject to the lien, etc., is excessive.

ACTION tried before *Boykin, J.,* and a jury, at Fall Term, (139) 1895, of NORTHAMPTON.

There was judgment for the plaintiff, and defendants appealed.

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

R. O. Burton for plaintiff.

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

FAIRCLOTH, C. J. In 1885 Thomas Outland died, leaving a will, which was duly probated, and had several children, and was seized of the land in controversy, having put into the possession of some of his children certain other property and devised the same in fee to them. He then lived on a tract of land, and by item 6 he devised to his son Cornelius in fee a part of the tract of land, and in item 7 he devised the balance of the tract in fee to his son Elijah. In item 8 he says:

"In consideration of the property I have given to Elijah and Cornelius, they are to have the care of and support Thomas, and it is my will that he should have his choice which of them he will live with, and the other pay half the expense." The plaintiff, Thomas P. Outland, is the one called "Thomas" in item 8, and is a person *non compos mentis,* and appears herein by his next friend, Robert S. Parker, who is also here as administrator of A. A. Parker, the late plaintiff herein.

Thomas, by agreement, has lived usually with his sister, wife of A. A. Parker, and Elijah has paid all the while one-half of the expense of the board of Thomas, and this action is by him to recover the other half against Cornelius and those defendants who have
(140) purchased his part of the land, and to have the land sold to satisfy the same. The defendants admit the personal liability of Cornelius, but deny that his legacy for support is a lien on the land, and especially now that it is in the hands of the purchasers, and that is the main question presented to this Court.

The universal rule pervading the construction of wills is that the intention of the testator shall govern its interpretation in each case. Sometimes there are serious difficulties in ascertaining the intention, but these difficulties do not disturb the rule. To arrive at the intent, it is proper to look at the whole instrument and the condition of the parties and the surrounding circumstances as they are supposed to be in the mind of the testator at the time of the disposition of his property. It appears that he made a secure and complete title to the legacies of his other children, and it would seem unreasonable and unnatural that he intended to leave the legacy of his most unfortunate child any less secure. If the contention of the defendants be true, then insolvency or bankruptcy might defeat the plaintiff's legacy, and at this time the homestead exemption might have the same effect. These possibilities are presumed to have been understood by the testator.

In *Laxton v. Tilley,* 66 N. C., 327, the language in a deed was "for and in consideration of $200 and the faithful maintenance of T. L. and wife, P. L. hath given and granted," etc.: *Held,* that this was a charge upon the land.

In *Thayer v. Finegan,* 134 Mass., 62, A devised to her son all her property, "he to pay all her debts and also to pay the school and college expenses of her younger son": *Held,* that the legacy to the younger son was a charge upon the real estate. In the under-cited cases similar decisions were made: *Aston v. Galloway,* 38 N. C., 126; *Woods v. Woods,* 44 N. C., 290; *Carter v. Worrell,* 96 N. C., 358.

The statute of limitations does not bar the claim of Thomas (141) by reason of the saving clause in The Code, sec. 163.

It was argued that the plaintiff's claim had been abandoned. Thomas was incapacitated to abandon any claim or right by any act or declaration, and the lapse of time was not sufficient to have that effect. *Thompson v. Nations,* 112 N. C., 508; *Cox. v. Brower,* 114 N. C., 422.

The land is charged with the legacy in the hands of the purchasers, because the jury find in the fourteenth issue that they purchased with actual notice. If this had not been found, they took the land with constructive notice, as they derive their title under the will creating it. *Christmas v. Mitchell,* 38 N. C., 534; *Harris v. Fly,* 7 Paige, 421.

There were several exceptions to the admission of evidence and to the judgment. In the view we have taken, these exceptions are unimportant, and are overruled. The judgment allows $211.25 of the recovery to be paid to Robert Parker, administrator of A. A. Parker. This seems to be an arrangement among the plaintiffs to equalize the burden, approved by the Court, and does not affect the defendants. Sitting as a court of equity, if we could see in this allowance that any just maxim of the law had been violated or that any injustice had been done to the interest of a *non compos mentis* person, we *ex mero motu,* would correct it, as in cases where the interest of infants is under consideration.

We think the allowance of $200 as an attorney's fee in this case is too much, and it is reduced to $100. *Moore v. Shields,* 69 N. C., 50. With this modification the judgment is sustained.

Modified and Affirmed.

Cited: Perdue v. Perdue, 124 N. C., 163; *Helms v. Helms,* 135 N. C., 169.

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F. S. FAISON v. C. HARDY, TRUSTEE, ET AL.

PRACTICE—APPEAL—PARTIES IN INTEREST.

Where, in an action to restrain a trustee from selling lands under a trust deed to satisfy acknowledged liens until the plaintiff (who claims that the trustee held the land under a parol trust for him subject to the liens) can have his rights ascertained and for an accounting as to the amount due, parties whose only interest in the suit is the payment of the money secured by the trust deed, cannot appeal from a judgment declaring the parol trust, in the equity of redemption, in favor of the plaintiff.

ACTION tried before *Boykin, J.,* and a jury, at August Term, 1895, of NORTHAMPTON.

The facts sufficiently appear in the opinion of *Associate Justice Avery.* There was a verdict for plaintiff, and from the judgment thereon the defendants Hardy (trustee) and C. W. Grandy and heirs appealed.

R. B. Peebles and McRae & Day for plaintiff.
Thos N. Hill and B. S. Gay for defendants.

AVERY, J. In 1876 the Farmers' Loan and Trust Company conveyed a tract of land to John W. Faison, and he, in order to secure certain notes representing the purchase money for it, conveyed the same land to the defendant, Caldwell Hardy, as trustee. The notes so secured subsequently became the property of C. W. Grandy & Sons. The plaintiff, F. S. Faison, seeks in this action to set up a parol trust, arising out of an agreement on the part of John W. Faison to buy and hold the land for him and convey to him upon the payment of the notes. The action was brought to restrain the defendant trustee (Hardy) from selling at the instance of the defendants
(143) Grandy & Sons, until the question whether there was a parol trust could be determined, and for an account to ascertain the amount of the encumbrance still undischarged, after making the proper allowance for certain alleged usurious transactions on the part of Grandy & Sons.

It was held on the former hearing (*Faison v. Hardy,* 114 N. C., 58) that the disputed question, whether a parol trust was created for the benefit of the plaintiff, "must first be determined by the trial of the issues before the necessity for the taking of an account can be ascertained," and suggested at the same time that an answer should be filed for the infant heirs at law of John W. Faison by their guardian B. B. Winborne. The guardian accordingly answered for the children, denying the equity of the plaintiff, but the widow of John W. Faison having testified to the truth of the allegation of the plaintiff in reference to the agreement which raised the trust, he, after a contest upon the issues below, and joining in the exceptions, declined or failed to prosecute an appeal on behalf of the infants. The jury found, in response to an issue submitted, among other facts, that it "was agreed between F. S. Faison (the plaintiff) and John W. Faison (the father of the infant defendants), at the time he bought the Urquhart and Round Pond plantations, that F. S. Faison was to pay the sum of $14,000 and interest thereon; that when he did pay the same, John W. Faison was to hold said land in trust for him, and on demand to convey the same to F. S. Faison. The question whether there was a parol agreement not within the statute of frauds was primarily

one between F. S. Faison and John W. Faison, or, on his death, between the plaintiff and his heirs at law. If Frank S. Faison had claimed that John W. Faison, during his life, held the two plantations in trust for him by reason of a verbal agreement, clearly within the statute of frauds, and had instituted suit to have him declared a trustee, the contract being not absolutely void, but voidable (144) at the option of the party to be charged (*Symne v. Smith,* 92 N. C., 338), John W. Faison might have answered, admitting the alleged contract, and no stranger could have complained that he did not see "fit to avail himself" of the privilege of pleading the statute. *Tucker v. Markland,* 101 N. C., 422; *Thigpen v. Staton,* 104 N. C., 40.

In the same way, before any alleged default, and prior to the attempt of the trustees to sell, the plaintiff might have brought an action against his brothers during his lifetime to enforce this trust, which it was encumbent on him to establish by strong proof, and if the defendant had admitted the allegations, now set up as to the trust, a judgment upon such admission would have been as conclusive on the defendant's heirs at law as if founded upon a verdict, and could not have been impeached by strangers to the suit.

The guardian of the infant defendants has held the plaintiff to strict proof of his equity, but in view, of the testimony of their mother, has in the exercise of his discretion failed to prosecute an appeal from the judgment below. The judgment, if the suit were between the plaintiff and the heirs at law only, would, without appeal and reversal, unquestionably be conclusive on them as to the agreement with F. S. Faison, and, notwithstanding the presence of other parties, the same effect attends the decree in this case. The question which confronts us, then, is whether the appellants (Grandy & Sons) and the trustee (Hardy), being strangers to the original agreement, have shown such an interest in the establishment of the trust as will give them a standing in the court to assign as error the exceptions to the rulings in relation to it.

It is admitted that the Farmers' Loan and Trust Company assigned the $10,000, which was secured by the mortgage executed by John W. Faison to Mrs. Ann D. Grandy, executrix of C. W. Grandy, deceased, and William Seldon—three-fourths to the (145) former and one-fourth to the latter—and that the two subsequently transferred it to the firm of Grandy & Sons, as now constituted, who are entitled to receive whatever portion of the amount is still unpaid. It is not denied, also, that Grandy & Sons have a mortgage lien by virtue of the mortgage from John W. Faison for any balance due on two drafts, amounting in the aggregate to $4,400. There

is no controversy between plaintiffs and defendants as to the amounts or dates of notes secured by mortgage, and, which, to the extent that they remain unpaid, constitute liens, which must be discharged before F. S. Faison could demand a conveyance of the land or a portion of the proceeds in case of a sale for foreclosure.

The order enjoining the sale was affirmed by this Court (*Faison v Hardy,* 114 N. C., 58) in order to await the finding upon the question of the parol trust, and in the event that, after answer filed by the infant heirs, it should be found and adjudged that there was a parol agreement, as alleged, for the further purpose of having an account taken. If Grandy & Sons are to receive only whatever sum has not been paid on the secured note and drafts, either of Frank S. Faison or John W. Faison, it is not material, so far as the rights of Grandy & Son are affected, which of the two was principal and which agent, or whether Frank was agent or *cestui que trust* in the transactions with them; nor have they any interest, in contemplation of a court of equity, in the question whether Frank or the heirs of John W. own the equity of redemption or have the right to the residue of the proceeds of sale after satisfying in full whatever remains due them.

One of the issues, not answered by consent, and in relation to which testimony was admitted and excepted to, was the ninth, involving the inquiry whether the parol agreement was made, (146) and in which, for reasons already given, the appellants have no interest. The only other issues which gave rise to any controversy before the jury were those involving the inquiry whether the Farmers' and Mechanics' Loan and Trust Company agreed to reconvey the Urquhart place, whether Grandy had notice of the parol agreement at the time of purchasing the several secured notes and drafts, whether F. S. Faison had retained possession of the land, and whether the agreement was made upon a valuable consideration.

The retention of possession was an evidential fact bearing upon the making of the parol agreement, as was the question whether it was made upon a valuable consideration. *Cobb v. Edwards,* 117 N. C., 244. If the appellants had no interest in the defeat or establishment of the trust, the findings upon those issues are as immaterial to them as that in response to the ninth.

The Farmers' and Mechanics' Loan and Trust Company claim no present interest in the land, and Grandy & Sons have shown only a lien to secure the unpaid balance, which both F. S. Faison and the heirs of John W. Faison admit constitute a lien, to be satisfied before the owner of the equity of redemption, whoever may be entitled to it, can claim the land or any portion of the fund arising from the sale.

The appellants have failed to show any error which materially affects their rights.

On the former appeal it was held that, whenever the jury should find that the parol agreement was entered into, an account must be ordered to show what amount of the indebtedness constituting a lien upon the land was still due. It being admitted that there were complicated accounts and unadjusted dealings, such transactions cannot be satisfactorily or justly settled without taking an account. *Pritchard v. Sanderson,* 84 N. C., 299; *Capehart v. Biggs,* 77 (147) N. C., 261. The account was, upon the rendition of the verdict, accordingly ordered, and neither in the judgment nor in the rulings upon evidence was there any error of which the appellants had reason to complain. As the appellants have failed to show any right on their part to have the ruling complained of reviewed here,

Appeal Dismissed.

L. H. LYON AND WIFE v. DAVID PENDER AND M. E. COTTEN, ADMINISTRATRIX OF A. J. COTTEN.

WITNESS, COMPETENCY OF—TESTIMONY OF INTERESTED PARTY—TRANSACTION WITH DECEASED PERSON—SURVIVING PARTNER.

1. In the trial of an action against a surviving partner and the administratrix of a deceased partner on a note purporting to have been given by the firm, the surviving partner is not a competent witness (by reason of section 590 of The Code) to prove the partnership, or that the deceased consented to the borrowing of the money and execution of the note therefor.

2. In such case the witness would be testifiyng "in his own interest," since, if judgment should be rendered against both himself and the defendant, as administrator of the deceased partner (instead of against himself alone), he could, by paying off the judgment, have contribution from the estate of his deceased partner.

ACTION tried before *Boykin, J.,* at Fall Term, 1895, of EDGECOMBE, to recover on a note for $1,000, alleged to have been executed on 24 April, 1889, by Pender & Cotten, in words and figures as follows:

"$1,000.00. 24 April, 1889. (148)

"On demand, we promise to pay to the order of Miss Ida Lee Bryan, one thousand dollars, at eight per cent interest, value received for money borrowed.

"Witness: W. R. RICKS. PENDER & COTTEN."

The defendant David Pender was called and sworn as a witness

for the plaintiff, and, the note being exhibited to him, testified as follows: "Pender & Cotten were partners, doing business in 1889. I signed the note 'Pender & Cotten.' I borrowed the money to pay the debts. We borrowed money from time to time. It was necessary to do so. The money was used to pay the debts of the firm. I told Mr. Cotten all about the firm's indebtedness, and he authorized me to borrow the money."

Here the counsel for M. E. Cotten, administratrix of A. J. Cotten, objected to the witness speaking of any transaction or communication had with A. J. Cotten. The judge made no formal ruling on the objection raised at this stage of the case, but permitted the witness to go on, who testified: "That the firm debts were paid with this money; it was applied to debts due Staton, to Johnson, Sutton & Co., and to others whose names he could not recall, as he had no access to his books since his assignment; that his bookkeeper, William R. Ricks, knew to whom the money was paid."

Upon cross-examination, witness stated "that in 1884 he and M. C. Pender and A. J. Cotten formed a partnership for three years, under the firm name of Pender & Cotten; then M. C. Pender came out, and myself and A. J. Cotten kept on under the same name. In January, 1889, myself, W. F. Hargrove and A. J. Cotten formed a partnership under the firm name and style of Pender, Hargrove
(149) & Cotten, and began business in January, 1889. We were partners when I gave this note, signed 'Pender & Cotten,' in liquidation. Mr. Cotten died in June, 1889. Hargrove and myself kept right on. The contract of Pender & Cotten and Pender, Hargrove & Cotten was in writing and signed by the partners—the first executed 7 March, 1884, and the second 29 January, 1889. The first contract was for three years, and Mr. Cotten and myself agreed after that to take M. C. Pender's interest. Mr. Cotten told me to borrow the money."

The counsel for the defendant M. E. Cotten, administratrix of A. J. Cotten, stated to the court that evidence had now been disclosed that the contracts of Pender & Cotten and Pender, Hargrove & Cotten were put in writing, and that the witness had gone on to state communications and transactions between himself and his partner, Cotten, who died in June, 1889, and asked the court to rule out all the evidence as to the agreements, which, the witness stated, were in writing and signed by the parties, respectively, and also that part of the evidence which related to personal transactions and communications between the witness and his deceased partner, A. J. Cotten, as incompetent. The court so ruled, and the plaintiff excepted.

W. R. Ricks, witness for the plaintiff, testified that at the beginning of the year 1889 A. J. Cotten and David Pender were doing business as Pender & Cotten, and he was their bookkeeper, and he was also the bookeeper of Pender, Hargrove & Cotten when that firm was formed, 29 January, 1889. "I have no personal knowledge that the money borrowed paid the firm debts. All I know is that I made entries on books by direction of David Pender."

Counsel for Cotten, administratrix, objected to witness speaking, except what he knew of his own knowledge. Objection sustained. Thereupon plaintiff's counsel stated that he would (150) take a judgment against the defendant David Pender, and submitted to a nonsuit as to the defendant Cotten, administratrix, and appealed to the Supreme Court.

J. L. Bridgers for plaintiffs.
Fred Philips and Staton & Johnston for defendant.

CLARK, J. The Code, sec. 590, is analyzed in *Bunn v. Todd*, 107 N. C., 266. The witness Pender is (1) "a party to the action" (and is also "interested in the event of the action"); (2) he is offered "as a witness to testify in own behalf of *interest,*" and (3) "as to a personal transaction or communication between the witness and a person since deceased," *i. e.,* to prove a partnership, and, further, that the deceased partner specially authorized him to borrow this money. The only possible debate is on the second head, above stated, whether the evidence given by the witness would be "in his own interest." Strictly, it would be "in the behalf" of plaintiffs, who called him as a witness, but the statute contains the words "in his own behalf or interest." The true test of interest is whether the judgment obtained herein could be used as conclusive of the liability of the intestate's estate in an action afterwards brought by the witness against the administrator of the deceased. *Jones v. Emry,* 115 N. C., 158. If by the testimony of the witness a judgment is obtained, not only against himself (which is not opposed), but also against his codefendant, who is the administratrix of one sought to be charged, as his partner, then the witness, upon paying off such judgment, could proceed to recover the pro rata share out of his codefendants, and this judgment, obtained against the two, being conclusive in each action of the partnership, would bind the said administratrix to contribu- (151) tion. Thus the testimony of the witness would be "in his own interest" and is forbidden by the statute.

If the action was between the alleged partners, the testimony of

the witness (the alleged surviving partner) would be incompetent to prove the partnership. *Sikes v. Parker,* 95 N. C., 232; *Armfield v. Colvert,* 103 N. C., 147.

This case differs widely from *Sutton v. Walters, post,* 495. In that case the witness was the principal in the bond sued on, against whom judgment was taken, and he testified as to a personal communication between himself and his deceased surety. But this was not "in the interest of the witness," whose liability was primary, and who could in no wise be benefited, nor could the judgment against him be in anywise abated by the judgment obtained upon his testimony against the surety. But in this case, if the witness' testimony establishes the partnership, the witness, upon paying off the judgment, can recover his pro rata share out of his codefendant's estate, since the judgment would establish that the debt was due by both as partners, *i. e.,* as coprincipals. In excluding the testimony there was

No Error.

Cited: Fertilizer Co. v. Rippy, 123 N. C., 658; *s. c.,* 124 N. C., 650; *Moore v. Palmer,* 132 N. C., 973; *Bonner v. Stotesburg,* 139 N. C., 7.

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(152)

F. S. ROYSTER, ADMINISTRATOR, ETC., OF O. C. FARRAR v. M. O. WRIGHT, EXECUTRIX OF GEORGE B. WRIGHT.

ACTION FOR ACCOUNTING—REFERENCE—APPEAL—PRACTICE—JUDGMENT OF CLERK, VALIDITY OF.

1. When a plea in bar is interposed to an action for accounting a reference cannot be made until the plea has been finally determined.

2. An appeal from a judgment sustaining a plea in bar is not premature, inasmuch as the plea puts in issue the cause of action, and it would be useless to incur costs and delay if the plea is sustained.

3. Where an executrix, on filing the final account of her testator, as executor, moved for an allowance of commissions due her testator, and thereafter, on 4 December, 1894, her counsel and opposing counsel agreed to continue the matter to a date to be agreed upon between them, and no date was ever agreed upon, and the plaintiff, being dissatisfied with the account, began an action on 9 February, 1895, to impeach it; and on 23 February, 1895, the clerk, at instance of the counsel for the defendant executrix, notified the parties that he would, on 4 March, 1895, resume the hearing of the motion for such allowance and requested information as to the items on which commissions were objected to, and plaintiff and his counsel failing to attend said hearing, the clerk entered judgment allowing the commissions: *Held,* that the suit begun by plaintiff on 4 February, 1895, was notice to the clerk that the plaintiff would pursue his remedy under The Code, and the judgment of the clerk was void.

ACTION heard by *Boykin, J.*, at Fall Term, 1895, of EDGECOMBE, upon motion for reference, etc.

The motion was refused, and plaintiff appealed.

The facts appear in the opinion of *Chief Justice Faircloth.*

H. G. Connor and Staton & Johnston for plaintiff.

Shepherd & Busbee and Gilliam, Parker & Munroe for (153) *defendant.*

FAIRCLOTH, C. J. This action is brought by the plaintiff, administrator *d. b. n. c. t. a.* of O. C. Farrar, against the defendant, executrix of George B. Wright, the original executor of said Farrar, for an account and settlement of the estate of Farrar. The original executor filed some annual returns of his administration with the clerk, and the defendant executrix filed a final return on 21 November, 1894, and it appeared that the defendant had been allowed $11,500 as commissions. The executrix moved for the allowance of commissions due her testator, before the clerk, which we understand to be in addition to those already allowed, and counsel of the parties voluntarily met before the clerk on 4 December, 1894, and entered into some discussion as to the items "on which a commission in law is not to be allowed. It was thereafter agreed between counsel that the matter should stand continued to some date to be agreed upon by the parties." No other date was ever agreed upon, and neither the plaintiff nor his counsel attended any other meeting or conference. On 23 February, 1895, at the instance of defendant's counsel, the clerk issued a notice to the parties that on 4 March, 1895, he would resume consideration of the application of the executrix for the allowance of commissions to her testator, with a request to the parties to indicate the items on which commissions should not be allowed. The plaintiff failed to attend, nor did his counsel attend, and on 13 March, 1895, "after careful examination of the several accounts filed," the clerk allowed certain commissions and rendered judgment, in the absence of the plaintiff and his counsel, in favor of the defendant executrix against the plaintiff for $3,187.27 and interest from 22 November, 1894.

The plaintiff, being dissatisfied with the account filed on (154) 9 February, 1895, instituted this action to have an account of the administration stated and to impeach the accounts filed, and for a reference (The Code, sec. 1511), and filed his complaint. The defendant, answering the complaint, pleaded specially that the accounting and judgment of the clerk above set out are a bar to the plaintiff's pleadings and the clerk's record, as above recited, and "said motion

cause of action. At the trial term the motion for a reference was denied, the court being of opinion that the plea in bar was to be first tried. The motion was heard by the court, upon an inspection of the pleadings and the clerk's record, as above recited, and "said motion was refused as to all matters and things adjudicated by the clerk, the court being of opinion that said adjudication constituted a plea in bar as to them, and the judgment was rendered as set out in the record." Plaintiff appealed from the order refusing a reference, and from the judgment rendered. This is the only question we have to consider.

We were told on the argument that this appeal was premature—that an exception should have been noted and made available on appeal from the final judgment. How the plaintiff was to proceed to final judgment, in the face of the above ruling and judgment, was not explained. Prior to The Code this Court had held that, where matters in bar of the right of action were well pleaded, the plea must be tried and determined before any reference to the master. *Dozier v. Sprouse,* 54 N. C., 152; *Douglass v. Caldwell,* 64 N. C., 372. The Code, sec. 548, expressly allows an apppeal from every judicial order or determination which in effect determines the action and prevents a judgment from which an appeal might be taken. The defense of a special plea in bar puts in issue the cause of action, and it
(155) would be useless to incur costs and delay if the plea is sustained.

It has been repeatedly held, since the adoption of The Code, that an appeal lies from a judgment sustaining or overruling a plea in bar, and that no reference should be ordered until the plea is finally determined. *R. R. v. Morrison,* 82 N. C., 141, 143; *Neal v. Becknell,* 85 N. C., 299, 302; *Leak v. Covington,* 95 N. C., 193, 195; *Clement v. Rogers,* 95 N. C., 248. Where a matter pleaded in bar is an estoppel was discussed in *Rogers v. Ratcliff,* 48 N. C., 225; *Armfield v. Moore,* 44 N. C., 157, and *Williams v. Clouse,* 91 N. C., 322. If the record is uncertain, and anything be left to conjecture and is not explained by proof, the judgment as evidenced is no estoppel. *Jones v. Beaman,* 117 N. C., 259.

Upon examination of the record of the clerk, offered as proof of the special plea, we think it was insufficient to support it, and that his Honor's conclusion thereon was erroneous.

It is true that persons may voluntarily come before any court and enter into agreements and cause their agreements to be entered of record as judgments of the court, and they are as effectually bound thereby as by any other judgment, but this must be done by consent.

In the present case the meetings in December, 1894, were voluntary and not by any process known to law. Nothing was debated except the propriety of allowing commissions on certain items in the account, about which no agreement was had; that the matter should stand continued to some date to be agreed upon by the parties, which date was never agreed on, and plaintiff pursued the subject no further.

We think that the issuance of the summons in this action, and the service of the same on defendant before the judgment of the clerk, was notice that plaintiff had abandoned the conference (156) meetings and that he elected to seek his remedy as prescribed by The Code.

We think, also, that the notice issued by the clerk on 23 February had no efficacy, and that the judgment entered by the clerk on 13 March, in the absence of the plaintiff or his attorneys, was without authority.

What would have been the effect if the parties had been present before the clerk, and judgment had been entered without objection or appeal, we need not consider, as the record sent to this Court does not present that question.

Reversed.

Cited: *Smith v. Goldsboro,* 121 N. C., 357; *Comrs. v. Wright,* 123 N. C., 536; *Kerr v. Hicks,* 129 N. C., 144; *Shankle v. Whitley,* 131 N. C., 168; *Jones v. Sugg,* 136 N. C., 144; *Jones v. Wooten,* 137 N. C., 424; *Oldham v. Rieger,* 145 N. C., 260; *York v. McCall,* 160 N. C., 279; *Bethell v. McKinney,* 164 N. C., 74; *Chambers v. R. R.,* 172 N. C., 560, 561; *Garland v. Arrowood, ib.,* 594; *Marler v. Golden, ib.,* 825.

F. S. ROYSTER, ADMINISTRATOR, v. P. LANE ET AL.

REGISTRATION OF MORTGAGE—CLERICAL MISTAKE IN RECORDING—PRIORITY OF LIENS.

1. A registry of a mortgage is not void because of a clerical mistake made by the register in transcribing, which does not affect the sense and provision as to the amount secured, description of property, etc., or obscure the meaning of the instrument.

2. A mortgage by "Patrick Lane and wife Zilpha Lane" to F. was properly executed, probated and ordered to be registered, but the register of deeds in transcribing the words in the premises wrote "Patrick *Savage* and wife Zilpha *Savage,*" instead of "Patrick Lane and wife Zilpha Lane." In recording the description of the land the register followed the mortgage, in describing it as "all the real estate of which Patrick *Lane* is seized," etc., but in a further description, "embracing that which Patrick Lane purchased," it was transcribed as "that which Patrick *Savage* purchased,"

etc. Otherwise, the mortgage was transcribed exactly as written, referring to "Patrick Lane" as the party of the first part, maker of the notes, and as entitled to surplus after payment of the debt in case of a sale. The mortgage was properly indexed. Subsequently, another mortgage was made to one M.: *Held,* in an action of foreclosure, that the mortgage to F., as registered, was good for all purposes and had priority over the mortgage to M.

(157) ACTION by administrator *d. b. n. c. t. a.* of O. C. Farrar against Patrick Lane and wife and J. J. Martin, tried before *Boykin, J.,* at Fall Term, 1895, of EDGECOMBE.

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

From a judgment in favor of the plaintiff the defendant appealed.

G. M. T. Fountain for defendants.
Staton & Johnston for plaintiff.

MONTGOMERY, J. Patrick Lane and his wife, Zilpha, executed a mortgage in 1881 to O. C. Farrar upon a tract of land in Edgecombe County to secure to him a debt of $2,791.94. The mortgage was proved in due form, the private examination of the wife taken before the clerk of the Superior Court and the instrument ordered to registration by that officer. The register of deeds, instead of recording it
(158) as it was written, when he came to transcribe the words in the premises, "Patrick Lane and his wife, Zilpha Lane," wrote "Patrick Savage and wife, Zilpha Savage," instead. That officer, in recording the description of the land, followed the mortgage, which was in these words: "All the real estate of which said Patrick Lane is seized and possessed," etc., but when he came to copy the further description, he wrote "said land embracing that which said *Patrick Savage* purchased," instead of writing "said land embracing that which said *Patrick Lane* purchased." The mortgage was otherwise registered just as it was written, the conditions showing that *Patrick Lane,* "party of the first part," owed the debt, and that if he should pay it according to the conditions of the mortgage it should be void, and providing that in case default was made by him in its payment, and a sale had to be made, the surplus, if any, should go to *Patrick Lane.* A second mortgage was made in 1892 by the same Patrick Lane and his wife to J. J. Martin on the same piece of land to secure a debt Lane owed Martin. This action is prosecuted by the administrator of Farrar to have foreclosure, first, to pay the debt due under the first-named mortgage, and then to pay any surplus to Martin on his second mortgage. His Honor was of opinion that the first mortgage was a prior lien, and ordered the land to be sold to pay, first, to the

plaintiff the debt due to his intestate's estate, and any surplus to Martin. The defendant Martin appealed.

The mortgage to Farrar was properly indexed, *i. e.*, in the name of "Patrick Lane and wife, Zilpha, to O. C. Farrar." It was properly admitted to probate, the wife's private examination being also taken and the order of registration duly made by the clerk. It was the register's duty to record it. There was enough of the mortgage registered properly to show to everybody that the register had made the clerical mistake of writing *Patrick Savage* and wife (159) as the grantors, instead of following the mortgage and writing it *Patrick Lane* and wife.

There is no rule of law, that we are aware of, which makes void a registry because of a clerical mistake, made by the register in transcribing, which does not affect the sense and provision as to the amounts secured, description of property, etc., or obscure the meaning of the instrument. *St. Croix Co. v. Richter,* 73 Wis., 409.

We are of opinion that the mortgage, registered as it was, was good for all purposes. This view of the matter renders it unnecessary to go into an extended discussion of notice and its effect upon subsequent purchasers. In the rulings of the court below,

No Error.

Cited: Smith v. Lumber Co., 144 N. C., 50; *Brown v. Hutchinson,* 155 N. C., 211.

ELIZABETH LANE, ADMINISTRATRIX OF JOSEPH LANE, v. F. S. ROYSTER, ADMINISTRATOR OF O. C. FARRAR.

TRUST—COMPENSATION OF TRUSTEE.

Where defendant's testator received as trustee certain notes against a corporation from plaintiff's intestate, which were exchanged for stock in the reorganization of the company, and the stock issued in the name of defendant's testator became thereafter much more valuable than the notes: *Held,* that in ascertaining the amount due the plaintiff's intestate, the defendant, whose testator retained the stock, cannot have credit for the services of his testator in obtaining the stock. If, in such case, compensation for such services is demanded, the defendant should surrender the stock procured by the services for which pay is asked.

ACTION tried at Fall Term, 1895, of EDGECOMBE, before (160) *Boykin, J.,* and a jury.

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

For error in the instruction to the jury, that defendant was en-

titled to a credit for the services rendered by his testator in obtaining the stock, which the latter retained, the plaintiff appealed.

G. M. T. Fountain for plaintiff.
Staton & Johnston and H. G. Connor for defendant.

CLARK, J. The defendant's testator, O. C. Farrar, took into his possession some evidences of indebtedness which were held by Joseph Lane, who was *non compos mentis,* against a factory company, and exchanged this indebtedness, on the reorganization of the company, into stock, which is now much more valuable. The court charged the jury "to find the value of said indebtedness, and that in arriving at the amount due the plaintiff they should consider the services of O. C. Farrar and say from the evidence what the same were reasonably worth, and deduct this from what they should find to be the value of the said indebtedness of the mills to Joseph Lane or the value of the stock issued to O. C. Farrar." This was excepted to, and was erroneous.

The instruction treats the indebtedness as identical in value with the stock issued in exchange for it, which probably was correct as to the values at the time of the exchange. If the plaintiff was seeking the delivery of the stock, or the defendant was offering to deliver it to the plaintiff, it would be proper to deduct from the present value of the stock any proper allowance for the services of O. C. Farrar in bringing about the exchange of the stock of the company for
(161) the said indebtedness. But the defendant is making no disclosure of the value of the stock, which the complaint alleges is now over $5,000, and is not offering to return it. To allow the defendant to hold on to the stock, with its enhanced value undisclosed, and yet to permit him to be credited with $500 for Farrar's services in making the exchange, is simply to grant him the whole benefit of the exchange into stock and $500 allowance for serving his own interests so well. Plainly, either the defendant should surrender the stock and be credited with a reasonable charge for his testator's services, or, if the defendant accounts only for the value of the indebtedness, he should not be credited for the value of his testator's services in turning the indebtedness into the stock.

It was error to charge the jury to "deduct what Farrar's services were reasonably worth from what they should find to be the value of the indebtedness of the mills to Joseph Lane" or "from the value of the stock (when) issued to O. C. Farrar." As Farrar retained the stock himself, he cannot be paid by Lane for services in getting the stock, and if his estate is to be credited with the services it must sur-

render to the plaintiff the stock procured by services which the plaintiff pays for. It is noteworthy that Farrar at the time paid no money and gave no note to Lane for the indebtedness, which would seem to indicate that the truth of the transaction was that he did not buy the indebtedness of Lane, but took it in hand to manage for him. If so, Lane's estate is entitled to the present value of the stock, or rather its highest value since demand made, subject to a reasonable charge for Farrar's services in exchanging the indebtedness, which he held as a fiduciary for Lane, into the stock. If Farrar could (162) charge Lane for services, the stock should be decreed to be held in trust for Lane, and Farrar's estate is liable for its value at this time or at any time since plaintiff elected to end the trust by a demand.

New Trial.

BOARD OF COMMISSIONERS OF THE TOWN OF TARBORO v. H. R. MICKS.

"CONNOR'S ACT"—DEED, REGISTRATION OF—RIGHTS OF JUDGMENT CREDITOR INTERVENING BETWEEN DATE AND REGISTRATION OF DEED—SUBROGATION TO RIGHTS OF MORTGAGEE.

1. Under the provisions of "Connor's Act" (chapter 147, Acts 1885), providing that no conveyance of land for more than three years shall pass title to any property as against the creditors of the grantor until the same is registered, the grantee in a deed executed by the grantor and deposited with the holder of a mortgage under an agreement between the latter and the grantee that it should not be registered until the payment of the purchase price, took subject to the lien of a judgment creditor of the grantor, whose judgment was rendered and docketed between execution and registration of the deed.

2. Where a deed was executed by B. to T., but was deposited with F., the holder of a prior mortgage on the land, with the understanding that it should not be registered until the purchase price was paid, which price, when paid, should be applied to the payment of the mortgage, such mortgage, when so paid, will not be kept alive for the benefit of the grantee in order to subrogate him to the rights of the mortgagee, which existed at the date of the deed, as against a judgment creditor of the grantor, whose judgment was obtained and docketed between the execution and registration of the deed.

3. In such case, the grantee is not entitled to have a sale under execution on such judgment enjoined, inasmuch as his right to compensation for betterments can be adjusted when the purchaser at the execution sale brings his action of ejectment.

ACTION pending in EDGECOMBE, heard by consent before (163) *Bryan, J.*, at chambers, in Newbern, N. C., on 19 December, 1895.

The injunction was refused, and the restraining order theretofore issued by *Brown, J.*, was dissolved, and plaintiff appealed.

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

J. L. Bridgers for plaintiff.
Jacob Battle and Shepherd & Busbee for defendant.

MONTGOMERY, J. This action was brought to have removed a cloud resting upon the title of a certain lot in the town of Tarboro, which the plaintiff alleges it owns, free from encumbrance, and upon which the defendant claims to have a lien under a judgment of Edgecombe Superior Court. The defendant had issued an execution on the judgment, and the sheriff had advertised a sale of the lot to take place in December last. A motion for injunction against the sale was heard, after continuance, before *Judge Bryan,* at chambers, on 15 December, 1895, the defendant having been restrained from selling, under an order of *Judge Brown,* until the application for injunction should be heard. *Judge Bryan* refused to grant the injunction, and set aside and vacated the former restraining order.

For the purpose of the motion for injunction, his Honor, upon the affidavits and complaint and answer, found as facts that on 27 December, 1887, for the price of $3,300, Battle Bryan and wife executed to the proper town authorities of Tarboro a deed to the
(164) lot in question, upon which the town afterwards erected a handsome and commodious public hall; that the deed for the lot was deposited with O. C. Farrar, not to be registered until the purchase money should be paid; that at the date of the execution of the deed there was a mortgage on the lot executed by Bryan and wife to J. W. and W. L. Sherrard, securing a debt of about $2,500, and it was agreed between Bryan and the town authorities that the mortgage should be paid first when the town should pay the purchase money. His Honor also found that the Sherrard mortgage and debt were duly assigned to Farrar; that the town paid the whole of the purchase money at and before 28 December, 1889, the Sherrard mortgage being satisfied on that day, the bond secured thereby being marked "Paid," and the mortgage canceled of record on 27 September, 1894, by the mortgagees, and the deed to the town from Bryan and wife registered on 10 January, 1890; and that at the Spring Term, 1888, a judgment was rendered for $3,250 in favor of A. T. Bruce & Co. against Battle Bryan, which judgment was afterwards assigned for value to the defendant, and which the defendant is now seeking to enforce against the lot bought by the town from Bryan, Bryan having no other property subject to execution. Upon these facts his Honor was of opinion

that the Sherrard mortgage had been canceled and the debt secured therein paid, and that the same could not be treated as in force, so as to give to the plaintiff any equitable right of subrogation to the rights of the mortgagees, as such rights existed on 27 December, 1887, when the deed from Bryan to the town was executed and delivered to Farrar.

His Honor was further of the opinion "that the defendant, the owner of the Bruce judgment, has the right to treat the conveyance dated 26 December, 1887, as not having been made till the date of its registration, 10 January, 1890, without regard to the (165) question of notice; that as for the plaintiff's right to compensation for betterments, the same can be adjusted when the purchaser at execution sale brings his action of ejectment; that the plaintiff, having an adequate legal remedy, is not entitled to extraordinary relief by way of injunction, and that the restraining order herein issued be vacated and that plaintiff pay the costs incident to the application for injunction.

We can see no error in the rulings of his Honor. Chapter 147, Laws 1885, provides that "No conveyance of land * * * for more than three years shall be valid to pass any property against creditors or purchasers for valuable consideration from the donor, bargainor or lessor but from the registration thereof." The deed from Bryan to the town was registered after the rendition of the judgment, and the lot is subject to the lien of the judgment. The defendant who purchased the judgment acquired all the rights under his purchase that the original judgment creditor had.

Affirmed.

Cited: Trust Co. v. Sterchie, 169 N. C., 24; *Realty Co. v. Carter,* 170 N. C., 7.

R. B. PEEBLES v. W. TAYLOR ET AL.

TAX DEED—VALIDITY.

Under section 77, Acts 1889, a tax deed made in pursuance of a sale of land for taxes listed in the name of a person other than the rightful owner, is not void if the land be in other respects sufficiently described.

ACTION for the recovery of a tract of land containing 350 acres, tried at Fall Term, 1895, of NORTHAMPTON, before *Boykin, J.,* and a jury. (166)

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

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

R. O. Burton and B. M. Gatling for plaintiff.
MacRae and Day, for defendants.

FAIRCLOTH, C. J. The law of this State for the assessment of property and the collection of taxes was materially changed by Laws 1889, ch. 218, now found in Laws 1895, ch. 116. In the former (section 72) and in the latter (section 66) it is enacted that the sheriff's deed to a purchaser of land sold for taxes shall be *presumptive* evidence, in all courts of the State, of certain facts therein enumerated, and shall be *conclusive evidence* of other facts therein stated. In section 77 of the first-named act and section 71 of the second it is declared: "No sale of real property for taxes shall be considered void on account of the same having been charged in any other name than that of a rightful owner, if the said property be in other respects sufficiently described." With the policy of this or any act this Court has nothing to do. It can only declare the meaning of such acts as they are recorded.

In the case before us the plaintiff claims title under a sheriff's deed as purchaser at a tax sale made 4 May, 1891, for taxes for 1890, the deed being dated 3 October, 1892.

Defendants claim under a trust deed made by Etheridge and Brooks, dated in 1889 and registered in 1894. The land was listed in 1888 and in 1889, in the name of Etheridge and Brooks, and the taxes paid. In 1890 the county commissioners listed the land as Etheridge and Brooks', under which listing the sheriff sold for taxes of 1890.

(167) When the evidence was introduced on the trial, his Honor held that the Legislature had no power to authorize the sale for taxes of Marshall's land, when it was listed as the lands of Etheridge and Brooks and advertised in the same way, and directed the jury to answer the first issue "No." Plaintiff excepted and appealed. This is the only question before us. The same question was recently before us in *Moore v. Byrd, post,* 688, and in *Sanders v. Earp, post,* 275, and it was held that the deed was *prima facie* evidence of title and that the plaintiff was entitled to recover, in the absence of evidence of the defendant's title. The land was sold as the property of Riddle, with whom the defendants had no privity. These cases dispose of the present.

During the argument the defendants' counsel discussed the con-

stitutionality of the conclusive section of the above acts, and referred to some eminent authorities in support of his view. We find the question is not presented in the record, and we are not at liberty to consider it, and we have no disposition to do so until it is presented and upon fuller argument and more mature consideration. The question is a grave and important one.

Error.

Cited: Fulcher v. Fulcher, 122 N. C., 102; *Edwards v. Lyman, ib.,* 746; *Collins v. Pettitt,* 124 N. C., 729; *King v. Cooper,* 128 N. C., 348; *Stewart v. Perguson,* 133 N. C., 285.

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J. H. TAYLOR, TRUSTEE, v. J. M. B. HUNT ET AL.

PAROL EVIDENCE OF CONTEMPORANEOUS AGREEMENT TO CHANGE CONTRACT—STATUTE OF LIMITATIONS—MORTGAGE.

1. While a contemporaneous parol agreement that a certain debt secured by a written lease should be indulged and that otherwise the lease should be void might be a defense to an independent action to collect the debt, evidence of such agreement is inadmissible to avoid the lease, there being no allegation that such stipulation was omitted by fraud, mutual mistake or accident.

2. When property is conveyed as security for an existing debt, the debt may be enforced to the extent of the security at least, although at the time of the conveyance the debt was barred by the statute of limitations.

3. An agency cannot be proven by the declarations of the alleged agent, but must be proved *aliunde.*

4. The mere fact that one is made the trustee under an instrument to collect rents for the creditors named therein, and to apply the same to their debts, does not make him the agent of the creditors to bind them by oral declarations made at the time.

ACTION for the appointment of a receiver to collect the rents of lands leased to the plaintiff, trustee, by the defendant J. M. B. Hunt, for the purpose of paying certain debts therein mentioned, tried before *McIver, J.,* and a jury, at September Term, 1895, of VANCE.

It appeared from the complaint that on 11 October, 1891, the defendants executed to the plaintiff, as trustee, a lease upon certain lands in Vance County, empowering him to collect the rents and apply them to the payment of certain debts due by the defendant J. M. B. Hunt to various parties named in the lease. Among the debts so secured were two to W. L. Taylor, one of which was secured by a deed (absolute on its face, but intended as a mortgage), conveying what

(169) is referred to as the Phipps land, and the other of which was secured by a deed of trust to N. B. Boyd. Among the debts secured by the lease were several judgments in favor of Paschall & Taylor and Taylor Bros., all of which were barred by the statute of limitations at the date of the lease. J. M. B. Hunt never delivered actual possession of the lands to the plaintiff, trustee, but collected the rents during 1891, 1892 and 1893, and paid a part thereof to the plaintiff, which was applied as provided in the lease. It was alleged that the creditor, W. L. Taylor, had no knowledge of the execution of the lease and never agreed to wait for the payment of his debts until the lease should pay them. About $1,000 of the debt due to W. L. Taylor had been due about seventeen years and the balance had been standing about seven years.

Upon the institution of an action by said W. L. Taylor for the foreclosure of his said mortgage for $1,000, in the early fall of 1894 (which action is still pending), the said defendant J. M. B. Hunt refused to make any other or further payments of said rents to plaintiff or to allow or permit the tenants of said lands to do so, the said Hunt pretending to claim that there was an implied agreement on the part of W. L. Taylor at the time of the execution of said lease to forbear the collection of his debts till all said rents would pay it, and that the proceedings to foreclose said mortgages by said W. L. Taylor worked a forfeiture of said lease.

The material defense of the defendants is set out in their amended answer, which is as follows:

1. That it was distinctly understood between J. H. Taylor, trustee, and each of the defendants that if this defendant would execute said lease W. L. Taylor would postpone the collection of his debts till the rents and profits from their lands embraced in said lease should pay same, and it was further understood and agreed, upon
(170) the payment of the said Taylor debts, that W. L. Taylor would convey the Phipps land to said E. A. Lewis and Susan Lewis; that but for such an agreement the said defendants would never have executed the same.

2. That the defendant Hunt agreed with the trustee, J. H. Taylor, to include the Taylor and Paschall judgments and the account of Taylor Bros., all of which were barred by the statute of limitations, upon the understanding that the said W. L. Taylor debts should be paid as provided in said lease, and that W. L. Taylor should convey the Phipps land to his codefendants when such payment had been made out of the rents and profits of land embraced in the lease; that but for such agreement he nor his codefendants would have executed said lease; that said W. L. Taylor, in violation of the provisions of

the said lease, has sold part of the land embraced in same, and has refused to abide by the provisions thereof.

Wherefore defendant asks judgment that said lease be surrendered for cancellation, and for such other and further relief, etc.

The issues submitted on the trial and the responses were as follows:

1. "Was the lease of 11 October, 1891, made upon the understanding and agreement that the W. L. Taylor debt should be indulged till paid out of the rents of the land described in said lease?" Answer: "Yes."

2. "Were the Taylor & Paschall and Taylor Bros. debts included in said lease because of said understanding and agreement?" Answer: "Yes."

3. "Were the debts or any part of them due by J. M. B. Hunt to Taylor & Paschall and Taylor Bros. barred by the statute of limitations?" Answer: "Yes."

4. "Did said J. M. B. Hunt and J. H. Taylor know they (171) were so barred?" Answer: "As to Hunt, 'No'; as to Taylor, 'Yes.'"

5. "Was it a part of the consideration for signing the lease of 11 October, 1891, that W. L. Taylor should convey the Phipps land to Miss Lewis and Ed. Lewis when his debts were paid out of rents?" Answer: "Yes."

There were various exceptions to the evidence and to the refusal to submit issues tendered by the plaintiff and to those submitted, as well as to instructions to the jury, etc., those necessary to the understanding of the decision of the Court being set out in the opinion of *Associate Justice Clark*. From the judgment rendered the plaintiff appealed.

T. T. Hicks, W. B. Shaw and R. O. Burton for plaintiff.
MacRae & Day and Argo & Snow for defendants.

CLARK, J. The principal point at issue in this case is discussed and settled in *Moffit v. Maness,* 102 N. C., 457. The defense set up is an attempt to contradict and vary the terms of a written contract of lease by showing a contemporaneous parol agreement that a certain debt therein secured should be indulged, and that if it was not, the lease was null and void. Such verbal agreement, if made, might be a defense to an independent action to collect the debt, but would not nullify the lease. There is no allegation that such stipulation was left out of the lease by fraud, mutual mistake or accident, and no prayer to reform the instrument on such ground. While it is true

that where a contract is not required to be in writing, if the *entire* contract is not reduced to writing, the other part may be proven by parol (*Nissen v. Mining Co.,* 104 N. C., 309), this has never been permitted to nullify the settled rule that such oral evidence
(172) must not contradict or vary the part that is in writing. If the defendants in the present case are merely seeking to show that it was agreed by parol that if a certain debt secured by the lease was to be indulged, and that it has not been, this does not, as they insist, nullify the lease, but was a defense to have been used against the action brought on the debt. If the defendants are seeking to show a verbal agreement that if the debt was not indulged the lease was to be void and ineffectual, this would be to contradict a written agreement by a parol defense. The first two issues, therefore, were improperly submitted. *Parker v. Morrill,* 98 N. C., 232, cases cited; *Martin v. McNeely,* 101 N. C., 634; *Bank v. McElwee,* 104 N. C., 305.

The next two issues were immaterial, for as those debts were secured by the lease it could make no difference whether or not at the date of the lease the defendant might have successfully pleaded the statute of limitation if action had been brought. If they were then barred, that did not prevent an honest debtor from securing them, and, indeed, such security is a new promise (The Code, sec. 172), at least to the extent of the property conveyed. Besides, the security, when not barred, is enforcible, though action on the debt is barred. *Capehart v. Dettrick,* 91 N. C., 344; *Long v. Miller,* 93 N. C., 227; *Arrington v. Rowland,* 97 N. C., 127; *Overman v. Jackson,* 104 N. C., 4; *Jenkins v. Wilkinson,* 113 N. C., 532.

The fifth and last issue is immaterial at present, as the debts secured have not been paid. When that has been done, if the promise to reconvey is not executed after demand made, action can then be brought to prove the promise and secure specific performance. The Court will not now anticipate questions which may arise in that action.

(173) This disposes of the first six exceptions, and it is not necessary to consider the others. It may be said, however, in reference to the seventh, eighth and tenth exceptions, that an agency cannot be proven by the declarations of the alleged agent. *Francis v. Edwards,* 77 N. C., 271; *Gilbert v. James,* 86 N. C., 244; *Williams v. Williamson,* 28 N. C., 281; *Grandy v. Ferebee,* 68 N. C., 356; *Johnson v. Prairie,* 91 N. C., 159. The mere fact that J. H. Taylor was made trustee by the terms of the lease to collect rents for the creditors named, and apply the same to their debts, did not make him the agent of the creditors to bind them by oral declarations made at the time, and it was erroneous to admit such declaration to prove that he

was at that time acting as their agent. Agency must be proved *aliunde* the declarations of the alleged agent.

Error.

Cited: *Jones v. Rhea,* 122 N. C., 725; *Machine Co. v. Seago,* 128 N. C., 162; *Summerrow v. Baruch, ib.,* 204; *Menzel v. Hinton,* 132 N. C., 663; *Jones v. Warren,* 134 N. C., 393; *Machine Co. v. Hill,* 136 N. C., 129; *Daniel v. R. R., Ib.,* 521; *Knitting Mills v. Guaranty Co.,* 137 N. C., 569; *West v. Grocery Co.,* 138 N. C., 168; *Piano Co. v. Strickland,* 163 N. C., 253; *Palmer v. Lowder,* 167 N. C., 333.

W. H. ROWLAND v. OLD DOMINION BUILDING AND LOAN ASSOCIATION

BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGE—ACCOUNTING.

Where a borrowing member of a building and loan association assigns his stock and gives a mortgage to secure the loan, in an accounting on the foreclosure of the mortgage, the contract being usurious, the borrower should be charged with the principal of the loan, with legal interest, and credited with payments made on account of principal, interest, fines and penalties, and payments on account of stock should go to the holder of the stock.

ACTION heard before *McIver, J.,* at Fall Term, 1895, of VANCE, on motion by the defendant, for judgment against the plaintiff and T. T. Hicks, his surety, for $130 and interest from 10 (174) October, 1892, pursuant, as alleged, to the opinion of the Supreme Court, as reported in 116 N. C., 877.

Plaintiff resisted the motion, upon the grounds set out in his affidavit, which was as follows:

W. H. Rowland, being duly sworn, says:

"1. The above-entitled action was begun by him in the fall of the year 1891, and after the order of reference and report of referee, and the judgment rendered thereon in the action by *Bryan, J.,* at the May Term, 1892, of this court, declaring what part of the fund then deposited in court in said action belonged to affiant, affiant applied to the clerk for his part of said fund. The said clerk declined at first to pay it, but afterwards, notice of a motion for an order requiring him to pay the same having been served on him by plaintiff, he concluded to pay, and did, about 10 October, 1892, pay to affiant the money adjudged to belong to affiant in said action.

"2. The defendant association did not, in their pleadings in said action or otherwise, seek or claim to recover on their mortgage in said

action any more than $75 in excess of what plaintiff conceded they were entitled to have. By the judgment of the Superior Court in said action they recovered said additional $75, plaintiff being the only contestant therefor, and the same was paid to them and they accepted it.

"3. This affiant nor the defendant association did not appeal from said judgment, but T. M. Pittman, one of the parties, did, though not from that part of it affecting plaintiff nor defendant, in so far as it directed the disbursement of said fund in court, or was supposed to affect it.

"4. Afterwards, said association having withdrawn the money ($75) to which it was entitled, hearing that plaintiff was mov-
(175) ing for a rule upon the clerk to require the payment to plaintiff of the amount due him, gave notice to plaintiff's counsel of a motion to be made before *Judge Brown,* then presiding, hereto attached, to modify and alter the judgment of *Judge Bryan* in the respect mentioned in said notice, and defendant association made said motion before *Judge Bryan* at October Term, 1892, and plaintiff, by his counsel, opposed it, and his Honor declined to allow the same, and no appeal was taken therefrom by the defendant association.

"5. Afterwards the Supreme Court affirmed the judgment of the Superior Court in said cause, in so far as it directed the payment of said money into court. This was about January, 1894; and affiant submits to the court that the judgment of *Judge Bryan,* unappealed from by plaintiff or said defendant, the refusal of *Judge Brown,* on motion, to modify it or to order the clerk to hold the money (this order of *Judge Brown* declining the motion was not reduced to writing), the payment of the said funds to plaintiff and defendant association, and the subsequent affirmation of said judgment by the Supreme Court (115 N. C., p. 825), vested in affiant the right and title to said fund, and that he ought not and cannot now be required to pay it to said defendant.

"6. That the question as to the right to said fund was not appealed to the Supreme Court, and the point in relation thereto was not, as affiant is informed, raised by said appeal, and this court ought not now to make any order requiring the return of said fund by this affiant. Wherefore, affiant prays the court to decline the motion for judgment against this affiant for $130."

The affidavit of Henry Perry, clerk of the Superior Court,
(176) was offered by the Old Dominion Building and Loan Association, and was as follows:

Henry Perry, being duly sworn, says: That he was Clerk of the Superior Court of Vance County during the pendency of the above-entitled action, until December, 1894, and as such clerk received and

disbursed the funds paid into court in that action; that on or about 10 October, 1892, he paid T. T. Hicks, Esq., attorney for plaintiff, the sum of $150.65 out of said fund, under the following circumstances: "An appeal had been taken from the judgment of this court by Thomas M. Pittman, trustee of T. A. Noell, and pending such appeal the plaintiff applied to affiant for the money in his hands, less the amount adjudged to be paid the defendant association, and certain costs and expenses and taxes adjudged to be paid; that H. T. Watkins, Esq., then attorney for said association, opposed such payment, upon the ground that the action of the Supreme Court upon such appeal might necessitate a different application of the fund than that prescribed in the judgment appealed from. Upon such objection, affiant declined to pay out the fund to plaintiff until it was agreed that plaintiff would secure the repayment of said sum into court if repayment thereof should be adjudged in the further progress of the action, and pursuant to such agreement T. T. Hicks became surety for such repayment, and the money was paid to T. T. Hicks, as attorney for plaintiff, as before set out; that the receipt for said money and the written agreement of suretyship of said T. T. Hicks have been mislaid and cannot at this time be produced by affiant; that such payment was not made pursuant to any order of court made at that time, but pursuant to the orders and judgment previous to the appeal to the Supreme Court; that no order was made by *Judge Brown* giving affiant any direction whatever as to the disbursement of said fund, and no order was named in the cause from the time of (177) the appeal, but *Judge Brown* did read the judgment of *Judge Bryan,* and said to me that there was no reason why I should not pay out the money under the order of the court, but when the contract of plaintiff and defendant's attorneys was mentioned to him he said he had nothing to do with that part of the controversy, and that Watkins should get an injunction if he wanted the money to remain in the clerk's office. Then, after a talk with plaintiff's attorney, they agreed to refund the money if the court ordered it returned, whereupon I paid it out. Mr. Watkins, attorney for the Old Dominion Building and Loan Association, afterwards collected the part that was adjudged due the association."

His Honor rendered the following judgment:

"This cause coming on to be heard upon the motion of the defendant, the Old Dominion Building and Loan Association, for judgment against the plaintiff and his surety for the return of funds paid to the plaintiff, according to the certificate of the Supreme Court, and it appearing to the court that on or about 10 October, 1892, the clerk

of this court paid over to plaintiff, of funds in his hands, which had been paid into court to await the determination of this action, the sum of $150.65, taking surety for the return thereof, if return should be adjudged, and it appearing that T. T. Hicks was such surety; and it further appearing that the Supreme Court has so modified said judgment as to require the repayment of $130 of said sum from the plaintiff to the defendant, the Old Dominion Building and Loan Association, it is now, on motion of Thomas M. Pittman, attorney for the Old Dominion Building and Loan Association, considered and adjudged that the defendant, the Old Dominion Building and
(178) Loan Association, recover of the plaintiff, W. H. Rowland, and T. T. Hicks, his surety, the sum of $130, with interest thereon from 10 October, 1892, and the costs of this motion and judgment, to be taxed by the clerk."

From this judgment the plaintiff appealed.

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

MONTGOMERY, J. When this case was first before this Court (*Rowland v. B. and L. Association,* 115 N. C., 825) it was decided that stock of Noell was not bought in by the company and canceled by the alleged assignment to the defendant building and loan association executed by Noell on 7 July, 1890, as contended by the association, and that the stock belonged to the defendant Pittman, the assignee of Noell. When that opinion was delivered the Court was (owing to the manner in which the case was presented on appeal) inadvertent to the fact that $130 had been credited as a payment on the stock at the time of the referee's report. This inadvertence was pointed out in the petition to rehear by the defendant. The petition to rehear was allowed, and the judgment below was ordered to be reformed, as appears in this case, *Rowland v. B. and L. Association,* 116 N. C., 877. At October Term, 1895, of the court below, the judge followed the instructions of this Court and rendered judgment accordingly. From that judgment the plaintiff appealed. It is not necessary to discuss each of the exceptions pointed out in the record. It was contended by the plaintiff's attorney, by brief, that "this Court based its modification of the former opinion on a statement of fact contained in the defendant's petition to rehear, which statement is contrary to the sworn statement of the defendant's answer and statement of
(179) account." The counsel is in error. Although in the statement of account made up by the referee it appears that $130 was collected on the debt, yet it is perfectly manifest from the complaint and

answer and the report of the referee that nothing but the interest had been paid on the debt up to 20 September, 1891, and that the $130 went to the stock account of Noell. Upon the whole record (we mean complaint, answer and referee's report) we have concluded, under the peculiar circumstances of this case, to send the matter back to the court below for a reformation of the judgment rendered in this case by *Judge McIver* at Fall Term, 1895. A judgment should be rendered against the plaintiff and his surety, T. T. Hicks, for $130, less $36 arrearages and $6 fines, which were charged in favor of the defendant company against Noell, with interest on the balance from the last Monday in September, 1895, the beginning of the term of this Court, at which the case was heard on the petition to rehear.

Modified and Affirmed.

OSCAR HOOKER v. L. C. LATHAM ET AL.

ACTION OF CLAIM AND DELIVERY OF TITLE DEEDS—REPLEVIN—TROVER AND CONVERSION.

Where there is a dispute about the delivery of a title deed involving a determination of the title to the land conveyed by it, neither replevin nor the provisional remedy of claim and delivery will lie. Nor, in such case, will trover lie for the conversion of the deed.

CLAIM AND DELIVERY for the recovery of a certain mortgage deed (and two notes secured thereby) executed by Henry Edmonds to I. A. Sugg, in July, 1877, and of a certain deed executed (180) by I. A. Sugg to William Whitehead, in the year 1888, alleged to be unlawfully detained from the plaintiff, who was a purchaser of the land described in said deeds at execution sale against Edmonds, tried before *McIver, J.*, and a jury, at December Term, 1895, of PITT.

The defendants, each for himself, filed a separate answer, denying the ownership of the plaintiff in the mortgage deed and the existence of any deed from Sugg to Whitehead.

Verdict and judgment for the plaintiff.

Defendants excepted and appealed to Supreme Court.

Thos. J. Jarvis and Shepherd & Busbee for defendants.
No counsel contra.

AVERY, J. The action is brought to recover possession of a mortgage deed executed by one Edmonds to Isaac A. Sugg, together with two notes secured by it, and also an absolute (186)

deed from Sugg to William Whitehead conveying the same land. The provisional remedy of claim and delivery was also resorted to, as ancillary to the first cause of action, thereby giving to it the characteristics of the old common-law action of replevin, which could be maintained only for the recovery of specific personal chattels wrongfully in the possession of another, as appears from the definition given in the books. 20 Am. & Eng. Enc., p. 1041; 7 Lawson R. & R., secs. 3641 and 3639; Cobbey on Rep., sec. 2.

The plaintiff had bought at execution sale subsequent to the date of the alleged deed from Sugg to Whitehead, and the sheriff had conveyed to him by virtue thereof the interest of Whitehead in the same land described in the Sugg deed and mortgage. The first cause of action, upon the face of the complaint, appears to have been brought solely to regain possession of the specific deeds mentioned, and damages for detention.

The general rule is that replevin, or this provisional remedy which serves the purpose of a substitute both for replevin and detinue, will lie for the recovery, either of deeds or certificates of stock, where the object is to regain possession of the specific paper and not to test the right to the property which it represents. But neither the common-law action nor the provisional remedy of claim and delivery can be maintained for the unlawful taking or the wrongful detention of a title deed, where there is a dispute about its delivery and the controversy involves the determination of the title to the land conveyed by it. Cobbey, *supra*, sec. 79; 7 Lawson, *supra*, sec. 3643; *Flannigan v. Coggin*, 71 Wis., 28.

In his second cause of action the plaintiff alleges that he is the owner and entitled to the possession of the deeds, and that
(187) the defendants wrongfully converted them to their own use.

Trover and conversion at common law was an action on the case, brought to recover damages for the wrongful taking of personal chattels from the owner or one having right to possession of them, and the wrongful conversion of them to the use of the latter. The use of the word "conversion," where the object is to acquire possession of particular property, and the judgment demanded and rendered is for its recovery, with damage for detention, does not change the character of the action. It is not necessary, therefore, to determine whether upon the facts an action for trover and conversion, or in the nature of it, could have been maintained, or whether the reason which precludes a recovery, when the action is brought for the specific chattel, would not apply when under the guise of seeking damage for the wrongful conversion of a deed; it is apparent that the object is to estop a party from setting up a title to the land conveyed by it by a

finding that it had not been delivered to him. *Martin v. Thompson,* 162 Cal., 618; 45 Amer. Rep., 663.

The plaintiff cannot maintain this action. Before the enactment of the late statute (Laws 1893, ch. 6) he might have tried the title by an action against a trespasser in possession, but now, under its provisions, he may also sue a claimant who is not an occupant, and force him to disclaim or defend his title. Had either remedy been resorted to, the court during the pendency of the action would have had the power to order the production and, if deemed necessary, the deposit with the clerk in the custody of the court of all the papers mentioned in the pleadings; and in passing upon the issues involved, the conflicting testimony offered in this case, or so much of it as would have been relevant, might have been heard. It is unnecessary to pass upon the exceptions to the competency of evidence, when, in no aspect of it, either including or excluding the testimony ob- (188) jected to, would the plaintiff be entitled to recover.

The judgment below is

Reversed.

Cited: Pasterfield v. Sawyer, 132 N. C., 259; *Bridgers v. Ormond,* 148 N. C., 377.

L. W. DAWSON AND WIFE v. JOHN C. QUINNERLY.

ESTATE—RULE IN SHELLEY'S CASE—ESTATE IN TAIL.

1. The rule in *Shelley's case* has always prevailed in this State, before and since the act of 1784 (section 1325 of The Code), which did not affect the principle of law decided in *Shelley's case.*

2. When an estate was conveyed to P. D. "for and during her natural life, and at her death to the heirs of said P. D., which may be begotten on the body of said P. D., by her present husband, L. W. D., to them the heirs of the said P. D. and L. W. D., their heirs and assigns": *Held,* that the qualifying words, "by the present husband the said L. W. D.," etc., etc., confined the remainder to the children of P. D. and L. W. D., and took the case out of the general rule of descent according to *Shelley's case.*

ACTION heard before *Boykin, J.,* at March Term, 1896, of PITT, on a case agreed, as follows:

That on or about 1 December, 1895, the plaintiffs contracted with the defendant to sell and convey to him in fee the lands described in the complaint for the sum of $3,500; that immediately thereafter the defendant entered into the possession of said lands (189)

under said contract; that plaintiffs, on 27 December, 1895, procured a deed (including said land) to be written, conveying the same in fee to the defendant, and tendered the same to the defendant and demanded of the defendant the said $3,500, the purchase price for said lands, and the defendant refused to accept said deed and pay the purchase price, alleging that the deed from John Rhem to the plaintiff Priscilla L. Dawson, under which the plaintiffs claimed said lands, only conveyed a life estate to said plaintiff Priscilla L. Dawson, and that the plaintiffs were not able to convey to him the lands in fee simple in accordance with their said contract, and upon these reasons alone the defendant refused to perform his part of the contract. The *habendum* in the deed from John Rhem to Priscilla L. Dawson was as follows: "To have and hold to her, the said Priscilla L. Dawson, for and during the term of her natural life, as aforesaid; and at her death, then the same shall go and descend to the heirs of said Priscilla L. Dawson which have been or may be begotten on the body of said Priscilla L. Dawson by her present husband, the said L. W. Dawson, to them, the heirs of said Priscilla L. Dawson and L. W. Dawson, their heirs and assigns, forever."

At the trial his Honor decided that the said deed from said John Rhem to said Priscilla L. Dawson did convey the fee simple to the said Priscilla L. Dawson, and that the plaintiffs were able to convey to the defendant the fee simple title to said lands in accordance with said contract, and gave judgment against the defendant, etc., and the defendant excepted and appealed.

(190) *F. G. James for defendant.*
A. J. Loftin for plaintiffs.

MONTGOMERY, J. In North Carolina the principle of law known as the rule in *Shelley's case* has always prevailed. The estate conveyed in the premises of the deed to Mrs. Dawson is limited to a life estate, and in the *habendum* clause the following language is used: "To have and to hold to her, the said Priscilla L. Dawson, for and during the term of her natural life, as aforesaid; and at her death, then the same shall go and descend to the heirs of said Priscilla L. Dawson which have been or may be begotten on the body of said Priscilla L. Dawson by her present husband, the said L. W. Dawson, to them, the heirs of said Priscilla L. Dawson and L. W. Dawson, their heirs and assigns, forever." If the *habendum* had not contained the words "by the present husband, the said L. W. Dawson, to them, the heirs of said Priscilla L. Dawson and L. W. Dawson, their heirs and assigns, forever," the rule in *Shelley's case* would apply. These words, how-

ever, appearing, they furnish the necessary words of qualification and explanation to the other preceding words to take the case out of the rule. The qualifying and explanatory words used in the deed, as above pointed out, confined the remainder interest to the children of Priscilla L. Dawson and her husband, L. W. Dawson, thus altering the general rule of descent. *Leathers v. Gray,* 101 N. C., 162; *Starnes v. Hill,* 112 N. C., 1; *Nichols v. Gladden,* 117 N. C., 497. The act of 1784, ch. 204, sec. 5, (Code, sec. 1325), converting estates tail into estates in fee simple, has no bearing upon the principle of law decided in *Shelley's case,* for, as we have said, the rule of law established in that case prevailed before the act of 1784, and has always prevailed since. There was error in the ruling and judgment (191) of the court below, and the same is

Reversed.

Cited: Chamblee v. Broughton, 120 N. C., 175; *Thompson v. Crump,* 138 N. C., 34; *Sessoms v. Sessoms,* 144 N. C., 125.

SOUTHERN FERTILIZER COMPANY v. C. E. MOORE ET AL., EXECUTORS OF MOSES MOORE.

CONTRACT—CANCELLATION—EVIDENCE.

Where, in the trial of an action on a contract for the sale of fertilizers, it appeared that M. and his son were agents for the plaintiffs under a contract which contained the provision that "this contract shall remain in force until canceled," and that on 16 December, 1885, the son wrote to plaintiffs: "I wish to sell your fertilizers again next year, and prefer selling myself. My father is getting very old, and does not care to have his name connected with the agency," and that he would like to have the advertising matter in his name, to which the plaintiff replied: "Let the contract stand exactly as it is," and there will be no trouble as to the advertising matter, "assuming that it is your father's desire," and it also appeared that some of the letters written by plaintiff were addressed to father and son, though no communication passed otherwise between the father and the plaintiff: *Held,* that the evidence did not prove a cancellation of the contract.

ACTION heard before *Coble, J.,* at Spring Term, 1895, of NASH, on plaintiff's exceptions to the report of Thomas W. Battle, referee, who found as a conclusion of law that the contract, referred to in the opinion of *Chief Justice Faircloth,* was not a continuing one.

The exceptions were overruled, and from the judgment for defendant the plaintiff appealed.

H. G. Connor and F. A. Woodward for plaintiff.

Jacob Battle and R. O. Burton for defendants.

(192) FAIRCLOTH, C. J. This action is brought to recover the proceeds of the sales of fertilizers for the years 1885 and 1887. The claim for 1885 is barred by the statute of limitations.

Moses Moore and his son, M. B. Moore, contracted in writing, in February, 1885, to sell plaintiff's fertilizers, as their agents, and it was stipulated in the contract, signed by all the contracting parties, that "this contract to remain in force until canceled." On 16 December, 1885, M. B. Moore wrote to the plaintiff, "I wish to sell your fertilizers again next year, and prefer selling myself; my father is getting very old and does not care to have his name connected with the agency," and that he would like to have the advertising matter made out in his name. On the next day plaintiff replied to M. B. Moore: "Let the contract stand exactly as it is, and there will be no trouble in putting on the advertising matter your name, assuming it is your father's desire." Other correspondence was had during the year 1886 about the business. Some of the letters before us, written by plaintiff, were addressed to M. B. and Moses Moore on their face. No communication between Moses Moore and the plaintiffs appears in the case. Whether the letter of 16 December, 1885, was sent by M. B. Moore, as the agent of his father, does not appear, or whether it was done on his own motion. His own declaration would not be sufficient to establish agency. We have looked through the evidence, and conclude that the contract was not canceled as to the plaintiff, whatever the father and son may have intended as between themselves, and that defendants are liable, according to the case as now presented.

Judgment Reversed.

Cited: *Waters v. Annuity Co.*, 144 N. C., 675.

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(193)

A. B. WESTER v. S. H. BAILEY ET AL.

SEALED NOTE—INSERTION OF PAYEE'S NAME AFTER EXECUTION OF BOND—RATIFICATION BY OBLIGOR—CONSIDERATION.

1. If the maker of a sealed note, blank as to the payee's name, acknowledges it to be his bond after the insertion of payee's name, it is valid and its maker is liable thereon.

2. A sealed note need not express a consideration.

ACTION tried on appeal from the judgment of a justice of the peace, before *Hoke, J.*, and a jury, at October (Special) Term, 1895, of FRANKLIN.

There was judgment for the defendant Bailey (his codefendant Parker making no defense), and plaintiff appealed.

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

N. Y. Gulley for plaintiff.
F. S. Spruill for defendants.

FURCHES, J. This is an action of debt, brought on the following paper-writing: "On the first day of November next we, or either of us, promise to pay A. B. Wester the sum of $100, with 8 per cent interest from date. Given under our hands and seals, this 12 April, 1892." (Signed and sealed by J. T. Harper and S. H. Bailey.) At the time this paper was drawn and signed by Harper and Bailey there was a blank left for the name of the payee, as it was not known at that time from whom the parties would get the money. The note, in this condition, was placed in the hands of defendant Harper to negotiate and get the money, and he went to the plaintiff, who agreed to let him have the money, and, by the direction of Harper, the plaintiff filled up the blank with his name as payee, and let Harper have the hundred dollars. There were no written pleadings, the case (194) having been commenced before a justice of the peace, but the defendant pleaded and relied on the "general issue." The plaintiff, besides proving the signatures to the note to be those of the defendants Harper and Bailey, introduced one Duke, who testified that, "acting for the plaintiff, he took the note to Bailey about the last of September, 1892, and Bailey said he signed the note and it was all right; he would see Harper and make him pay it, and asked witness if he supposed Wester would take back the horse," etc.

We do not feel called upon to consider the views presented by plaintiff's counsel as to whether the action may be maintained under The Code practice, as construed in *Fulps v. Mock,* 108 N. C., 601; *Stokes v. Taylor,* 104 N. C., 394; *Moore v. Edmiston,* 70 N. C., 510; *Pipe Co. v. Walton,* 114 N. C., 178. To do so would cause us to review a long line of decisions, where it has been held with marked uniformity that a bond (a note under seal) must be complete at its execution.

But it seems to us there is another point presented by the case on appeal that is decisive, and that is the acknowledgment by Bailey, some time in the latter part of September, 1892. It was then complete. The payee's name was in it then, and this acknowledgement made it his bond then, if it had not been so before.

The only ground presented by defendant Bailey (Harper did not appeal) is that it was without consideration—a *nudum pactum.* But this defense cannot benefit the defendant, because, when he acknowl-

edged it, it became his *bond*—being under seal—and needed no consideration to support it. "The law *conclusively presumes* that it was made upon good and sufficient consideration." Smith on Con-
(195) tracts, p. 14; *Angier v. Howard,* 94 N. C., 27, and numerous other cases, which we do not think it necessary to cite.

This point was incidentally presented in *Isenhour v. Isenhour,* 64 N. C., 640, and, though not directly passed upon by the Court, the treatment of the question inferentially sustains the ruling in this case. In that case the action was upon a note similar to this, brought by the representative of the deceased payee. On the trial the defendant was offered as a witness to prove that the note was in blank, as to the payee, when he signed it. This evidence was objected to by the plaintiff, under section 590 of The Code, upon the ground that the intestate payee, were he living, might testify that defendant afterwards *acknowledged it as his bond.*

But, as the Court held that this was not a transaction or communication between the defendant and intestate, it did not fall within the proviso to section 590, and the point was not directly passed upon by the Court. But from the treatment given it, it appears to us the inference is that, if it had been proved that he afterwards acknowledged it, that would have made it his bond. We must therefore hold that the acknowledgment by Bailey in September, 1892, made the paper sued on his bond, and it needed no consideration to support it. There is

Error.

Cited: Moose v. Crowell, 147 N. C., 552.

(196)

W. A. BENTON v. R. V. COLLINS ET AL.

PRACTICE—MISJOINDER OF ACTIONS—TORT—EQUITABLE RELIEF.

1. Under section 267 (1) of The Code, which provides that several causes of action may be joined in the same complaint where they all arise out of the same transaction or transactions connected with the same subject of action, a cause of action for a tort may be joined with one for the enforcement of an equitable right: *Hence,*

2. A complaint is not demurrable for misjoinder of independent causes of action, which seeks to recover damages for personal injuries and also to set aside a deed as fraudulent and to have the land sold to pay plaintiff's recovery.

FAIRCLOTH, C. J., dissenting.

ACTION heard on complaint and demurrer, before *Robinson, J.,* at January Term, 1896, of FRANKLIN.

The complaint was as follows:

The plaintiff, complaining of the defendants herein, alleges:

1. That on 25 November, 1893, at and in the county of Nash, said State, the defendant R. V. Collins did forcibly, negligently, willfully and maliciously shoot, beat, wound and ill-treat the plaintiff, W. A. Benton, to his damage $1,500.

2. That on 26 September, 1894, the said Collins and wife, for the purpose of defrauding his creditors, and particularly for the purpose of hindering, delaying, defeating and defrauding this plaintiff of his damages for the cause stated above, executed the deed in trust to S. E. Eure, which is hereto attached, marked "A."

3. That, as will be seen from said deed in trust, the beneficiaries or alleged creditors named therein are the wife and children of the said Ruffin Collins, and this plaintiff avers that said debts are feigned, and they knew of the fraudulent intent of R. V. Collins.

4. That the plaintiff in this action procured an order of (197) arrest for the defendant R. V. Collins, and the said Collins gave the undertaking required for his release in the sum of $1,500, with William Rich as surety; that in order to procure William Rich to become surety on said undertaking, the said Mary J. Collins, her husband forcing her, so this plaintiff is informed and believes, executed to said William Rich a conveyance of any and all of her interests under the aforesaid deed in trust, to secure him against loss by paying any judgment which should be recovered against her husband.

Wherefore this plaintiff demands judgment:

1. For $1,500 damage and the costs of this action against R. V. Collins.

2. That the said deed in trust be set aside, and that after allotting the homestead of the defendant the residue shall be sold to pay the plaintiff's recovery.

3. That if the defendant shall not be entitled to this, then that the conveyance made of Mary J. Collins' interest under said deed to William Rich shall be declared to be security for the plaintiff's recovery and so applied.

4. For such other and further relief as this plaintiff may be entitled to.

The defendants, except Eure, trustee, demurred to the complaint of the plaintiff filed herein, assigning as grounds: that several causes of action have been improperly joined: (*a*) For that the plaintiff joins with a demand to recover unliquidated damages for a cause of action arising out of a tort, viz., an alleged assault and battery on plaintiff by the defendant R. V. Collins, a demand to set aside for alleged fraud a deed executed by said R. V. Collins to his codefendant,

Eure, for the benefit of his other codefendant; (*b*) for that,
(198) with the two causes of action already stated, the plaintiff joins another demand to be subrogated to the rights of the surety of the defendant R. V. Collins on the arrest and bail proceeding, or to have the alleged deed of indemnity to said surety by said Collins declared security for the plaintiff's possible recovery against said defendant for the alleged assault and battery."

The demurrer was sustained, with leave to amend complaint, and plaintiff appealed.

C. M. Cooke for plaintiff.
F. S. Spruill for defendants.

MONTGOMERY, J. Subdivision 1 of section 267 of The Code, which provides for the joinder of several causes of action, where they all arise out of "the same transaction or transactions connected with the same subjects of action" in the same complaint, has, with us, given rise to very many difficulties in its practical application, as it has in all the States which have adopted a similar provision in their codes of procedure. *Ashe, J.*, in *Young v. Young*, 81 N. C., 91, said for the Court: "While it was the object of the Legislature, by adopting section 126 of the Code of Civil Procedure (The Code, sec. 267), to avoid a multiplicity of suits and prevent protracted and vexatious litigation, the first subdivision of the section has given rise to more unprofitable litigation and fine-spun disquisitions upon its construction than any other, not excepting section 343 (The Code, sec. 590). In *Land Co. v. Beatty*, 69 N. C., 329, *Rodman, J.*, delivering the opinion of the Court, said, in reference to the same subdivision: "It is difficult to give any exact meaning to that clause." It is admitted almost generally to be quite an impossibility to give a technical meaning to such words and phrases as "transaction," "transactions connected with the same subject of action," and the like expressions. In the earlier
(199) cases of *Logan v. Wallace*, 76 N. C., 416, and *Doughty v. R. R.*, 78 N. C., 22, it was broadly stated that a cause of action founded on a *tort* could not be joined with one founded on contract; but in *Hodges v. R. R.*, 105 N. C., 170, this rule was explained and extended, so as to permit such a joinder of actions, provided they arose out of the same transaction.

In considering the complaint in this action, from the view of the demurrer, as declaratory of two causes of action, it is to be observed that one of them is for a *tort* and the other is for an equitable demand and right. Neither of the causes of action in the complaint is *ex contractu*. The matter, then, of the uniting causes of action, one in tort

and one *ex contractu,* in the same complaint, is not the matter which we are to consider. The only question before us is, are the two causes of action stated in the complaint such as can be considered as arising out of the same transaction, or transactions connected with the same subject of action? If they can be considered as arising out of the same transaction, or transactions connected with the same subject of action, then there is no objection which could be made to the joinder of a tort and an equitable demand which could not of equal force be made to the joinder of an action *ex contractu* with one for an equitable demand. Taking this proposition to be true, we will find in one of our own decisions analogies that will aid us in determining the question before us. In *Bank v. Harris,* 84 N. C., 206, the complaint united a cause of action in debt on a bond with another to have declared void certain deeds for lands alleged to have been made by the debtor to his co-defendants, after the execution of the bond, in fraud of the plaintiff creditor—the cause of action *ex contractu* and one for an *equitable demand and relief.* A demurrer was filed, assigning the following grounds: (1) For that it is not averred that the defendant has not other property liable to execution and suffi- (200) cient to pay the plaintiff's demand; (2) for that it appears from the face of the complaint that the debt has not been reduced to judgment, so that execution could issue therefor; (3) for that there is a misjoinder of distinct and independent causes of action; (4) for that there is a misjoinder of parties, and there is no community of interest among them in the several impeached assignments. The demurrer was overruled by this Court, and it was decided that it was not then necessary, as formerly, for the creditor to reduce his debt to judgment and then proceed with his legal remedies before he could invoke the aid of a court of equity in his behalf, but that the courts, under the present system, being courts both of law and of equity, would give full relief in one action. The late *Chief Justice Smith,* delivering the opinion, said: "Why should a plaintiff be compelled to sue for and recover his debt, and then to bring a new action to enforce payment out of his debtor's property in the very court that ordered the judgment? Why should not full relief be had in one action, when the same court is to be called on to afford it in the second? The policy of the new practice, and one of its best features, is to furnish a complete and final remedy for an aggrieved party in a single court, and without needless delay or expense. The demurrer admits the debt, the insolvency of the debtor, his fraudulent contrivances, with the help of others, to place his property beyond the reach of creditors and secure it for the enjoyment of himself and wife, his large indebtedness still subsisting, and, by a fair implication, the want of other property which a creditor

can reach. These facts would seem to remove all obstacles in the way of the relief demanded."

In the case before the Court the defendants, except the
(201) trustee, join in the demurrer. By the demurrer it is admitted that the defendant R. V. Collins committed a battery on the plaintiff by both beating and shooting him, for which the plaintiff, in law, is entitled to recover in any court nominal damages; that he made the fraudulent conveyance of his property, for the benefit of his wife and children, to defeat any recovery the plaintiff might make against him. It is no objection to the complaint that the defendants, other than R. V. Collins, are made parties to the action. They, by the deed made professedly for their benefit, claim an interest in the land. "If the objects of the suit are single, and it happens that different persons have separate interests in distinct questions that arise out of the single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject." *Young v. Young,* 81 N. C., 91.

Nothing is asked against the defendants, other than R. V. Collins, in case the deed should be declared void. No property of theirs is sought to be reached, and only the property of the defendant R. V. Collins is sought to be subjected to any recovery the plaintiff may make. In this case, as in *Bank v. Harris, supra,* the aid of the court is invoked to remove a cloud upon a title by declaring the deed void, so that the property may be sold, under the direction of the court, and bidders be induced to give the value for it. Both grounds of demurrer were sustained by the court below, and the plaintiff appealed from the judgment sustaining the first, and not from the judgment sustaining the second. In our opinion, there was error in the ruling of the court sustaining the first ground of demurrer. The plaintiff no doubt will

be allowed to amend his complaint, so as to strike out that
(202) part in which the second ground of demurrer was successfully interposed, and to proceed to trial on the other counts.

Error.

Cited: Solomon v. Bates, post, 316; *Cook v. Smith,* 119 N. C., 355; *Daniels v. Fowler,* 120 N. C., 17; *Hobbs v. Bland,* 124 N. C., 288; *Sloan v. R. R.,* 126 N. C., 490; *Pritchard v. Comrs., ib.,* 915; *McCall v. Zachary,* 131 N. C., 469; *Reynolds v. R. R.,* 136 N. C., 347; *Troxler v. Building Co.,* 137 N. C., 58; *Fisher v. Trust Co.,* 138 N. C., 240, 245; *Oyster v. Mining Co.,* 140 N. C., 137, 138; *Hawk v. Lumber Co.,* 145 N. C., 50; *Ricks v. Wilson,* 151 N. C., 49; *Howell v. Fuller, ib.,* 318; *Graeber v. Sides, ib.,* 599; *Chemical Co. v. Floyd,* 158 N. C., 462; *Ayers v. Bailey,* 162 N. C., 212; *Lee v. Thornton,* 171 N. C., 213, 214.

JOHN D. ALSTON ET AL., PROPOUNDERS, v. FRANK DAVIS ET AL., CAVEATORS.*

WILL—HOLOGRAPHIC WILL—REQUISITES—LETTER, WHEN CONSIDERED A WILL.

1. However inartificial the language employed in an instrument propounded as a last will and testament, if, upon examination of the whole instrument, it appears that it was the purpose of the maker to give expression to his wishes as to the disposition of the whole or any part of his property, to take effect after his death, it will be regarded as a will, unless the statutory requisites as to execution and attestation have been disregarded.

2. If the language used by the writer of a letter shows an evident intent to make a disposition of his property to the person addressed, after the writer's death, it is a reasonable inference that the letter, transmitted by mail to one so deeply interested in preserving it, was sent by the writer for safe-keeping as his will, although the addressee was not specially requested to preserve it as such.

3. Where a brother, living in Texas, where he had gone from North Carolina for his health, wrote to his sister, living in North Carolina, and, after expressing sorrow for her in her financial affairs, which required the sale of her portion of the land inherited from her father, stated, in regard to his own portion, that he intended to build on it when he got old, and added: "If I die or get killed in Texas, the place must belong to you, and I would not want you to sell it," and further directed his sister to collect and retain any moneys that might be due him: *Held,* that the letter was good as a holographic will, devising the land to the sister, though she was not directed to preserve the letter as his will, and though there was no other evidence that he intended the letter as a will.

DEVISAVIT VEL NON, tried at January Term, 1896, of (203) FRANKLIN, before *Robinson, J.*

The jury rendered the following special verdict:

"1. That Augustus Davis was one of the children of Thomas Davis, and from him inherited about 200 acres of land in Franklin County, North Carolina, and this was all the land he ever owned in said county, either by inheritance or otherwise. This land was set apart to the said Augustus Davis in a regular partition proceeding, begun after the death of said Thomas Davis, in Franklin County, for the purpose of dividing his land among his heirs at law.

"2. That the said Augustus Davis, some time prior to 1873, removed to Texas; while there, letters passed between him and his sister, Temperance Alston, *nee* Davis, who is the propounder of the paper-writing offered to probate.

"3. On 28 February, 1873, the said Augustus Davis wrote to the said Temperance Alston the letter which is offered to probate, and which appears at length as 'Exhibit A' in the transcript made by the clerk below and sent up to this Court.

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

"4. That said letter was posted at Stockdale P. O., Guadaloupe County, Texas, and by the United States mail was transmitted
(204) in the usual course to the said Temperance Alston, and by her in due time received, since which time she has carefully preserved it.

"5. That the letter and every part of the same, and the signature, are all in the handwriting of Augustus Davis.

"6. That Augustus Davis has not been heard from in more than seven years and has been continually absent since his first departure. When last heard from, he was in Texas. We therefore find the fact to be that the said Augustus Davis died in Texas.

"7. That the following are the heirs at law of the said Augustus Davis, viz., Temperance Alston, who is sister of the whole blood; Frank Davis, John Davis, Nicholas Davis, brothers of the half blood; Betty Mordecai, daughter of a deceased sister of the whole blood; Pattie Boyd, Annie Boyd and Willie Boyd, infant children of a deceased sister of the half blood, who are all parties to this action.

"8. That the said Augustus Davis had no other property of any sort, either in North Carolina or elsewhere.

"Upon this statement of facts so found, if the court shall be of the opinion that the letter of date 28 February, 1873, which was offered for probate, is the last will and testament of Augustus Davis, we do for our verdict so find. If the court shall be of a contrary opinion, we find the contrary."

The letter referred to in the special verdict is as follows:

"STOCKDALE P. O., GUADALOUPE COUNTY, TEXAS,
28 February, 1873.

"MY DEAR SISTER:—With great pleasure I seat myself to answer your most welcome letter, which reached me over a week ago. It had been over a month since I had heard a word from you, so you can imagine that I was more than glad to hear from you, for in
(205) truth I was, and I guess you are getting anxious to hear from me, for I think it has been something like a month since I wrote you last. I would have written ere this, but our mails have been completely stopped by the epizootic with our horses—completely disabled the stages to move—and we are entirely dependent on them for our mails. I think they are traveling again regularly. Notwithstanding it has been so long since I wrote you, I don't know that I can write you anything interesting, yet I know it will please you to hear from me. I wrote you in my last letter that I did not buy the land which I was talking of buying. I could have raised the money to pay for it, but I came to the conclusion that it was too much for it, and I would

have had to borrow two or three hundred dollars to have made the first payment and paid interest on it, besides paying interest on the balance that was due on the land. I am living with Mr. James McDonald, the same man that I lived with last year; have about eighty acres of land rented from him. I pay him one-third of the corn and one-fourth the cotton that I raise for the rent. I have all the expenses to pay toward the crop. I have the use of his gin, free of charge, to gin the cotton which I raise. I board with him, paying him $10 per month. The family are very kind to me, and my fare is as good as the country affords. I have a nice room to sleep in; two of Mr. McDonald's sons, twelve and fourteen years old, and a man whom he has hired, stay in the room with me. I have acess to plenty of good books, but don't have time to read much. I have two men hired to help me with my crop, both negroes. I pay them $17 per month; they find their own provisions. Mr. McDonald has a son, about my age, who is having the balance of his plantation cultivated. He has been in the mercantile business at Sutherland Springs some time, but had to quit on account of his health. He was very anxious for me to take the (206) whole of his pa's place this year, but labor is so uncertain in this county I did not care to be bothered with it. I had the entire farm under my charge last year, and found it very difficult to get labor, but I made the best crop that has been made on the place since the war. I cleared about $800 last year off my crop, but had $400 old store accounts to pay, which I contracted while in the mercantile business at Nockenout. I have about $500 due me, which was let out while in that business. We have had a beautiful year, so far. Planters in this country are further advanced in their crop than I ever knew them this season of the year, and are making larger preparations for a crop than they ever have since I have been in the county. I have all my corn planted, about twenty acres; expect to get through breaking up all my land for cotton next week; will commence to plant cotton as soon as I get through breaking up. I am staying at home very close and working very hard this year; hope I will be able to come and see you when I get through with crop; but I have been talking so long about coming to see you that I know you will never pay any attention to what I say about it. If you know of any young ladies that are waiting for me, tell them not to pine for my long absence. I say 'ladies' because I know there are lots of pretty ones around you, and, like the cattle and horses, very wild and hard to catch. I wish you and the young lady you spoke of would fix me up a box and send; I would pay double the expense on it just for the sake of getting something from home. I know it would make me homesick, but I would not care for that, for I think it would help me in the end, but don't

think that you could safely send it so that I could get it in time. I hope you will get fixed on your place this year all right. I am
(207) sorry you will have to sell your land that you got from our father's estate to make the payments. I don't think I will ever sell mine. When I get old I am going to build on it so I can have it as a home when I get old. If I should die or get killed in Texas the place must belong to you, and I would not want you to sell it. I don't care about tenants put on it; I am afraid they will destroy the timber on it. If I could walk over the tract and pick out a place that suited me to build I would not mind allowing a good tenant to build and open a small field on the tract, and I am willing for you to pick out a pretty place to build on for me. So if you see a good tenant that will build a house and open a small field on the tract I will get you to make the best arrangements with him that you can for me, and you can get Brother John to take you over there, so you can pick out the spot to build on. Any place that you pick out will suit me. If you collect any money of mine keep it until I call on you for it, and try and collect all you can for me. My sweet sister, I don't want you to trouble yourself or to allow these little trifles of mine that I speak to you about to bother you in the least; I merely mention them that you may know how to act in case you should feel like attending to them for me or should have a convenient opportunity. I don't get any letters at all from North Carolina, except from you. I used to have several correspondents back there, but it has been so long since I have had a letter or written to them that I don't know who owes, they or I. Give my best love to Brother John aud all the family, especially to Cousin Rini. How is ma and the children getting on? I am going to write to Mollie and Frank soon. Do you get letters from.....? Give her my best love. I am going to write to her soon. I believe
(208) I have written you all the news, and the mail boy is hurrying me; so I must close. I will write again soon. So, with a prayer to God to take care of you, I bid you good-bye. I am, as ever, your devoted brother,

AUGUSTUS DAVIS."

The court, upon the verdict, being of opinion that no part of the letter was the will of Augustus Davis, gave judgment accordingly, and the propounders appealed.

S. F. Mordecai and F. S. Spruill for propounders.
C. M. Cooke for appellees.

AVERY, J. In response to the issue of *devisavit vel non* the jury returned a special verdict, upon which the court below rendered the judgment appealed from. The two elements of every will—that is, operative to transmit property—are that it shall disclose the intention of the maker concerning the disposition of his property after his death, and that it shall be executed and attested according to the requirements of law. No particular form is prescribed or is necessary. However inartificial the language in which it is expressed, and even where the apt legal words which ordinarily characterize a deed or power of attorney may not be used in it, if upon an examination of the whole instrument it appears that it was the purpose of the maker to give expression to his wishes as to the disposition of the whole or any portion of his property, to take effect after his death, it will be regarded as a will, unless the statutory requisites as to execution and attestation have been disregarded. Woemer Am. Law A., sec. 38, p. 60; *Cross v. Cross,* A. & E., 8 (C. L. R.), 714; *Byers v. Hoppe,* 51 Md., 206; In The Goods of W. Coles, 2 Court of Probate and Divorce, 362. The paper-writing is a letter offered for probate as a holograph will, the material portion of which is as follows:

"I hope you will get fixed on your place this year all (209) right. I am sorry you will have to sell your land that you got from our father's estate to make the payments. I don't think I will ever sell mine. When I get old I am going to build on it, so I can have it as a home when I get old. If I should die or get killed in Texas the place must belong to you, and I would not want you to sell it. I don't care about tenants put on it; I am afraid they will destroy the timber on it. If I could walk over the tract and pick out a place that suited me to build I would not mind allowing a good tenant to build and open a small field on the tract, and I am willing for you to pick out a pretty place to build on for me. So if you see a good tenant that will build a house and open a small field on the tract I will get you to make the best arrangements with him that you can for me, and you can get Brother John to take you over there, so you can pick out the spot to build on. Any place that you pick out will suit me. If you collect any money of mine, keep it until I call on you for it, and try and collect all you can for me. My sweet sister, I don't want you to trouble yourself or to allow these little trifles of mine that I speak to you about to bother you in the least; I merely mention them that you may know how to act in case you should feel like attending to them for me or should have a convenient opportunity. I don't get any letters at all from North Carolina, except from you. I used to have several correspondents back there, but it has been so

long since I have had a letter or written to them that I don't know who owes, they or I."

The statutory requirement as to the execution and attestation of a holograph will, or so much thereof as is pertinent to the question here presented, is that it shall "be found among the valuable papers and effects of any deceased person, or shall have been lodged
(210) in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will." The jury will find that every part of this letter is, as the required number of witnesses testified, in the handwriting of Augustus Davis. The letter from which the foregoing extract is taken was mailed at Stockdale, Texas, and purported to have been dated 28 February, 1873, and received in due course of mail. The jury found as a presumption, arising from the fact that Augustus Davis had not been heard from in seven years, that he was dead.

There is no safer rule for the interpretation of a statute, where a controversy arises as to the meaning of its language, in applying a general principle embodied in it to a particular state of facts, than to look to the reason which prompted its enactment. If the meaning of the words used in the statute were unmistakable, there is no ground for further dispute, because they must be interpreted according to their obvious meaning. *Randall v. R. R.*, 104 N. C., 410.

But the question whether a paper-writing has been lodged in the hands of another for safe-keeping is one that must be answered, when the paper has been in fact sent or given to another person by the maker, after a careful review of all of the attendant circumstances, and after considering them in connection with the writing, in order to determine what inferences may be fairly drawn from the words and conduct of the writer as to his purpose in sending or giving the writing. The requirement of the statute is founded upon the idea that a decedent's estate should not be deemed to have been disposed of by any careless expression used by him in a letter, unless there was something to indicate that he intended the writing not merely to subserve the purpose of expressing his present wishes, which might
(211) change, but that he intended to state how he desired to dispose of a part or the whole of his property after his death. Where a testator puts away a paper among his valuable papers, or gives it to another for safe-keeping, it is evidence that he wishes it preserved, in order that it may serve the purpose after his death for which it purports to have been written. It is not essential that the maker of the instrument should use any particular words, such as "I lodge this paper with you for safe-keeping, as the law requires I

should do." No such rigid rule was intended to be applied in the interpretation of the statute giving the privilege to one, *inops consilii,* and remote from those he loves, of providing for them, when the thought of their dependent condition comes up before him, even on a farm in the backwoods. Does the letter show upon its face that the writer was thinking of the contingency of his death while in Texas? Does it plainly express the disposition he wished made of the land if the contingency happened? The answer to these inquiries is in the words of the letter: "If I should die or get killed in Texas, the place must belong to you, and I would not want you to sell it." In determining whether the letter was given to her for safe-keeping, it must be remembered that it shows she was charged with the duty of collecting what was due to him, and was presumably the custodian of any valuable papers left behind him. The law does not require men situated as Augustus Davis was to go through needless forms. He wrote her a letter expressive of his intention that she should have his land, and took pains in that connection, as if he thought it possible that she might assert her rights under the letter, to add that when she should come into the inheritance he would prefer that she should not sell the land. It would seem to be sticking in the bark to allow the devise to fail because he took it for granted that she would lodge in some safe place without a special request (212) to do so a letter which might become so valuable to her. If he had written this expression of his wishes as to a devise to her to a stranger, without requesting him to preserve the letter, a different question would have been presented. But the law is founded upon reason and common sense, and therefore warrants the inference of an intent to leave with a person for safe-keeping a paper in the preservation of which the person entrusted with its custody is above all others most interested. Why add to the statement that the place must belong to her, upon his dying in Texas, the injunction to keep the letter safely?

In *Cross v. Cross, supra,* the facts were that P., being in India, executed an instrument, attested by two witnesses, in the first part of which he constituted E. his attorney to collect notes, etc., but the latter part of the instrument is as follows: "And I do empower her, the said E., to hold and retain all proceeds of said property for her own use until I may return to England and claim possession in person, or, in the event of my death, I do hereby in my name assign and deliver to the said E. the sole claim to the beforementioned property, to be held by her during her life, and disposed of by her as she may deem proper at the time of her death. At the same time I wish it to be understood that I claim all right and title to

said property on my arrival in Great Britain, when the term of E.'s occupancy shall be considered at an end." True, that paper was attested by the requisite number of witnesses to make a good devise, but the language is reproduced to show that substantially the same idea as that expressed in the letter was upheld as a testamentary disposition of property. In both instruments there is a clear declaration of a desire and purpose that, in case the maker should not return to his old home by reason of dying at his later place of abode,
(213) his property should go to the person, in one instance, named in the power of attorney, and, in the other, in the letter addressed to her. Neither purports upon its face to be a devise, except in so far as the particular words used in it to convey a wish show it to be in law a devise or a disposition to take effect after death. Language about equivalent is used in letters in several of the other cases cited *supra,* and, though in some of them the suggestion that the letter be preserved is added, they nevertheless establish the principle that such language is evidence of the intent to make a disposition of propprty. If that purpose is unmistakably shown, it is clearly a reasonable inference that a letter transmitted by mail to one deeply interested in preserving it is sent by the writer for safe-keeping. He had better reason for believing that she would take care of it without such caution than that another who had no interest in the result would keep it safely with an express request to do so. The statute is but an affirmance of the elementary principle that it is reasonable to suppose that a testator will manifest the wish to have his will safely kept, when it does not upon its face purport to be a formal devise, but that purpose can be accomplished as readily by finding a custodian whose interest it is to preserve it as by confining it to the care of a disinterested keeper and relying on his observance of the most solemn injunction to keep it safely.

The case of *St. John's Lodge v. Callender,* 26. N. C., 335, is not analogous, because the writing propounded there was found, not amongst the papers of the maker, but amongst those of his partner, who meantime had died, and there was no testimony offered, except the incompetent declaration of the deceased partner, as to how he acquired the custody. *Non constat* that the paper had not been thrown
(214) into a waste basket by the maker, with intent to destroy it, and picked up by his associate in business. But here it is found as a fact that the writer sent it by mail to his sister, in whose custody it was found, as might have been expected.

The judgment is reversed. Let this opinion be certified, to the end

that judgment may be entered below on the special verdict in favor of the propounders.

Judgment Reversed.

FURCHES, J., dissenting: I cannot agree that this paper has been established, according to law, as the will of Augustus Davis. It does not seem to have been written as a will, nor, so far as I can see, intended as a will. It is not executed as a will, according to any of the requirements of the law. It has no attesting witnesses. It was not found among the valuable effects of the alleged testator after his death, nor was it deposited *as a will* with anyone for safe-keeping. *St. John's Lodge v. Callender,* 26 N. C., 335; *Simms v. Simms,* 27 N. C., 684.

In my opinion, it must be the intention of the testator to make a will that is to dispose of his property by what he does, before it can be his will. And this intention must be manifest from the paper itself, or it must be found by the jury; and the burden of showing this is on the propounders. 1 Redfield on Wills, star p. 174, and note. I do not believe a man can make his will "onbenowins" to himself, and I have no idea that it ever occurred to Augustus Davis that he was making his will when he wrote this letter.

Cited: Smith v. Loan Assn., 119 N. C., 262; *Keith v. Scales,* 124 N. C., 514; *Kerr v. Girdwood,* 138 N. C., 476, *Overruled; Spencer v. Spencer,* N. C., 163 N. C., 88.

(215)

WINNIFRED YOUNG v. J. R. ALFORD ET AL.

ACTION ON NOTE—STATUTE OF LIMITATIONS—PAYMENTS—PROOF OF PAYMENTS—APPLICATION OF PAYMENTS—ENDORSEMENTS—TRIAL.

1. In the trial of an action on notes where the plea of the statute of limitations has been made, it is not incumbent on the plaintiff to prove that payments alleged to have bene made thereon were made by the debtor with the intention of continuing the notes in force or reviving them, since the law presumes such intention from the fact of payment.

2. Where, in the trial of an action on notes to which the statute of limitations was pleaded, and in which the issue was whether there had been a payment continuing the note in force, it appeared that the plaintiff got a quart of brandy from the debtor, who told her to "let it go on the notes," and the plaintiff, valuing the brandy at 75 cents, applied it as a credit on three notes, 25 cents on each note: *Held,* that it was proper to refuse to instruct the jury that, unless they found that the debtor authorized plaintiff to estimate the value and to divide it into three parts for credit on the three notes, they should return a verdict for the defendant. In such case it was the *payment* and not the *amount* thereof that revived the debt, and being a

payment, and defendant not having directed how it should be applied, the plaintiff had the right to make the application and to divide it by crediting a part on each note.

3. The date when a payment is *made* and not when it is *entered* on the note, governs as to its effect under the statute of limitations.

4. An endorsement of a payment on a note is not in itself evidence of the payment, unless it is shown to have been made before the bar of the statute arose.

5. Where there is any evidence at all, however slight, of a material fact, it is the better and safer rule to submit the issue to a jury, and a verdict rendered thereon will not be disturbed.

(216) ACTION on notes and for the foreclosure of a mortgage securing the same, tried before *Coble, J.*, at Spring Term, 1895, of FRANKLIN.

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

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

C. M. Cooke and T. W. Bickett for plaintiff.
F. S. Spruill for defendants.

FURCHES, J. This is a civil action of debt, evidenced by three notes, secured by mortgage, and a foreclosure of the mortgage. The execution of the notes and mortgage and their non-payment are admitted. But defendant pleads and relies on the statute of limitations as a bar to plaintiff's action. The notes are under seal and were made in 1874, and this action was commenced in the spring of 1892. There had been several payments made and endorsed on these notes, but none of them had been made within ten years before the commencement of the action, except an endorsed payment on each one of them of 25 cents, bearing date 5 November, 1890. The defendant contends that his intestate made no such payment as the last mentioned, and this is the issue. If such payments were made, the plaintiff is entitled to judgment; and if not made, the defendant is entitled to judgment.

It was in evidence that the plaintiff and defendant's intestate were brother and sister, and that plaintiff is quite an old lady, and that these endorsements of 25 cents are in the handwriting of one J. H. Alford, a son of plaintiff, who was acting as her agent at the time they bear date. Upon this testimony the plaintiff offered these endorsements in evidence. Defendant objected, and his objection was sustained.

(217) The plaintiff then offered as a witness Mrs. S. B. Harris,

who testified as follows: "I knew Simon Alford; don't remember when he died; it has been about three years ago; he was her uncle; he was in the habit of visiting at their house; the last time he visited was the year he died; don't remember how long before he died; at the last time he had a conversation with witness' mother about losing his sheep and horses; talked about crediting some brandy; spoke of the notes; he said credit the brandy on his note; that would be the only way it would ever be paid. He brought it up, talking about paying them; said send down there and get brandy and credit on his notes; it would be the only way he could ever pay it."

Plaintiff then introduced J. H. Harris, who testified as follows: "I am a son-in-law of plaintiff; knew Simon Alford. Mrs. Young is at home; saw Alford at Mrs. Winnie Young's not long before he died. Simon had been over to the still. Witness stayed with Mrs. Young about three years after he was married. Simon Alford was there. Winnie said she wanted brandy, but she didn't have the money, and Simon said, 'Why don't you send down and get some brandy from him?' She said she didn't have the money, and he said he owed her more than he would ever pay her. 'You send down and get the brandy and let that go on'—he didn't say on what; he said he owed her more than he would ever pay her in his lifetime, but there would be enough left after he was dead to pay her. She said she would never trouble him as long as he lived. Went to Simon's for Winnie after Simon got sick; when she got ready to start she got a quart of brandy, took out some money and said she thought she would pay him for the brandy, and he said no, that he owed her more than he would ever pay her, and let that go on. She said she thought he (218) needed some money. Brandy was worth 75 cents per quart.

D. E. Harris testified that the plaintiff, Winnifred Young, had been feeble for a good many years.

The court then allowed these endorsements to be read to the jury, and the defendant excepted.

These notes being barred by the statute, they could only be revived by a written acknowledgement or a payment made on them by defendant's intestate. There is no claim that he revived them in writing. And the question is, did he do so by making a payment in 1890, as alleged by plaintiff? The jury have found that he did, and this ends the matter, unless there was error committed by the court on the trial. The defendant says there was, as is pointed out by his exceptions.

Defendant's first prayer for instructions asked the court to charge that where the statute of limitations is pleaded it devolves on the

plaintiff to show that his action was not barred. This prayer was given.

In defendant's second prayer for instruction he asked the court to charge "that unless the jury are satisfied that defendant's intestate intended that the alleged payments, if he made them, should renew his obligation upon the bonds, they will return a verdict for the defendant." This prayer was refused, and defendant excepted. In this there was no error. If the payment was made, and nothing else appearing, the law presumed the intention, and it was not necessary for the plaintiff to prove what the law presumed from the fact of payment. *Woodhouse v. Simmons,* 73 N. C., 30; *Williams v. Alexander,* 51 N. C., 137.

In defendant's third prayer he asked the court to instruct the jury as follows: "It is not the mere endorsement of a credit upon the notes by the holder which will have the effect of reviving the liability, but an actual payment made and received as such; and un-
(219) less the jury believe that Simon Alford did let plaintiff have the brandy, intending it as a payment on these notes, and that plaintiff received it, intending it as such payment, and that the brandy was an actual payment, they will return a verdict for the defendant." This instruction was given. But we bring it forward as a part of his Honor's charge.

Defendant's fourth prayer for instructions was as follows: "In order to make specific articles a payment, they must be received as payments by the holder of the note and intended as payments by the maker, or, by subsequent agreement between the parties, applied as such." This instruction was given. But we bring it forward for the same reason that we brought forward the third—as a part of his Honor's charge.

Defendant's fifth prayer was as follows: "A payment, if made at all, can only be made by the debtor; and in order to entitle the plaintiff to recover she must show to the satisfaction of the jury that defendant Simon Alford authorized her to estimate the value of the brandy herself, and to divide it into three parts, in order to credit the bonds with 25 cents each, with the view of bringing them back into date; that this act was the mutual act of the parties, and not the act solely of the plaintiff, and unless the jury do so find the facts they will return a verdict for defendant." This prayer was refused, and the defendant excepted.

The issue in this trial is as to whether the brandy was a payment, and not as to whether the plaintiff had priced it too high or too low. The only evidence as to its value was 75 cents; but if it was only

worth half that amount, and it was *made as a payment,* it was just the same, in effect, so far as reviving the debts, as if it had been worth twice as much. It was *the payment* and not the amount (220) that revived the debt; and if it was a payment, defendant not having made the application, the plaintiff had the right to make it. *Moss v. Adams,* 39 N. C., 42; *Sprinkle v. Martin,* 72 N. C., 92; *Moose v. Barnhardt,* 116 N. C., 785; *Long v. Miller,* 93 N. C., 233. And if the plaintiff had the right to make the application, she had the right to divide it and to credit a part on each note. *Sugg v. Watson,* 101 N. C., 188; *Wittkowsky v. Reid,* 84 N. C., 21.

Defendant's sixth prayer is as follows: "Unless there is evidence, outside of the credits themselves, that they were put on the bonds the day they purported to be put there, and unless there is evidence further sufficient to satisfy you as to the hand-writing of such endorsements, the defendants are entitled to your verdict, and you will answer the issue as to the statute of limitations 'Yes.'" The court refused this prayer for instructions, and committed no error in doing so. The effect of the prayer was to make the statute of limitations depend upon the date of the entry or endorsement on the notes, and not on the payments. The endorsements were not payments, and did not revive the notes. This was done by the payments. *Woodhouse v. Simmons* and *Williams v. Alexander, supra; Bank v. Harris,* 96 N. C., 118. The endorsements, of themselves, were not even evidence of payments, as was held by the court on the trial below, when his Honor refused to allow them to be read in evidence, upon proof of handwriting, when first offered; but when there was evidence tending to prove the payment, they then became competent evidence to show the application, and they were then allowed to be read in evidence.

It is true that a different rule prevails where an endorsed payment appears to be made before the statute bars, and when it was against the interest of the party making it. *Woodhouse v. Simmons, supra.* In this case, if it is shown that the endorsement was made at the time it bears date—that is, if it is shown to have been made before the statute had become a bar—the endorsement (221) then becomes evidence of the payment. *Woodhouse v. Simmons* and *Williams v. Alexander, supra.* But still it is not the endorsement which revives the note, but the payment (*Bank v. Harris, supra*), and the endorsement in such cases as this becomes *evidence* of the payment. *Williams v. Alexander, supra.*

The defendant's eighth and ninth prayers were given, with very slight modifications, and defendant was not prejudiced by these modi-

fications. Besides, the modifications were proper, and the law involved in them has not been discussed in what we have said above.

The defendant's tenth, eleventh, twelfth and thirteenth prayers were properly refused by the court. The tenth is as to whether the brandy was a payment, and as to its value. The eleventh is as to the plaintiff's right to "split" it up and apply it as a payment on the three notes, and the twelfth is also as to the right of plaintiff to make the application—all of which have been discussed and disposed of in what has already been said.

The thirteenth prayer presents the main point in the case, as to whether there was any evidence of payment or any such evidence as should have been submitted to the jury. If there was not, the defendant was entitled to this prayer. *Wittkowsky v. Wasson,* 71 N. C., 451; *State v. Vinson,* 63 N. C., 335. This rule is well established, but where the evidence is slight there is often difficulty in making the application; and in such cases it is the safe rule to submit the question to the good sense of the jury. *State v. Allen,* 48 N. C., 257. It is true the evidence of this payment was not very positive. But there was certainly some evidence; there was more than a scintilla—more than there was in *Wittkowsky v. Wasson,* or *S. v. Vinson, supra*—more than would authorize the court in saying there was no evidence
(222) and to take the issue from the jury; and had his Honor done so, he would have committed an error which would have entitled the plaintiff to a new trial. This being so, it cannot be error in the court to submit the issue of payment to the jury; and as the jury have found the payment, and as we find no error in the record, the judgment must be affirmed.

This opinion does not overrule the case of *Young v. Alford,* 113 N. C., 130. It was before this Court at that time on quite a different state of facts. It then presented two questions—one as to whether the endorsed payments after the claim is barred by the statute were evidence of actual payment—and the Court held they were not. This was held to be so on the trial below, and this question is not presented by this appeal, but in the discussion we have sustained that ruling. The other question was as to whether the indebtedness, which would be a counterclaim, would rebut the statutory bar or revive the indebtedness when barred. That question is not presented by this appeal; but if it were we would sustain that ruling. The judgment is

Affirmed.

Cited: Weeks v. R. R., 119 N. C., 742; *Spruill v. Ins. Co.,* 120 N. C., 149; *S. v. Gragg,* 122 N. C., 1091; *Gupton v. Hawkins,* 126 N. C., 83; *Bond v. Wilson,* 129 N. C., 388; *Lee v. Manley,* 154 N. C., 246.

C. J. CRUDUP ET AL. v. J. N. HOLDING ET AL.*

WILL, CONSTRUCTION OF—DEVISE TO WIFE—TRUST.

A testator devised as follows: "I give to my beloved wife * * * all my property of every description, to keep and hold together for her use and the use of my children, after my just debts are paid": *Held,* that the widow holds the estate during her life, as trustee for her own use and the use of the children, and has no power to sell or convey any estate.

ACTION heard at April Term, 1895, of FRANKLIN, before (223) *Coble, J.,* on exceptions to the report of T. W. Bickett, referee.

The purpose of the action was to obtain a construction of the will of Dr. E. A. Crudup and to set aside a deed that had been executed by C. J. Crudup, the widow, and some of the children of the testator, in the attempt to convey a fee simple, etc.

W. M. Person and Shepherd & Busbee for plaintiffs.
F. S. Spruill and S. F. Mordecai for defendants.

FAIRCLOTH, C. J. E. A. Crudup died 1 April, 1876, leaving him surviving his wife, Columbia J. Crudup, and eight (230) minor children, seized and possessed of real and personal property. His will was as follows:

"I, Edward A. Crudup, of the State of North Carolina, Franklin County, being of sound mind and disposing memory, make this, my last will and testament. Item is, I give to my beloved wife, Columbia Crudup, all my property of every description, to keep and hold together for her use and the use of my children, after my just debts are paid. This 31 March, 1876. "EDWARD A. CRUDUP.

"Witnesses: J. C. FOWLER, G. M. COOLEY."

The plaintiff C. J. Crudup was duly qualified executrix, and the other plaintiffs are the children of the said testator, some of whom are now of full age, and have made deeds of conveyance for their interest in said lands to the defendants, the said C. J. Crudup having joined with them in so doing.

The question presented is whether the wife and children, upon the death of the testator, took a fee simple estate as tenants in common, or whether the said C. J. Crudup, the widow, holds the estate as trustee for her own use and the use of the children, without power to sell or convey any estate.

The rule is well settled that such questions must be determined by the intention of the testator, and that is to be ascertained by looking at the whole instrument in the light of surrounding circumstances.

* CLARK and MONTGOMERY, JJ., did not sit on the hearing of this appeal.

Holt v. Holt, 114 N. C., 241. These circumstances appear from the foregoing statement; and, looking at the language in its natural bearing upon the situation, we think the testator intended that his wife should take and hold his entire estate, after the debts were paid, and keep it during her life, and also keep the children with her during their minority, and use it to the best advantage for the benefit
(231) of herself and his children, and this we declare to be the meaning. It appears to us to be as if he had said: "I desire that you, as long as you live, keep my minor children with you as the family; care and provide for them as well as you can; and to enable you to do so I leave all my property with you, to be used for your mutual comfort for that length of time. I adopt this plain and simple plan in order to avoid the necessity, expense and risk of the appointment of a guardian and administrations, if any of the children should die under age, and also to save the property from waste until the children shall have arrived at more mature age."

Taking this view, the trustee, having no power under the will to do so, could not sell or mortgage any part of the property, as that would at once defeat the intent of the testator. We refer in support of this view to *Young v. Young,* 68 N. C., 309, where A gave to his wife "all my estate—real, personal and mixed—to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them in that manner she may think best for their good and her own happiness." *Held* to be a gift to the wife in trust, not for herself nor for the children alone, but for both, to be managed at her discretion for the benefit of herself and children. *Held further,* that the trust is coupled with the power to dispose of the property at her own discretion as to time, quantity and person, and that no one of them is entitled as of right to have a share of the property allotted to him upon his arrival at age.

This is much like the present case, with some discretionary power in the trustee not found in the instrument before us. The defendants contend that upon the testator's death the wife and children were seized in fee as tenants in common and could dispose of their interest at will. We cannot assent to that view. That would have
(232) been so if Crudup had died intestate, with the slight difference as to the widow in taking one-ninth of the whole instead of a life estate in one-third as her dower, and there was no reason for making a will to dispose of property "according to law." We have examined the decisions of this Court cited by the defendant, and do not find any in conflict with our view of this case. With this question settled, it is not necessary to consider the other questions propounded between the defendant and those children who have undertaken to

assign their supposed interest. These will be in order after the death of the trustee, C. J. Crudup, as the parties may deem proper.

Judgment Reversed.

Cited: Crudup v. Thomas, 126 N. C., 334, 339; *Deans v. Gay,* 132 N. C., 229; *Watts v. Griffin,* 137 N. C., 577; *Jarrell v. Dyer,* 170 N. C., 178.

POCAHONTAS COAL COMPANY v. HENDERSON ELECTRIC LIGHT AND POWER COMPANY

MORTGAGE OF CORPORATION PROPERTY—PRIORITY OF DEBTS FOR LABOR AND MATERIALS.

1. Debts of a corporation for labor performed or materials furnished to keep it "a going concern," have a priority over a mortgage previously recorded, although the labor done or materials furnished do not add to the plant or enhance its value (Code, section 1255).

2. Coal furnished to and used by an electric light and power company to enable it to operate its plant is "material furnished," within the meaning of section 1255 of The Code.

AVERY, J., dissenting.

ACTION tried before *McIver, J.,* at October Term, 1895, of (233) VANCE, on an appeal from the judgment of a justice of the peace.

The purpose of the action was to collect $131.87, with interest from 1 December, 1894, of the defendant corporation, due for coal consumed in operating defendant's plant, and to establish the priority of said claim over certain pre-existing debts, secured by deeds of trust on the property of the defendant corporation, under section 1255 of The Code.

A jury trial was waived and the matter was submitted upon facts agreed, and his Honor gave judgment in favor the plaintiff for the amount claimed, but held that the same had no priority over the anterior secured claims, from which last ruling the plaintiff appealed.

W. B. Shaw for plaintiff.

A. C. Zollicoffer for defendant.

FURCHES, J. In 1892 the defendant, the Henderson Electric Light and Power Company, made a mortgage to Zollicoffer to secure a part of the purchase money of the concern. In 1893 it made another mortgage to Cooper to secure borrowed money. After the making of these mortgages the defendant company continued to operate the concern,

which is a corporation, by and with the knowledge and consent of the mortgagees. That one Bridgers was in the management and control of the corporation, with full power and authority to purchase material, hire hands and operate the concern, which he did; and during this time, and in December, 1894, the defendant, through its agent, Bridgers, purchased coal of the plaintiff, which was used and consumed by defendant company. It is for the debt created by the purchase of this coal that plaintiff brings this action. The
(234) liability of the defendant is not denied, but plaintiff claims that defendant's property is liable under execution for its debt, notwithstanding the mortgages. This the mortgagees deny (having made themselves parties), and this is the question presented for our determination.

Under the general law there can be no doubt that the position of the defendant mortgagees would be sustained. But the plaintiff puts its contention under section 1255 of The Code, and it depends upon the construction given to this section, whether the property so mortgaged is still liable for the plaintiff's debt.

This section differs entirely from section 1781, which creates or provides for creating a lien as a security for certain debts. It (section 1255) creates no lien, but undertakes to afford the creditor protection by disabling corporations from conveying their property by mortgage, freed from liability upon a judgment obtained against such corporations "for labor performed, for material furnished or *torts* committed by such corporations, their agents or employees." This statute must mean such labor performed, such material furnished and such *torts* committed after making the mortgage, as the act was passed in 1879. If it were for liabilities existing prior to making the mortgage, they would have been provided by section 685, which was enacted in 1798, and there would have been no need for the enactment of section 1255.

This construction seems to be so manifest from the provisions of sections 685, 1255 and 1781 that we would not feel called upon to discuss them further but for the construction put on section 1255 in the case of *Paper Co. v. Publishing Co.*, 115 N. C., 143, and what is said by the Court in the discussion of *Bank v. Mfg. Co.*, 96 N. C., 298. In these cases section 1255 was treated as a statutory lien, or at
(235) least it was discussed in connection with section 1781 and interpreted in the light of the construction put on that section by the Court. If both statutes provided a statutory lien for the creditor, and section 1781 had been construed, it is within the usual line of interpretation to reason by way of analogy from the construction given to section 1781 in construing section 1255; but if they are not

both statutory lien laws, then this mode of reasoning and construction is erroneous and misleading. It is admitted that section 1781 provides for a lien on the property, which, like a mortgage, follows it wherever it goes, if the act is complied with; and under this statute (1781), for "material furnished," it must be such material as enters into and becomes a part of the property and adds to its value. But no such lien is provided for in section 1255; and to show that none was intended, and in fact that none can exist, it is only necessary to reflect a moment and inquire what benefit there could be to the defendant's property by defendant's committing a *tort* on the plaintiff. And this is one of the claims that section 1255 provides for. As we have said, this section neither creates nor provides for the creation of a lien. It does not seem to provide against prior judgment liens, whether taken upon a prior or a subsequent debt; nor does it provide against an absolute *bona fide* sale, but only provides that the property mortgaged shall stand, so far as these debts and liabilities are concerned, just as if there had been no such mortgage made.

It is claimed that it would be a great hardship to hold that this property is liable to plaintiff's judgment, notwithstanding the defendant's mortgages were duly registered before the plaintiff's debt was made; but it does not appear so to us. This section was a part of the public laws of the State long before and at the date of these mortgages, and entered into and became a part of the contract (236) and conditions of the mortgages. *McClees v. Meekins*, 117 N. C., 34.

Section 1255 was enacted after sections 685 and 1781, and could not have been intended to give the same relief they gave; and it is equally certain it was passed for the benefit of the class of persons mentioned in the enactment, and it is the duty of the Court to take into consideration the object for which it was passed and to construe it in that light. Potter's Dwarris on Statutes, p. 128.

The only remaining question to be considered is as to the "material furnished." This term, too, should be interpreted in the same spirit as that laid down above—by considering the evil to be remedied and the relief to be afforded. Potter, *supra*, pp. 127, 132, 141; *Millard v. Lawrence*, 16 How. (U. S.), 251. The object seems to have been two-fold—one to enable such concerns to continue their operations, which they would probably not be able to do if it was known they had nothing out of which their employees and contractors could make their debts, but the other and probably the principal object moving to this enactment was to give protection to this class of laborers and contractors, who had contributed their labor and material to keep the concern going. There is no contention that the terms of the act do not include

the fireman who shoveled the coal into the furnace; and if it includes him, why should it not include the man who furnished the coal? One was as necessary to the operation of the concern as the other; and that was certainly one of the objects in view in passing the enactment. We must conclude that coal, which was necessary to run the concern, is embraced within the terms "material furnished." Potter, *supra,* p. 143; *Millard v. Lawrence, supra; Etheridge v. Palin,* 72 N. C., 213. Therefore, while we hold that plaintiff, under section 1255, had no
(237) lien on the plant of the defendant company for its debt, yet the mortgages mentioned are no bar to plaintiff's proceeding to enforce its judgment against the property by execution. There is error in that part of the judgment appealed from. The property mortgaged has been sold, but it is stated that the purchasers took with full notice of plaintiff's claim, and for convenience in the discussion we have used the term "mortgagees."

Error.

Cited: Langston v. Imp. Co., 120 N. C., 134; *James v. Lumber Co.,* 122 N. C., 160; *Dunavant v. R. R., ib.,* 1001; *Belvin v. Paper Co.,* 123 N. C., 147; *R. R. v. Burnett, ib.,* 213; *Williams v. R. R.,* 126 N. C., 920; *Fisher v. Bank,* 132 N. C., 778; *Cheeseborough v. Sanatorium,* 134 N. C., 247; *Clement v. King,* 152 N. C., 462, 465; *Riley v. Sears,* 156 N. C., 269; *Norfleet v. Cotton Factory,* 172 N. C., 834.

M. MILLHISER & CO. v. W. H. PLEASANTS ET AL.

WRITTEN CONTRACT—CONSTRUCTION OF—CHATTEL MORTGAGE—DEED OF TRUST.

1. Where there is no allegation of fraud or mistake in the execution of a writing, which embraces the whole contract between the parties, the nature and effect of the contract are matters of judicial construction upon an inspection of the whole instrument.

2. Whether an instrument conveying property for the payment of a debt is a mortgage or deed of trust depends, not upon what it is called, but upon the powers, rights and duties conferred upon the parties named in the deed, and especially upon the grantee.

3. Where one partner conveyed all his interest in partnership chattels to his individual creditor to secure his debt, the instrument providing that the goods so conveyed should remain in the place of business, subject to all the rights of the other partner, that the firm debts should first be discharged and that only the net interest of the grantor should be subjected to the grantee's debt: *Held,* that the instrument was a mortgage securing the individual debt of the maker to the grantee and not a deed of trust imposing on him the duty to take into his possession the entire interest of the grantor in order to protect other creditors of the firm.

ACTION by Millhiser & Co. against W. H. Pleasants to (238) have the latter declared a trustee for the benefit of creditors, and to recover from him, as such trustee, certain amounts claimed to be due plaintiffs, tried before *Hoke, J.*, and a jury, at Fall Term, 1895, of FRANKLIN.

The deed of assignment from Jacob Thomas to the defendant, under which plaintiff sought to have defendant declared a trustee, was as follows:

"This deed, made this 17 November, 1891, by Jacob Thomas to W. H. Pleasants, witnesseth: That whereas the said Jacob Thomas is justly indebted to W. H. Pleasants and R. G. Hart, trading as Pleasants & Hart, in the sum of $220, or thereabouts, due by account, and to W. H. Pleasants in the sum of $170, due by note; and whereas he is desirous of securing to said Pleasants & Hart and to said Pleasants the amount due each:

"Now, therefore, for and in consideration of the premises and for the purposes aforesaid, and for the further consideration of $10 by the said W. H. Pleasants to the said Jacob Thomas paid, receipt for which is acknowledged and surrendered, the said Jacob Thomas does hereby sell and convey to the said W. H. Pleasants and to his assigns the following described personal property, to-wit: all the leaf tobacco of said Jacob Thomas in the basement of the Riverside warehouse or in the warehouse of Pleasant & Hart or elsewhere; (239) all the interest of the said Jacob Thomas in and to the tobacco raised during the year 1891 on the land of W. H. Pleasants by Thomas & Pippin; the one-half interest of the said Jacob Thomas in and to the stock of goods, wares and merchandise, store furniture, and so forth, of Pippin & Thomas, now in the Carlisle store, on Main Street, next to Crenshaw, Hicks & Allen; to have and to hold the said tobacco herein conveyed, and the interest in goods, wares and merchandise, unto him, the said W. H. Pleasants, and to his personal representatives and assigns; but on this special trust, however—that is to say, the said W. H. Pleasants shall, immediately upon execution of this paper, take possession of the tobacco herein conveyed, and shall, at the best advantage and for the best prices obtainable, sell the same, the net amount of sales from which shall be applied to the satisfaction, in so far as it may extend, of the debt due Pleasants & Hart, and W. H. Pleasants, as aforesaid. The stock of goods herein conveyed, or the interest in the same herein conveyed, shall be and remain in the store or place of business of the firm, and the said W. H. Pleasants is simply put into possession of said stock of goods as a partner of said Pippin in lieu of the said Thomas, subject to all the rights of the said Pippin in the premises, and with the express declaration that the partnership

debts and liabilities are first to be discharged as by law required, and only the net interest of the said Jacob Thomas shall be and is hereby made subject to the debts herein attempted to be secured, and the said Pippin is hereby directed to pay over to the said W. H. Pleasants the net amount ascertained to be due the said Thomas. So much of the proceeds of the sale of the tobacco herein conveyed and of the
(240) interest of the said Thomas in the said partnership as may be necessary to pay the debts herein named shall be applied by the said W. H. Pleasants to that purpose, after he has first paid the cost of executing this trust, including cost of probating and recording this deed, and a reasonable fee to the attorney for drawing the same, and the balance, if any, shall be paid over to the said Jacob Thomas or his assigns.

"In testimony of which, the said Jacob Thomas has hereunto set his hand and seal, the day and date above written.

"JACOB THOMAS [Seal.]

"Witness: W. H. PLEASANTS, JR."

On the trial, his Honor having intimated his opinion that the deed imposed no duty on the trustee to look after the interest of partnership creditors, unless he voluntarily assumed to do so and took possession of the goods (in which case he would be held to strict account), and it being admitted that defendant did not take possession of the goods, etc., the plaintiff submitted to a nonsuit and appealed.

W. M. Person, Shepherd & Busbee and Thomas B. Wilder for plaintiffs.

F. S. Spruill, T. W. Bickett and R. O. Burton for defendants.

MONTGOMERY, J. The only question raised by the appeal is, was the failure of the defendant to take into his possession for the benefit of the plaintiffs the one-half interest of Thomas in the partnership goods of Pippin & Thomas, under the deed from Thomas to the defendant, a breach of duty which the defendant owed to the plaintiffs? And this question will find its solution in the proper legal
(241) construction of the deed itself. That instrument, which is the foundation of this action, embraced the whole contract between the defendant and his debtor, Thomas; and as there was no allegation in the complaint that there was either fraud or mistake in its execution, the court below held properly that the nature and effect of the contract was a matter of judicial construction, and intimated that the plaintiffs could not recover. Whether a paper-writing be a deed of trust or whether it be a mortgage depends, not upon what it may be styled, but upon the powers, the rights and the duties con-

ferred upon the parties named in the deed, and especially upon those conferred on the grantee, these powers and duties and rights being the subject of legal construction, upon an inspection of the whole instrument. In this case, if the deed be simply a mortgage made to secure the debts which the grantor owed the defendant, the plaintiffs cannot recover, and there was no error in the ruling made by his Honor. If, on the other hand, it appears that any duty was imposed on the defendant in the deed to act for or to protect any interests of the plaintiffs, the defendant having undertaken the execution of the deed as to those parts which were for his benefit, he will be held a trustee and accountable to the plaintiffs for any damages which they may have sustained by reason of his failure to fully execute the trust. A mortgage is a security for debt, with the right in the debtor to pay the debt and thus redeem his property. In a deed of trust for creditors there is a security for debt, and at the same time duties and powers are conferred upon the trustee for the benefit of all the creditors, which he can neglect to perform only at his peril. The plaintiffs contend that the instrument is a deed of trust, and that by its provisions the defendant was required to take into his possession the goods conveyed to him, and to hold and dispose of the same for their benefit; and that, having executed the trust upon other prop- (242) erty conveyed in the deed for his own benefit, he could not refuse to execute that part of the trust which was of benefit to them. The debtor, Thomas, if he had intended and desired to confer upon the defendant such power, would have had no right in law to do so. If, under the deed, the defendant had demanded of the other partner, Pippin, possession of the goods conveyed to him by Thomas for the purpose of controlling and disposing of them for the plaintiff's benefit, the partnership would have been dissolved and the surviving partner, Pippin, himself entitled to settle the partnership affairs, dispose of its assets and pay its debts. The rights of Pippin in all the partnership matters, both in its continuance and after its dissolution, accrued on the formation of the partnership with Thomas and no assignment by Thomas of his interest in the goods of the partnership could abridge or destroy those rights. Jones on Chattel Mortgages, sec. 45. But no such purpose or intimation on the part of Thomas appears in the deed, either in its language or by any proper construction that may be put upon it. Only the *net* interest of Thomas in the stock of goods, after the partnership debts had been discharged, as by law required, was conveyed to the defendant (for the benefit of the defendant's debts alone) and the net amount to be ascertained by the other partner, Pippin, and paid over to the defendant by Pippin, as the plain and clear words of the deed declare: "The stock of goods herein conveyed, or the in-

terest in the same herein conveyed, shall be and remain in the store or place of business of the firm, and the said W. H. Pleasants is simply put into possession of said stock of goods as a partner of said Pippin in lieu of the said Thomas, subject to all the rights of the said Pippin in the premises, and with the express declaration that the part-
(243) nership debts and liabilities are first to be discharged as by law required, and only the net interest of the said Jacob Thomas shall be and is hereby made subject to the debts herein attempted to be secured, and the said Pippin is hereby directed to pay over to the said W. H. Pleasants the net amount ascertained to be due the said Thomas."

In our opinion the deed is only a mortgage, and was executed to secure only the debts of the defendant; and, of course, he had the right to enforce his rights, in whole or in part, as he saw fit. If he by any means, with the consent of Pippin, had taken possession of the goods conveyed to him by Thomas, he would have been responsible to the plaintiffs for their value upon the principle decided in *Brassfield v. Powell,* 117 N. C., 140.

The recitals in the deed declare expressly that the purpose of the grantor was to secure his indebtedness to the defendant. The plaintiffs, including all other partnership creditors of Pippin & Thomas, have no cause of complaint against the defendant, for he did not have the right in law to take from the possession of Pippin the interest of Thomas in the partnership goods, under the deed, if he had been disposed so to do. There was no error in the ruling of his Honor, and the judgment is

Affirmed.

Cited: Daniel v. Crowell, 125 N. C., 522.

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(244)

HENRY KIRBY v. ALEXANDER BOYETTE ET AL.

STARE DECISIS—RULE OF PROPERTY—FEME COVERT—SEPARATE ESTATE OF MARRIED WOMAN—TRUST FOR MARRIED WOMAN—POWER OF DISPOSITION.

1. Where a rule of property established by this Court more than thirty years ago is sought to be changed, this Court will not disturb it, whatever might be the present view of the Court upon the subject, if it were presented as *res nova.*

2. Where a married woman acquires the title to land before or after marriage, without any qualification or restriction upon her right of alienation, she can dispose of it during her lifetime only in the way pointed out in the Constitution (Article X, section 6).

3. The Constitution imposes no limitation upon the right of a grantor or devisor to restrict or enlarge, by the terms of the instrument through which title passes, her *jus disponendi.*

4. The words "for the sole and separate use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created.

PETITION TO REHEAR case reported in 116 N. C., 165.

Shepherd & Busbee for petitioners.
H. G. Connor and Pou & Pou contra.

AVERY, J. An examination of the brief filed by counsel (254) for the appellant in *Hardy v. Holly,* 84 N. C., 661, will show that the argument in that case fully covered the ground upon which we are asked to review the decision of this Court (*Kirby v. Boyette,* 116 N. C., 165), and with it to overrule a line of cases extending over fifteen years past. The exhaustive brief of the learned counsel who appeared in that case, and the questions raised by the appeal, invited and demanded at that juncture a review of the previous cases in which the doctrine of the respective rights and powers of (255) married women and trustees, holding for their sole and separate use, in selling and disposing of the separate property. The learned Justice (*Ruffin*) who delivered the opinion started out in the discussion by stating the English doctrine, that a married woman was regarded as a *feme sole* as to any estate conveyed to her separate use, except in so far as she was restrained by the positive prohibition in the instrument creating the estate.

After a cursory review of the previous cases in our reports bearing upon the subject, the Court said, in *Hardy v. Holly, supra:* "When the question next arose, in *Knox v. Jordan,* 59 N. C., 175, the Court, as then constituted, without division and without any sort of reservation, repudiated the doctrine of the English courts and adopted that which prevails in most of the courts of the States; and whether this was wisely done or not, *that case has been too often approved,* and doubtless too often acted upon in matters intimately connected with the interest and comfort of families, to admit of its correctness being now called in question." The Court then proceeded to crystallize the law as they understood it to have been declared in *Knox v. Jordan.* It is insisted that this statement of the rule, established by previous decisions, was a *dictum* as well as a departure from the doctrine theretofore laid down by our own and other courts of this

country. It may aid us in disposing of this contention to reproduce the rule which it is insisted was a *dictum,* followed by the language used in *Knox v. Jordan,* cited as authority to sustain it. In *Hardy v. Holly* the court said: "We must take it to be the settled law of this State, at least, that a married woman, as to her separate property, is to be deemed a *feme sole* only to the extent of the power expressly given her in the deed of settlement. Her power of disposition is not
(256) absolute, but limited to the mode and manner pointed out in the instrument, and when that is silent she is powerless." The same principle was stated by *Manly, J.,* under the inspiration of a Court constituted differently, twenty-one years before, as follows: "We prefer adhering as closely as may be, consistently with decided cases, to the rule that a separate estate for the support of a married woman does not confer any faculties upon her, except those which are found in the deed of settlement, and that in all other respects she is a *feme covert* and subject to the usual disabilities." It is difficult to distinguish between a rule that a married woman, as to property limited to her sole and separate use, is a *feme sole,* except as to "faculties" or powers "found in the deed," and the proposition that her power of disposition is not absolute, but limited to the mode and manner pointed to (instead of the powers found) in the instrument creating the trust, and "when that is silent she is powerless." If the rules are plainly expressive of the very same principle as the Court, in *Hardy v. Holly,* held that they were, the lapse of fifteen years since its reiteration would enhance the probability that it had been too often acted upon to be disturbed, if the subject had never been since discussed. But in *Kemp v. Kemp,* 85 N. C., *Justice Ruffin,* again speaking for the Court, said: "A married woman is to be deemed a *feme sole* as to her separate estate, only to the extent of the power conferred upon her in the deed of settlement, and if no power of disposition be given in that instrument she is altogether without such power." In *Mayo v. Farrar,* 112 N. C., 66, the same rule was again substantially reiterated, and the Court cited 2 Pomeroy Eq. Jur., sec. 1105, where the author classifies this Court as one of those where the wife's power over the estate conveyed to a trustee for her separate use is made to de-
(257) pend solely upon the permissive provisions of the instrument creating such estate. 2 Pomeroy, *supra,* note 1, p. 1651. Again, in *Monroe v. Trenholm* (at the same term), 112 N. C., 634, the Court laid down the rule that where land was conveyed to a trustee for the sole and separate use of a married woman she had "no power of disposition except such as is clearly given in the instrument." With the explanation that the restriction would not continue as a rule when the married woman should become discovert, the opinion in the case

last mentioned was affirmed on the rehearing (114 N. C., 590). The doctrine of *Hardy v. Holly* was also approved in *Broughton v. Lane,* 113 N. C., 16. There was, therefore, a line of decisions sustaining the principle governing this case, which extended over thirty-five years, when it was first heard. If it were conceded that every opinion since *Knox v. Jordan, supra,* in so far as it incorporated this rule restricting the powers of married women, was a *dictum,* still that case would remain with its plain and forcible announcement of the solution of a vexed question which the Court had, upon careful consideration, promulgated as the law. Can this Court, consistently with its constitutional obligation to adhere to decisions which may have become a rule of property, alter or modify the principle upon which the people of the State have been invited to invest their money for so long a period? The proposition upon which the contention of the petitioner to rehear is based is unsound in law, and cannot be acted upon without grave danger to the rights acquired under a well-founded confidence in the stability of judicial decisions. The theory is that if a Court, in the elucidation of the questions involved in any given controversy, finds it necessary to crystallize the law upon the subject into a clean-cut rule, which will prove a guide to the profession, such rule (258) may be abrogated, after it has been acted on for over thirty years, because the case in hand might have been decided by stating the principle governing the particular case, instead of the broader one, founded upon the reason of the thing, but decisive also of other cases as well as that at bar. To lend our sanction to such a view of the law would be to imperil the security of many principles upon which titles have been acquired under the advice of the most competent counsel. A due regard for vested rights necessarily constrains a court to reject such a theory as little short of revolutionary.

It is true that the Court of Appeals of New York is among the appellate tribunals of this country which have adopted the English doctrine. Counsel called attention to the fact that the case of *Methodist Church v. Jacques,* 3 Johnson Ch., 78, in which *Chancellor Kent* held that a married woman must, as to separate property settled on her, be considered a *feme sole* only to the extent of the power expressly given her in the marriage settlement, was subsequently overruled by the higher Court. That fact was noticed in *Hardy v. Holly, supra,* and the Court expressed its approval of the doctrine, as announced by the learned chancellor, and its dissent from the views of the higher Court.

The suggestion that the constitutional provision (Art. X, sec. 6) was intended to abrogate the right to restrict the wife's power of alienation by deed of settlement is not a new question. The brief of appellant's counsel, in *Hardy v. Holly,* shows the contention of the defend-

ants there to have been that the Constitution of 1868, Art. X, sec. 6, substituted the husband in the place of the trustee in all marriage settlements so far as to establish it as the universal rule that the
(259) wife could, with his assent, make a good title to realty, regardless of the wishes of a trustee. The contention was that the Constitution restricted her right of disposition in no way beyond the requirement that the assent of the husband should be given, and that any attempt to impose further limitations by deed upon her power of alienation was an invasion of her constitutional rights. The court uttered no dictum in answering the contention, as it did, when it announced its holding to be not only that the constitution was not to be construed as a universal enabling act for the benefit of married women, but that in all cases where the legal estate was vested in a trustee to hold for the sole and separate use of a *feme covert* the intent of the grantor would prevail, and such deeds would be construed as indicative of an intention to protect her against the solicitations of a possibly imprudent husband by placing her under common-law disabilities, except in so far as the instrument emancipated her from them. *Knox v. Jordan, supra.* A principle which a court finds it necessary to announce in order to meet the contentions of an appellant and to constitute the basis of one of the stages by which it reaches the opposite conclusion is in no sense a *dictum.* The application of it to the case in hand does not destroy its weight as the bed rock upon which the adjudication rests. No matter what would be the view of this Court, were the matter now before it *res nova,* it cannot disturb a rule of property announced fifteen years ago and declared to be but an affirmance of the principle laid down over twenty years before. Wills Res Adjudicata, secs. 598-603.

Some time after the enactment of the statute of uses the courts of England held that it did not transfer the possession to the use, where the trustee was charged with a special duty, such as paying over the rents, which could not be performed if he were deprived of the legal estate. When the courts of England subsequently held that a
(260) married woman, to whose sole and separate use an estate had been limited, was to be deemed a *feme sole,* except in so far as her power to do so was restricted in the deed of settlement, it followed, of course, under such a theory, that in the absence of restrictions the legal estate was transferred by the operation of the statute. The English construction of such deeds was based upon the idea that if the grantor intended to restrict her powers he would give expression to his purpose in the deed. The American courts, which have followed the lead of the English tribunals, have proceeded upon the same rule for ascertaining the intent. But in *Knox v. Jordan,* 58 N. C., at

p. 176, the Court finally settled down upon and adopted exactly the opposite theory as the true exposition of the law. After *Harris v. Harris,* 42 N. C., 111, had been in effect overruled, the rule which was afterwards gathered from that opinion by the judge who wrote *Hardy v. Holly* was upheld, upon the ground that it was not willing "to depart further from the principles of the common law in relation to the disabilities of married women, and run into the labyrinth of difficulties which allows the doctrine whereby they are treated as *femes sole.*"

The difference in the two lines of authorities grows out of the fact that deeds of settlement are interpreted under different rules of construction. The theory upon which this Court has heretofore acted is that grants, like statutes, will be construed strictly in determining whether they abrogate a common-law rule. The idea present in the mind of this Court was that, while the right of the grantor to enlarge the powers of a *feme covert* was conceded, his intent to do so must be plainly expressed, in order to prove operative in relieving a woman from her common-law disability. *Chancellor Kent* said, in *Methodist Church v. Jacques, supra,* at p. 113: "Her (the wife's) incapacity is general, and the exception is to be taken strictly (261) and to be shown in every case, because it is against the general policy and immemorial doctrine of the law. These very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. It is a protection which this Court allows her to assume or her friends to give, and it ought not to be rendered illusory."

It is like putting new cloth upon old garments to attempt to fit the English doctrine, or any rule that grows out of it as a logical sequence, to the principle adopted here. If, as *Chancellor Kent* says, *supra,* "the very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation," it must follow that the duty of shielding her from such evils devolves upon him, *ipso facto,* by the limitation of an estate to him as trustee for the sole and separate use of a *feme covert.* If the special duty and authority of protecting her by the exercise of the veto power upon attempted sales by her with the joinder of the husband are imposed upon him by the grantor, then it follows that the statute of uses does not transmit the legal estate and thereby disable the trustee to give the contemplated protection, and if it does not pass out of him by force of the statute it can only pass by his joinder in a deed. It is not sufficient to cite authorities from the English and other courts where it is held that no special duty devolves upon the trustee outside of what is specifically mentioned in the deed of settlement, for under that theory, of course, the trustee is charged with no special

trust, and the legal estate passes to the *feme covert.* The rule that where, in a conveyance to uses, the grantee is charged with a special duty in reference to the property, a trust is created, is universal, whatever may be the differences in its application. But when
(262) we hold that a special trust is created by certain language, and the English courts or others in this country hold that it gives rise only to a naked trust, it must follow that under one theory the legal estate is put into the trustee for the protection of the *cestui que* trust, while under the English doctrine it is transmitted by the statute.

"The same considerations (says Dr. Minor, 2 Inst., 187, 213) which, before the statute, induced the courts of equity to decline to interfere with the possession of the person seized, namely, because such possession was requisite for the purposes of the transaction, led to the construction that *special trusts* were not executed by the statute, but remained, as before, equitable estates only."

Before the passage of 27 Hen. VIII. the *cestui que use* could as a general rule invoke the aid of the Ecclesiastical court to compel a recusant feoffee to uses to convey the legal estate to him or to any other person he might designate [2 Minor's Inst., 211 (185)]; but where the conveyance to the *cestui que trust* would disable the feoffee from performing or prevent the performance of a duty which it was intended by the feoffor, as evidenced by the very terms of the declaration made contemporaneously with the livery, should devolve upon the feoffee, the court of equity refused to aid in defeating instead of carrying out the intention of the feoffor. Washburn, in explaining the nature of indirect trusts arising from the failure of the statute to execute, says: "Thus, for illustration, a grant or devise to A in trust for B, or to permit B to take rents and profits, would be an executed trust in B, unless B *was a feme covert,* when, in order to carry out the grantor's or devisor's intent, it would be a trust or use not executed." 2 Wash. Real Prop., 488 (163). Acting upon the rule laid down in *Knox v. Jordan,* that a *feme covert* was emancipated from her
(263) common-law disabilities only to the extent that the deed of settlement expressly clothed her with greater power, and upon the doctrine of *Chancellor Kent,* approved in *Hardy v. Holly,* that the conveyance to the sole and separate use of a married woman, *ex vi termini,* implied a purpose on the part of the grantor to protect her against the solicitations of a thriftless husband, this Court could not have reached any other conclusion than that the transmission of the possession to the wife, where it vested in the trustee for a special purpose, would tend to defeat the express object of the grantor, and that it would be divested only by a conveyance in which he and the *cestui*

que trust should join. The statute of uses, substituted for 27 Hen. VIII. (The Code, sec. 1330), provides that the possession of the bargainee shall be transferred to the bargainee as perfectly as if the barginee "had been enfeoffed at common law with the livery of seizin of the land intended to be conveyed," etc. The case of *Wilder v. Ireland,* 53 N. C., 85, was one in which the distinction, which was familiar to those who enjoyed the privilege of his instruction, was sharply drawn by *Chief Justice Pearson* as to the operation of this statute in transferring the legal estate, where the conveyance was for the use of a *feme covert.* There the Court held that where a devise was to a trustee, "to the use and benefit of my daughter, E.," for life, the statute executed the use by transferring the legal estate to her for life. But in the discussion the learned Chief Justice, for the Court, said "Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operations, *i. e.,* (1) where a use is limited on a use, (2) where a trustee is not seized but only possessed of a chattel interest, and (3) where the purpose of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed for the sep-
arate use and maintenance of a married woman. This is fa- (264)
miliar learning. See Black. Com." If the statute executed
the use, though the husband and wife were deemed to be jointly seized, the rights of the wife were so merged by the coverture that the husband alone was at common law entitled to the rents and profits. 1 Wash, *supra,* star p. 276. The same author (star p. 278) adverts to the fact that in some of the States the English rules of chancery are adopted, while "in others the wife is not permitted to go beyond the power expressly given by the deed of settlement." In a note, South Carolina, Mississippi, Tennessee, Virginia and Rhode Island are enumerated along with Pennsylvania as among the States adhering to the American rule, though he failed to mention the fact which Pomeroy notices that North Carolina belongs to the same class.

Upon the direct authorities cited from our own reports, as well as upon the fundamental principles as interpreted by this Court, we conclude:

1. That where a woman acquires the title to land, before or after marriage, without any qualification of or restriction upon her right of alienation, she can dispose of it during her lifetime only in the way pointed out in the Constitution (Art. X, sec. 6).

2. That the Constitution imposes no limitation upon the right of a grantor or devisor to restrict or enlarge, by the terms of the instrument through which title passes, her *jus disponendi.*

3. That the words "for the sole and separate use," or equivalent language qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly
(265) provided in the instrument by which the estate is created. In the former opinion the case of *Norris v. Luther* was referred to, and some obvious distinctions between the facts there and in other authorities cited were mentioned. But there was a broad intimation that, in so far as the opinion in that case could be construed as antagonizing the doctrine of *Knox v. Jordan, Hardy v. Holly* and the later adjudications, it must be considered as modified. The petition is

Dismissed.

Cited: Narron v. R. R., 122 N. C., 859; *Perkins v. Brinkley*, 133 N. C., 160; *Cameron v. Hicks*, 141 N. C., 23; *Hill v. R. R.*, 143 N. C., 576; *Owens v. Wright*, 161 N. C., 135; *Threadgill v. Wadesboro*, 170 N. C., 644.

HARDY COLLINS v. YOUNG BROTHERS.

PRACTICE—REFERENCE—WAIVER OF JURY—FINDINGS OF REFEREE—APPEAL—ASSIGNMENT OF ERRORS.

1. Where an order of reference is made at plaintiff's request, or without objection by him, the right to a trial by jury is thereby waived and cannot be recalled, except by consent of all parties.

2. The findings of fact by a referee, when there is any evidence to support them, is conclusive.

3. Where no error is assigned on appeal the judgment below will be affirmed.

ACTION heard before *Timberlake, J.*, at Fall Term, 1895, of HARNETT.

There was judgment for the defendant, and plaintiff appealed.

(266) *L. B. Chapin and W. E. Murchison for plaintiff.*
F. B. Jones for defendant.

FAIRCLOTH, C. J. At the trial, but before the case was heard, the plaintiff demanded a jury trial, which was refused. In the case sent to this Court by his Honor it appears that when the order of reference was made the plaintiff interposed no objection, and also that the order was made at the plaintiff's request. This was a waiver of the right to a jury trial which could not be recalled except by consent. *Driller Co. v. Worth*, 117 N. C., 515, where the authorities are collected.

The findings of fact by the referee, when there is any evidence, are not reviewable in this Court. The exceptions made before the referee in this case are not reviewable here. The case states that the plaintiff excepted to the judgment, but no errors are assigned, so that in this respect there is nothing before us.

Affirmed.

Cited: Dunavant v. R. R., 122 N. C., 1001; *Belvin v. Paper Co.*, 123 N. C., 150; *Kerr v. Hicks*, 129 N. C., 144; *Foy v. Gray*, 148 N. C., 437; *Lumber Co. v. Lumber Co.*, 169 N. C., 91.

D. A. CAMERON v. CONSOLIDATED LUMBER COMPANY

LABORER'S LIEN—NOTICE.

Under section 1784 of The Code requiring the claim for a laborer's lien to be filed in detail, specifying the labor performed and the time thereof, plaintiff filed his claim as follows before a justice of the peace: "J. S. C., owner and possessor, to D. A. C., 22 October, 1894. To 122½ days of labor as sawyer at his sawmill, on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, $127.24. (Signed) D. A. C., claimant," which was sworn to: *Held*, the claim as filed was a reasonable and substantial compliance with the statute.

ACTION to enforce a laborer's lien in favor of plaintiff (267) against J. S. Cameron, heard on appeal from a justice's judgment, before *Timberlake, J.*, at November Term, 1895, of HARNETT.

The Consolidated Lumber Company interpleaded as owner of the property upon which the lien was filed. His Honor rendered the following judgment:

"This cause coming on to be heard at a Superior Court at Lillington, on 25 November, 1895, *Timberlake*, and it having been agreed that the judgment of the justice of the peace should be affirmed if the court should be of the opinion that the bill of particulars filed by plaintiff was in accordance with the provisions of the statute with regard to liens, and for the defendant if the court should be of the contrary opinion; and the court being of the opinion that the said bill of particulars conforms to the requirements of the statute, it is considered, ordered and adjudged that the plaintiff recover of defendant, J. S. Cameron, the Consolidated Lumber Company and the sureties on the defendant's undertaking on appeal, H. McD. Robinson and R. M. Nimocks, the sum of $95, with interest thereon from 22 October, 1894, until paid, and the cost, to be taxed by the clerk."

The defendant appealed from the judgment rendered.

O. J. Spears for plaintiff.

Robinson & Bidgood for defendant.

JOHNSON *v.* RICH.

FAIRCLOTH, C. J. This action was instituted to enforce a laborer's lien, under The Code, secs. 1781 and 1784, requiring the claim to be filed in detail, specifying the labor performed and the time thereof. The notice to J. S. Cameron, the owner, was that the plaintiff "has filed a lien for work and labor performed on all the lot of lumber now on the yard of your sawmill, on Jumping Run Creek, in said
(268) township and county, the plaintiff performing the work of sawyer in the manufacture of all of said lumber," and refers to the bill filed with the justice of the peace, Johnson. The claim filed was in these words: "J. S. Cameron, owner and possessor, to A. D. Cameron—1894, 22 October: To 122½ days of labor as sawyer at his sawmill, on Jumping Run Creek, in Harnett County, and at his old mill, from 1 October, 1893, to 31 August, 1894, $137.24. (Signed) D. A. Cameron, claimant."

The plaintiff had judgment, in which his Honor states that it had "been agreed that the judgment of the justice of the peace should be affirmed if the court should be of opinion that the bill of particulars filed by the plaintiff was in accordance with the provisions of the statute with regard to liens," but if otherwise, for the defendant. This is the sole question presented to this Court. We think the bill filed is a reasonable and substantial compliance with the statute. No one need misunderstand it who should become interested in the property. The subject is more fully treated in *Cook v. Cobb,* 101 N. C., 68.

Affirmed.

Cited: Fulp v. Power Co., 157 N. C., 160.

BARNEY JOHNSON v. Z. RICH, ADMINISTRATOR

WITNESS—TESTIMONY, COMPETENCY OF—TRANSACTIONS WITH DECEASED PERSON.

In an action against an administrator for fees incurred as witness for his intestate, the plaintiff is not precluded by section 590 of The Code from testifying that he attended court as a witness for the intestate, and as to the number of days he so attended (it appearing that his witness tickets, issued to him and filed with the clerk, had been lost by the burning of the courthouse) since they were facts of which others equally with the intestate had knowledge.

(269) ACTION heard at Spring Term, 1896, of HARNETT, before *McIver, J.*

There was a judgment for plaintiff, and defendant appealed.

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

H. E. Norris and O. J. Spears for plaintiff.

L. B. Chapin for defendant.

FURCHES, J. One Benjamin Johnson had an action of ejectment against defendant's intestate during his lifetime, and plaintiff alleges that he was summoned as a witness by the Sheriff of Harnett County for the defendant in that action, and attended court as such for a number of terms; that he filed his witness tickets in the clerk's office; that the courthouse has since been burned and his tickets destroyed by fire.

Plaintiff was allowed to testify, under the objection of defendant, that he attended court as a witness, and the number of days he so attended. Defendant's objection was overruled, and he excepted. This is the only point in the case.

The objection is put, under section 590 of The Code, as a transaction with the deceased. This section has given rise to a great many questions, it being an entire departure from the common-law rule. But this Court, soon after its enactment, in construing the proviso, which prohibited parties in interest from testifying as to "communications and transactions" with deceased persons, gave as a reason for this exception to the general rule that all persons might be witnesses in their own behalf, and placed it upon the ground that the only person who could contradict such testimony was dead. *Hallyburton v. Dobson*, 65 N. C., 88. But they did not extend the exception so far as to exclude an interested witness, because the deceased, if living, might contradict what he swore. To give it this broad construction would exclude every interested witness and destroy (270) the general rule, and in effect invalidate the statute. *Isenhour v. Isenhour*, 64 N. C., 640.

Applying the rules laid down in these cases, it would seem that this evidence was competent. It does not seem to be a transaction or communication between plaintiff and defendant's intestate; but it is certainly not such a transaction or communication as the intestate alone had knowledge of and could have contradicted.

It was held by this Court, in *Gray v. Cooper*, 65 N. C., 183, that while the plaintiff could not testify as to the contract of hiring his slaves to the defendant's intestate he might testify that defendant's intestate had them in his possession during the years 1862 and 1863, as this was a matter that might be contradicted by others.

In *March v. Verble*, 79 N. C., 19, it was held that while the plaintiff could not testify as to the contract with defendant's intestate he might testify that he had owned the "bull" and that it was the only one of the kind he had owned.

In *Cowan v. Layburn*, 116 N. C., 526, it was held that plaintiff was competent to prove that she carried provisions to defendant's intestate

while she was sick; that this was not a transaction between plaintiff and defendant's intestate that fell under the exception in section 590.

The only case cited and relied on by defendant's counsel was *Kirk v. Barnhard,* 74 N. C., 653. There is no discussion in that case of the point decided, and we cannot give it the construction contended for by defendant. To do so would be to put it out of harmony with too many decisions of this Court.

As we are instructed by the authorities cited, the judgment of the court below must be

Affirmed.

Cited: Cheatham v. Bobbitt, post, 347; *Moore v. Palmer,* 132 N. C., 976; *Davidson v. Barden,* 139 N. C., *in re Bowling,* 150 N. C., 510.

(271)

HANOVER NATIONAL BANK v. R. P. HOWELL ET AL.

FEME COVERT—CONTRACT—MARRIED WOMAN'S SEPARATE ESTATE—CONFLICT OF LAWS.

Where a married woman domiciled in this State makes a contract solvable in another State, her liability therein can be enforced in our courts only in the same cases in which it could be enforced if the contract was solvable in this State. (*Armstrong v. Best,* 112 N. C., 59, approved.)

ACTION tried at April Term, 1895, of WAYNE, before *Starbuck, J.,* and a jury.

It was admitted that the plaintiff was entitled to judgment against the defendant R. P. Howell. The following issue was submitted to the jury: "What is plaintiff entitled to recover of the defendant Ella D. Howell?"

It was in evidence that on 15 May, 1893, the plaintiff was a national bank, duly incorporated and engaged in the business of banking in the city of New York, State of New York. It was further in evidence that the defendant Ella D. Howell was, at the said time and is now, a married woman and wife of the defendant R. P. Howell, and that she, together with her said husband, then resided and has since continuously resided in Goldsboro, N. C. It was further in evidence that on said 15 May, 1893, the defendants R. P. Howell and Ella D. Howell, for a valuable consideration, executed and delivered to the plaintiff their note, in the following words and figures, to-wit:

"$1,500. 15 May, 1893.

"Four months after date, we promise to pay to the order
(272) of the Hanover National Bank of New York $1,500, at Hanover National Bank, New York.

"Value received.

"R. P. HOWELL,
"ELLA D. HOWELL."

That the defendant Ella D. Howell signed the same as the surety of the said R. P. Howell; that the said defendants signed the said note at their residence in Goldsboro, N. C., and it was sent to plaintiff, in the city of New York, to be discounted there, and that the same was discounted by the plaintiff at its place of business in New York, and the amount of the same, less the discount, applied to the credit of the defendant R. P. Howell. It was further in evidence that at the time of the execution of the said note the plaintiff knew that the defendant Ella D. Howell was a married woman, and that she executed the said note as surety, and that she resided in North Carolina.

It was admitted that the statute in force in the State of New York at the time of the signing of the said note by the defendant Ella D. Howell, being chapter 381, Laws 1884, reads as follows: (The statute is set out in the opinion of *Associate Justice Clark.*)

His Honor charged the jury that in no aspect of the evidence was the plaintiff entitled to recover against the defendant Ella D. Howell, and directed them to answer the issue submitted "Nothing."

Plaintiff excepted. Verdict in accordance with his Honor's instructions, and from the judgment thereon plaintiff appealed.

Aycock & Daniels for plaintiff.
W. C. Munroe for defendants.

CLARK, J. In *Pippen v. Wesson,* 74 N. C., 437, 445, it is (273) said: "The Legislature may abolish all the incapacities of married women and give them full power to contract as *femes sole.* The question is, Has it done so?" The court proceeded to answer the question by holding that the Legislature had not done so, and that in a case exactly like the present the *feme covert* had incurred no legal liability by her signature to a similar obligation, it not being for her benefit nor charged upon her separate estate. That case has been held ever since to be the settled law in North Carolina.

The plaintiff contends that this case does not come under the rule, because the note was payable in New York, and that by the laws of that State a married woman is liable upon an obligation like the present. The law in force there is as follows, being chapter 381, Acts 1884, of New York:

"Section 1. A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary.

"Sec. 2. Provided, that this act shall not apply to any contract that shall be made between husband and wife."

Whether the adoption of a similar statute here would not cure many abuses which now exist, and would not be more in accordance with the liberal intent of the constitutional provision as to married woman (Article X, section 6), is a matter addressed to the judgment of the Legislature. Our statute is still the same that was in force when *Pippen v. Wesson* was decided.

But it was earnestly and ably contended by the counsel for appellant that, though our policy in this regard is settled until our statute shall be changed, this contract being solvable in New
(274) York, the liabilities of the married woman, though resident here, must be enlarged to the extent of the New York statute. But her liability is sought to be enforced in our courts and against her property within the jurisdiction of this State, and under our present statute, by our precedents, judgment cannot be given against her, since a judgment would be a charge upon her real estate (if she has any), and she cannot charge it except upon privy examination. *Farthing v. Shields,* 106 N. C., 289; *Thompson v. Smith, ib.,* 357. Nor can the plaintiff recover against her, because the complaint neither alleges that she has separate property nor describes it, and it is admitted that the debt was not incurred for her benefit and is not charged on her estate. *Dougherty v. Sprinkle,* 88 N. C., 300; *Flaum v. Wallace,* 103 N. C., 296; *Baker v. Garris,* 108 N. C., 218; *Green v. Ballard,* 116 N. C., 144.

But it is unnecessary to discuss the subject further, since the point now in issue was fully considered in the very careful and well-considered opinion delivered by *Shepherd, C. J.,* in *Armstrong v. Best,* 112 N. C., 59, in which case the authorities were cited and reviewed, and it was held that where a married woman domiciled in this State makes a contract solvable in another State her liability thereon can be enforced in our courts only in the same cases in which it could be enforced if the contract was solvable in this State.

Affirmed.

Cited: Loan Association v. Blalock, 119 N. C., 326; *Barrett v. Barrett,* 120 N. C., 130; *McLeod v. Williams,* 122 N. C., 455; *Vann v. Edwards,* 128 N. C., 429; *Finger v. Hunter,* 130 N. C., 531; *Smith v. Ingram,* 132 N. C., 967; *Harvey v. Johnson,* 133 N. C., 360, 363; *Ball v. Paquin,* 140 N. C., 93; *S. v. Robinson,* 143 N. C., 630; *Bank v. Benbow,* 150 N. C., 787; *Council v. Pridgen,* 153 N. C., 447, 456; *Bushnell v. Bertolett, ib.,* 566.

(275)

W. M. SANDERS v. JOHN EARP.

TAX DEED—VALIDITY—NOTICE OF SALE TO TAXPAYER—DUTY OF SHERIFF.

1. Though by the Revenue Act of 1891 the sheriff is directed to give notice by mail to a taxpayer of the sale of his land for taxes, yet the failure to give such notice is declared by the same act to be an irregularity only, so far as the purchaser is concerned, and does not invalidate the deed for the land.

2. *Semble*, that the sheriff would be liable to the owner of the land, in damages, for his failure to give the notice required by the statute.

CONTROVERSY submitted without action, and heard by *McIver, J.*, at chambers, in Lillington, N. C., 19 February, 1896, at the request and by the consent of both parties to the controversy; and from the judgment therein rendered by the judge the plaintiff appealed to the Supreme Court.

The submission of the controversy and the judgment rendered are as follows, to-wit:

"W. M. Sanders and John E. Earp, being parties to a question in difference, which might be the subject of a civil action, present a submission of the same to the court for its decision as follows:

"On the first Monday of May, 1893, a tract of land, situate in the county of Johnston, the property of said John E. Earp, described as follows: that tract in O'Neal's Township whereon said Earp now lives, adjoining the lands of Turner Eason, W. T. Jones, W. S. Eason, J. W. B. Watson, T. T. Oliver and others, containing 159 acres, more or less, was sold by J. T. Ellington, the sheriff of said county, for taxes lawfully due thereon and unpaid for the year 1892; that a certificate was lawfully executed to the purchaser at said (276) sale, and said Earp failed to redeem the land during the time prescribed by law; that within the time prescribed by law said certificate was duly and properly transferred and assigned by the said purchaser at the sheriff's sale, in accordance with the statute, to said Sanders, and also within the time prescribed by law, and after the time for redemption of the said tract of land had expired the sheriff executed and delivered to said W. M. Sanders, upon surrender of the certificate, a good and sufficient deed, according to law, properly conveying the tract of land above described; that all the requirements of law relative to the sale of said tract of land for taxes and the execution of said deed were complied with, except that said Earp was not notified by the sheriff, through the mail, of said sale, but that notice of the sale was made according to law for four consecutive weeks in the Smithfield *Herald*, a newspaper published in said county and designated by the commissioners of Johnston County; that said Earp

is in possession of the land and refuses to surrender possession of the same, but that said Sanders does not seek to recover the annual rental value of the same. Wherefore said W. M. Sanders and J. E. Earp, desirous of saving the costs of a civil action, respectfully ask your Honor to decide who is the owner and entitled to the possession of the tract of land upon the facts above stated."

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

Shepherd & Busbee for plaintiff.
No counsel contra.

(277) MONTGOMERY, J. Before the Revenue Act of 1887 the laws put upon the purchasers of lands at tax sales, who claimed by deed from the sheriff, the burden of proving the regularity of most of the proceedings under which the sales were made, and especially that part of the proceedings which required the sheriff to give notice of the intended sale to the person who held the legal title to the land. The act above referred to reversed the whole spirit of our laws in respect to the sale of land for taxes, and made either a presumption of entire regularity in favor of the purchaser or declared errors and mistakes mere irregularities, from the levying of the taxes by the commissioners to the sale of the property, including the sheriff's deed, if the taxes were lawful and there was no fraud in the sale, or unless the taxes had been paid and erroneously entered by the sheriff on his books as a credit to another person for his taxes. However, in the act of 1887 there was a most important and salutary provision, which has been omitted in all the subsequent revenue acts. Section 69 of that act, in substance, provides that the purchaser of lands at tax sales, or his assignee, shall three months before the expiration of the time of redemption, serve a written or printed notice of his purchase on the person in the actual possession of the land, and also on the person in whose name the land was assessed; and in the notice he shall give the date of his purchase, the name of the person in whom the land was assessed, a description of the same, for what year the tax was assessed, and when the time of redemption will end. Section 70 of the act required that the purchaser, before he could demand a deed from the sheriff, should make affidavit that he had given the notice required by
(278) section 69. The affidavit was to be filed by the sheriff in the office of the register of deeds and was to be only *prima facie* evidence that such notice had been given; and false swearing in this respect was made perjury. In section 82 of the act this failure to give

notice is excepted from the list of irregularities in the proceedings, which are deemed mere irregularities under that act.

It is difficult to understand why such a just and wholesome provision of the act of 1887 has not since that time been brought forward as a part of the revenue law of the State.

The present case was submitted to the court below, under section 567 of The Code. It is agreed in the case that all of the proceedings are regular, except that the sheriff gave no notice of the sale by mail to the defendant. The only question in the case is, was the failure of the sheriff to give notice by mail to the taxpayer of the sale of land for taxes fatal to the deed from the sheriff to the plaintiff? The law is plainly written that such notice, while required in the statute, is declared in the same to be a mere irregularity, in so far as the purchaser is concerned. The plaintiff is entitled to the possession of the land. It appears that a tract of land of 159 acres had been sold for taxes, and that the purchaser had no notice of the sale, except that of a general advertisement in a newspaper, probably with many other sales in the same advertisement. If the constitutional limitation in respect to taxation is considered it will be seen that the taxes levied on this land could have been only a few dollars—the amount the purchaser probably was not anxious to see stated in the case submitted. It is a hard case, but probably the defendant is not without a remedy. Because the revenue law, while providing for the notice, declares that the notice is only directory, and the want of it a mere irregularity as to the purchaser, it does not follow that the sheriff or tax collector can neglect to perform his part of the requirements of the law with impunity. If he knew where the post office of the defendant was, or with reasonable diligence could have learned of it, and (279) did not give the notice, he can probably be made to respond in damages to the value of the land to the defendant for his failure to discharge his duty. The principle laid down in *State v. Hatch*, 116 N. C., 1003, is another of the healthy stimulants applied by the law to force neglectful public officers to the performance of their reasonable duties. There is error in the judgment of the court below, and the same is

Reversed.

Cited: Peebles v. Taylor, post, 167; *Fulcher v. Fulcher*, 122 N. C., 102; *Edwards v. Lyman, ib.*, 745; *Wilcox v. Leach*, 123 N. C., 76; *Collins v. Pettit*, 124 N. C., 729, 733; *Geer v. Brown*, 126 N. C., 241; *King v. Cooper*, 128 N. C., 348; *Stewart v. Pergusson*, 133 N. C., 285; *Turner v. McKee*, 137 N. C., 254; *Jones v. Schull*, 153 N. C., 521; *Williams v. Dunn*, 163 N. C., 212.

ALICE A. SHAFFER v. MOSES A. BLEDSOE AND DONNA M. BLEDSOE.

EXECUTION SALE—RETURN OF SHERIFF—ADVERTISEMENT AND NOTICE—ADVERSE POSSESSION—EVIDENCE.

1. The requirement of sections 456 and 457 of The Code that notice of the sale under execution must be published four weeks and a copy of the advertisement must be served on the judgment debtor ten days before the sale, is only directory, and if the return of the sheriff shows that he duly advertised the sale and gave the notice to the debtor, the purchaser will acquire title under the sheriff's deed.

2. An instruction that defendant in an action for the recovery of land must show adverse possession of the land for twenty years, and that such possession, if adverse, well known and uninterrupted for that length of time, would give defendant a good title, is correct.

3. An unregistered, undated and unwitnessed endorsement on a bond for title, purporting to assign the obligee's interest in the land referred to in the bond to another, is inadmissible in evidence without proof of its execution.

4. In the trial of an issue as to whether a *feme* defendant had maintained adverse possession of land alleged to have been conveyed to her by her husband (her codefendant and the defendant in the execution under which plaintiff claimed the land), evidence of the husband's solvency prior to and at the time of such alleged conveyance was inadmissible.

(280) ACTION for the recovery of land, tried before *Coble, J.*, and a jury, at October Term, 1895, of WAKE. A verdict for plaintiff, and from judgment thereon defendants appealed.

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

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

MONTGOMERY, J. This action was brought by the plaintiff against the defendant Moses A. Bledsoe and Donna M. Bledsoe, his wife, for the possession of certain lots of land situated in the city of Raleigh. The plaintiff claims title to the property under a deed executed to her by the Sheriff of Wake County, by virtue of a sale under two executions, one in favor of the Raleigh National Bank and the other in favor of C. H. Belvin, both against Moses A. Bledsoe, issued to him from the Superior Court of Wake County. The answer makes a general denial of the plaintiff's right to recover. The defendants asked the court to charge the jury that the return of the sheriff on the executions under which the land was sold failed to show that notice of sale was posted according to law, and also failed to show that a copy of the advertisement of sale was served on the defendants ten days before sale. This request was properly refused by his Honor. Upon the executions the

sheriff made his return of the levy and sale, which he stated that he had duly advertised the sale of the land and had also given notice to the debtor of the sale. If the return in any respect as (281) to advertisement and notice should be considered defective, the prayer for the instruction was properly refused. Sections 456 and 457 of The Code, which require such advertisement and notice by the sheriff, have been held to be only directory. *Burton v. Spiers,* 92 N. C., 503; *Dula v. Seagle,* 98 N. C., 458. The plaintiff, in support of her title, had introduced the executions against the defendant Moses A. Bledsoe from the Superior Court of Wake, and the returns thereon, showing the sale and the sheriff's deed for the land which is the subject of the litigation, and had also proved that the defendants were still in possession. That was sufficient to pass the title to the purchaser, she being a stranger to the judgment and execution. *Lee v. Bishop,* 89 N. C., 256; *McKee v. Lineberger,* 87 N. C., 181. The defendant also requested the court to charge the jury "that if Donna M. Bledsoe (wife of the other defendant) has had adverse possession, under metes and bounds, for twenty-one years, of the land described in the bond for title (one of the tracts in litigation), the plaintiff is not entitled to recover." His Honor did not give the instruction as prayed, but told the jury that, if they believed the testimony, the plaintiff had made, *prima facie,* a case sufficient to entitle her to recover all the land described in the complaint, "unless defendant has satisfied you that Donna M. Bledsoe has been in the adverse possession of the land or some part of it—the land described in the bond for title—for more than twenty years. Twenty years' adverse possession of any part of the land would entitle defendant Donna M. Bledsoe to have you answer the fourth issue ('Is Donna B. Bledsoe wrongfully withholding possession of the land described in the bond for title executed by M. M. Henry to M. A. Bledsoe?') 'No.' Her possession, if adverse, well known and uninterrupted for that length of time, would give her a good title to that part of the land."

The defendants have no cause to complain of the instruction (282) given by his Honor in the place of the one they offered. In substance, it clearly instructed the jury as the defendants had requested, though not in the language of their prayer. The addition made by his Honor was proper, and fitted the circumstances of the case.

On the trial the defendant Moses A. Bledsoe produced the original bond for title to one of the lots of land in controversy, executed by Margaret Henry to him (the plaintiff having already introduced a certified registered copy of the same), and offered to read, without proof of the execution, an unregistered and undated and unwitnessed

writing on the back of the bond, purporting to have been signed by himself, as evidence of his assignment and conveyance of his interest in the land described in the bond to his wife, the other defendant. The writing is in the following words: "For and in consideration of $500, the receipt whereof is hereby acknowledged, I hereby bargain, sell, assign and convey to Donna M. Bledsoe and her heirs all my right, title and interest in and to this bond and the land therein described." His Honor refused to allow the writing to be read, and the defendant excepted. The exception cannot be sustained. Proof of the same was necessary before it could be used for any purpose.

The defendant Moses A. Bledsoe offered to show that his wife took possession of the land under the unregistered and undated assignment of the title bond twenty-two years before the trial, and "that he had ample means, exclusive of the land described, in the title bond and in the complaint unencumbered, to much more than pay all his liabilities." The testimony was rejected, and the defendant excepted. It ought not to have been received, and his Honor ruled correctly in refusing it.

The only question before the court was as to the title to
(283) and right of possession of the land. The defendants set up as their title the uninterrupted and adverse possession of the same, under known and well-defined metes and boundaries, for more than twenty years, and the question of solvency or insolvency of the defendants, or either one of them, could in nowise throw light on that subject. Besides, the jury had already, under proper instructions, found that the defendant Donna M. Bledsoe had not been in the open, uninterrupted and adverse possession of the lot described in the title bond for more than twenty years. The prayer for this instruction was based upon an assumption of fact which the jury had found against the defendant Donna M. Bledsoe.

The other exceptions were based on the failure of the sheriff to allot to the defendant a homestead in the land in controversy, but were abandoned on the argument before this Court. The defendant Moses A. Bledsoe had had allotted to him a homestead in other of his lands.

There was no error in the rulings of the court below, and the judgment is

Affirmed.

B. F. MONTAGUE, ASSIGNEE OF J. B. BURWELL, v. RALEIGH SAVINGS BANK ET AL.

MORTGAGE—SALE—INJUNCTION—REMEDY AT LAW—HOMESTEAD.

1. Where, in a complaint seeking to enjoin a sale of several tracts of mortgaged land, there is no allegation that there is any dispute as to the amount of any of the debts, or that either of the mortgaged tracts is certainly of greater value than the mortgage upon it, or that the debtor has proceeded to have his homestead allotted, either under an execution against him or by petition, the sale under the mortgage will not be enjoined in order that a homestead may be allotted, since any surplus arising from the sale would still be realty, in which the mortgagor could still assert his right to a homestead exemption.

2. Where the assignee of a mortgagor seeks to enjoin the sale of the mortgaged premises by the mortgagee, and does not show that any irreparable damage will accrue to the debtor thereby, or that there is any reason why the mortgagee is not a proper person to sell, the court will not enjoin the sale and substitute a commissioner of the court in lieu of the one designated in the mortgage to exercise the power of sale.

3. The court will not order mortgaged land to be divided and sold in parcels, when such method is not stipulated for in the mortgage, unless some valid reason therefor is shown.

MOTION for an injunction to restrain the defendants, (284) mortgagees, from selling the lands mortgaged to them by J. B. Burwell (the assignor of plaintiff), heard before *McIver, J.*, at chambers, in Raleigh, during January Term, 1896, of WAKE.

The injunction was refused and plaintiff appealed.

The complaint of plaintiff, used as an affidavit, sets forth the execution to him by J. B. Burwell, on 11 November, 1895, of a deed of assignment conveying all his property for the benefit of creditors; that the personal property is sufficient to pay only a small part of the debts; that the lands mortgaged by Burwell to the defendants are very valuable, being situated near the city of Raleigh; that plaintiff is not accurately informed as to the exact amounts due on the notes secured by the mortgage, and that the assignor, Burwell, was indebted to a corporation which had filed a builder's lien upon the building erected on one of the mortgaged tracts. Various docketed judgments are also referred to as held by some of the defendants which constitute liens on the land subsequent to the mortgages. The complaint further alleges:

"10. That the property above described is very valuable and ought to sell for a large amount, and, in the opinion of plaintiffs, will do so, provided all the rights and equities between the parties can be properly adjusted and the homestead properly allotted and defined; but plaintiff is informed and believes that some (285)

of the defendants having liens upon the said property are about to attempt to advertise and sell said property or portions thereof, and if they were allowed so to do before an account is stated, and in the uncertainty that exists, the said property will not bring a fair price, and the unsecured creditors, as well as defendant J. B. Burwell, will be greatly injured thereby, the unsecured debts amounting in the aggregate to several thousand dollars; that plaintiff ought to be allowed a day to redeem after an account is stated between the parties and the amount due to each ascertained."

Wherefore the plaintiff prays judgment:

1. That an account be stated between the defendant J. B. Burwell and each of the other defendants, so that it may be ascertained what amount is due to each.

2. That the homestead may be properly allotted and defined, under the direction of the court, to the defendant J. B. Burwell.

3. That the plaintiff may be allowed a day to redeem the said property, and, in default, that the same may be sold under order of the court, and that the equities of the parties be adjusted, etc.

4. That the defendants be restrained from selling any of said property until the further order of the court.

5. For such other and further relief, etc.

The defendant J. B. Burwell admitted the allegation of the complaint, and prayed that a homestead might be allotted to him in the lands.

The answers of the defendants, mortgagees, averred that sales of the mortgaged land had been advertised by the persons authorized by the deeds to conduct the sales before the restraining order was issued or served on them; that there was no uncertainty as to the
(286) amount due on the notes secured by the mortgages, statements of which had been frequently rendered to the mortgagor; that there was great doubt whether the lands would sell for enough to pay the debts; that the builder's lien referred to in the complaint was not valid, not having been enforced within the time required by law, and that the corporation did not claim said lien to be in force; that as to the right of Burwell to a homestead in the lands, the mortgages did not reserve it, and he had ample time before the sale to have the homestead allotted by petition or under executions on the judgments docketed against him; that the mortgages did not provide for the sale of the lands (which were agricultural lands) in parcels.

His Honor refused the injunction and dissolved the restraining order, and plaintiff appealed.

Armistead Jones and T. P. Devereux for plaintiff.
Alex Stronach and F. H. Busbee for defendants.

CLARK, J. There seems no serious contention that there is any dispute as to the amount due upon each mortgage. The answers deny that there is any, and the complaint does not clearly and distinctly aver that there is. The case, therefore, does not fall within the principle laid down in *Purnell v. Vaughan,* 77 N. C., 268.

The allotment of a homestead, if made, would not interfere with the right of the mortgagees to sell under their mortgages, which contain no reservation of the homestead. There is no allegation that either of the mortgaged tracts is certainly of greater value than the mortgage upon it (*Hinson v. Adrain,* 92 N. C., 121) nor that the debtor has proceeded to have his homestead allotted, either under one of the executions referred to or by petition, under The Code, secs. 511, 515. Should the land sell for more than the mortgage (287) debt, the surplus money is still realty, in which the debtor can assert his homestead as against any execution. *Hinson v. Adrian, supra.* The debtor, having thus his remedy at law, cannot resort to an equitable one.

The plaintiff has not alleged nor shown that any irreparable damage will accrue to him if the injunction is not granted, nor any reason why the court should substitute a commissioner to sell the property in lieu of those designated by the agreement of the parties in the mortgages, nor any legal ground why the court should order the mortgaged property to be divided and sold in parcels, when it is not so stipulated in the mortgages. *Scott v. Ballard,* 117 N. C., 195. The defendants, however, voluntarily agree that the property may be sold in lots to suit purchasers. By consent of parties it might be sold in lots, and at the same time each tract, as a whole, the property to be disposed of as the result of the two sales, proves most advantageous. In refusing the injunction there was

No Error.

S. McD. TATE, STATE TREASURER, v. ISAAC BATES ET AL.

PLEADING—PARTIES—JOINDER OF CAUSES OF ACTION—BANKS—DIRECTORS, LIABILITY FOR NEGLIGENCE AND MISMANAGEMENT—DEPOSITORS IN BANKS—REMEDIES.

1. A cause of action by a depositor against bank directors for the loss of a deposit caused by their negligence and mismanagement lies *in tort* and not *ex contractu,* since the depositor's contract was with the corporation and not with the directors.

2. A cause of action against directors of a bank for the loss of a deposit resulting from their neglect and mismanagement, even if it be *ex contractu*, might be joined with the causes of action for fraud and deceit, since all the causes of action "arose out of the same subject-matter."

3. A single depositor may maintain an action in his own name against the directors of a bank for the loss of a deposit resulting from their fraud, neglect or mismanagement.

4. In an action against bank directors for the loss of a deposit caused by their fraud, neglect and mismanagement, in which the complaint charged that the defendants willfully and fraudulently made false and misleading statements of the condition of the bank, and declared and paid dividends when the earnings did not justify it, with the purpose to conceal the true condition of the bank and induce deposits, the complaint is not demurrable on the ground that it does not state in terms that the defendants knew or believed the bank to be insolvent.

5. The directors of a bank are conclusively presumed to know its condition; if they do not know it, it is their duty to know it, and it is fraudulent on their part to put forth official statements of the solvency of an insolvent bank when they do not know it to be solvent.

6. Bank directors who, by false and fraudulent statements to the State Treasurer as to the condition of the bank, in order to conceal its insolvency, induce him not only to make new deposits of the public funds, but also to permit a part of the funds deposited by his predecessor in office to remain, are liable to such State Treasurer for the loss of any part of the old or new deposits.

7. In an action against the directors of an insolvent bank for the loss of a deposit resulting from their fraud, neglect or mismanagement, neither the bank or its receiver is a necessary party, and hence it is not necessary for the complaint to allege that the bank or receiver had been requested and refused to bring the action.

8. The complaint in an action against directors of an insolvent bank for loss of deposits resulting from the fraud, negligence and mismanagement of a bank, alleged that the vice president permitted the president and cashier to borrow large sums "upon inadequate security," and fraudulently suppressed such loans in making up the official reports of the condition of the bank, and that the directors knew of such conduct: *Held*, that the complaint, by such allegation, did not state a cause of action in that it was not averred that the loans were lost or cannot be collected.

(289) ACTION heard before *Starbuck, J.*, on complaint and demurrer, at April Term, 1895, of WAKE.

The complaint was as follows:

The plaintiff above named, complaining of the defendants above named, says, for a first cause of action:

1. That the plaintiff, S. McD. Tate, was, on 20 November, 1892, and continually since has been, and still is, Treasurer of the State of North Carolina, and, as such treasurer, is, under the Constitution and

laws of said State, charged with the trust and duty of suing for and collecting all money due to the State; and the said Tate is successor in office of one Donald W. Bain, now deceased, who for many years prior to 10 November, 1892, was treasurer of the said State, charged with all the duties of said office.

2. That the Bank of New Hanover, hereinafter called 'the bank,' was, on 1 January, 1888, and for many years before that time had been, and thence continually up to 19 June, 1893, was a banking corporation, duly organized under its charter of corporation, as contained in Private Laws 1871-'72, ch. 31, and, as such banking corporation, was authorized to carry on in all its branches, and did at such times carry on, the business of banking in the city of Wilmington, N. C., and elsewhere, by branches, in said State; and that the (290) stockholders of said corporation were by its charter authorized to elect a board of directors, and that the directors so elected were authorized and required to choose a president and vice president to serve during the continuance in office of said directors.

3. That, as plaintiff is informed and believes, the defendants Isaac Bates, George W. Williams, John Wilder Atkinson, W. I. Gore, F. Rheinstein and H. Vollers were, on 1 January, 1889, and thence continually up to 19 June, 1893, directors of the Bank of New Hanover, duly elected from time to time by the stockholders, and charged by law with all the powers and authority necessary to govern the affairs of a corporation, and charged with the duty of carefully, honestly and faithfully administering its affairs, and of carrying out the by-laws of said bank, framed to insure an honest administration of its affairs, and with the further duty of protecting the depositors in said bank from any danger of loss, as is hereinafter more particularly set forth.

4. That, as plaintiff is informed and believes, the defendant Isaac Bates was, at the times above mentioned, president of the said bank, and George W. Williams, at said times, was vice president of the said bank, charged with the duty of carefully and faithfully supervising the affairs and protecting the interest of said bank and its stockholders and depositors, and of carefully investing and protecting the moneys in the custody of the said bank, and charged with the other duties as set forth in the by-laws of the said bank, as is hereinafter more particularly set forth.

5. That under the by-laws of the said bank, duly adopted by its stockholders and directors, amongst other duties, it became the duty of the directors actively to manage and superintend the business affairs of the said bank, and to meet each Tuesday and (291) examine the discount book of said bank, containing a statement of all loans made, with the names of the parties to whom made,

the amount of the loans, the securities given and the time when due; to appoint each three months a committee of two from the board of directors to examine the books of the said bank, its valuable effects and other matters; to count the money on hand, to compare with the books and to report to the board of directors.

6. That the defendants, in violation of their duty as directors, as plaintiff is informed and believes, failed and neglected to appoint such a committee each three months to examine into the condition of the said bank, and to require said committee to report to the said board; and failed and neglected to meet each Tuesday and to examine the discount book or to inquire into the solvency of the loans made by the said bank, as they were in duty bound to do.

7. That by reason of the failure of the defendants to perform such duty, loans of large sums of money were made from time to time by the said bank to insolvent persons upon inadequate security; the assets of the bank were wasted, and the said bank became insolvent about the year 1889, or earlier, and such insolvency continued to grow worse and worse from year to year, until the bank closed its doors, on 19 June, 1893.

8. That there was a meeting of the stockholders of the said bank required to be held and actually held every year, and that at each of said meetings, after the said bank became insolvent in 1889, or before,

(292) the defendants, as directors, willfully and fraudulently made statements of the condition of the said bank, showing that the bank was solvent, that its capital stock was unimpaired and that there was a surplus on hand; and each year an annual dividend was declared and paid, amounting to between $20,000 and $25,000; that such false and misleading statements, and the fact that the dividend had been declared, were published in the newspapers of Wilmington, with the knowledge and consent of the defendants, all of whom were at the time mentioned and still are citizens and residents of Wilmington.

9. That since the year 1889 the said defendants, as directors, willfully and fraudulently caused semi-annual statements to be published in the newspapers of Wilmington, sworn to by the president or cashier of the said bank and attested and verified by three of the said directors, showing in substance that the said bank was solvent, its capital stock unimpaired and that it had a surplus on hand, and that all the defendants acquiesced in or participated in making such statements.

10. That the said statements were made and published by the defendants, as plaintiff is informed and believes, for the purpose of establishing the credit of the said bank, and in order to conceal its

real insolvent condition, and to induce the public to deal therewith and to deposit money therein.

11. That at the times the dividends were declared and paid since the year 1889, and at the times said statements were published and made, as plaintiff is informed and believes, the said bank was utterly insolvent, and that the said statements were untrue, and that all the defendants knew the same to be untrue, or negligently failed to acquaint themselves with the facts and the true financial condition of the said bank, as by law they were required to do, and permitted such false statements to be made and published as a true statement of the exact financial condition of the said bank.

12. That, as plaintiff is informed and believes, the plain- (293) tiff's predecessor in office, D. W. Bain, knew that the said dividends were declared, and saw or was informed of said statements published in said newspapers, and the said D. W. Bain, as treasurer, believing the same to be true and relying thereon, and upon the statements made directly to him as treasurer, as herein set forth, from time to time deposited in the said bank to his credit as treasurer large sums of money; and the plaintiff, also knowing of the declaration of the said dividends, and seeing and hearing the said statements published as aforesaid, permitted a large part of the sums then deposited, and other sums deposited by sheriffs to the credit of the plaintiff from time to time, to remain in the said bank, except such parts as were drawn from the said bank from time to time; and on 19 June, 1893, there remained a balance due to the plaintiff, as treasurer in said bank of $15,000.

13. That on 19 June, 1893, the insolvency of the said bank became notorious, and on that day it closed its doors and ceased to do business; that it was shortly thereafter placed in the hands of a receiver, and is wholly insolvent, and that plaintiff has demanded payment of the said sum due by the said bank, of the receiver, which has been refused.

14. That by reason of the negligence and the fraudulent acts of the defendants, the plaintiff, as treasurer, has been damaged and suffered loss to the amount of $15,000, with interest from 19 June, 1893.

And for a second cause of action—

15. Repeat paragraphs 1 and 2 of the first cause of action.

16. That, as plaintiff is informed and believes, the defendants Isaac Bates, George W. Williams, John Wilder Atkinson, W. I. Gore, Clayton Giles, F. Rheinstein and H. Vollers were, (294) on 1 July, 1892, and thence continually up to 19 June, 1893, directors of the Bank of New Hanover, duly elected and qualified,

and charged by law with all the powers necessary to administer the affairs of said bank, and charged with the duty of honestly, carefully and faithfully administering its affairs and of obeying and carrying into effect the by-laws of said bank and the statute laws of North Carolina.

17. That, as plaintiff is informed and believes, the defendant Isaac Bates was, at the time above mentioned, president of the said bank, and George W. Williams at said time was vice president of the said bank, charged with the duty of carefully and faithfully supervising the affairs and protecting the interest of said bank and its stockholders and depositors, and of carefully investigating and protecting the moneys in the custody of the said bank, and charged with the other duties, as set forth in the by-laws of the said bank, as is hereinafter more particularly set forth.

18. That under the law of North Carolina it became the duty of the defendants to make a statement to the State Treasurer of the financial condition of the said bank on 30 September, 1892, within ten days from such 30 September, 1892, and to have such statement published in a newspaper printed in Wilmington, which statement was required to be verified by the oath of the president or cashier and attested by at least three directors of the said bank.

19. That on 10 October, 1892, the said bank, through its proper officers, the defendants, all of whom were members of the board of directors, made to the Treasurer of North Carolina a report of the condition of the said bank, as required by law, which report was filed in the office of said treasurer on 13 October, 1892, a
(295) copy of which is hereto appended; and a statement was also printed in a daily newspaper published in the town of Wilmington, N. C. The said report was made upon a blank furnished by the State Treasurer, and was verified by the oath of W. L. Smith, cashier, and attested by the defendants I. Bates, W. I. Gore and Clayton Giles. All of the other defendants acquiesced in said report, as plaintiff is informed and believes, and not one of the defendants protested or objected to any item in said report.

20. That, as plaintiff is informed and believes, the statements in said report were untrue and fraudulent; that the resources were unduly magnified; that there was stated to be a surplus fund of $109,167.11, while in truth there was no surplus; that the loans and discounts, not upon real estate, were stated to be $1,381,319.01, while in truth and fact this statement included several hundred thousands of dollars of loans and discounts which were utterly valueless; that the uncollectible or questionable debts were stated to be "$10," meaning $10,000, when in truth there were not less than $500,000 to $700,-

000 of questionable debts; that the individual liabilities of directors as payers was stated to be $20,000, when it was in fact several times that sum, and in many other respects this statement was untrue, fraudulent and misleading.

21. That all the defendants knew that this statement was not true, as plaintiff is informed and believes, or by the reasonable diligence required of them as officers of the bank would have known, and it was their duty to know that the said statement was utterly untrue and fraudulent.

22. That plaintiff's predecessor, relying upon the truth of said verified and attested statement, made from time to time deposits in said bank, and plaintiff also made deposits and allowed them to be made by sheriffs and others, and permitted a portion of (296) the deposits to remain, so that on 19 June, 1893, there was on deposit in said bank to the credit of the plaintiff, as treasurer, the sum of $15,000.

23. That on 19 June, 1893, the insolvency of the said bank became notorious, and on that day it closed its doors and ceased to do business; that it was shortly thereafter placed in the hands of a receiver and is wholly insolvent, and that plaintiff has demanded payment of the said sum due him by the said bank, of the receiver, which has been refused.

24. That by reason of the negligent and the fraudulent acts of the defendants the plaintiff, as treasurer, has been damaged and suffered loss to the amount of $15,000, with interest from 19 June, 1893.

And for a third cause of action—

25. Repeating paragraphs 1, 2, 16, 17 and 18.

26. That the defendant I. Bates was not only a director of said bank, but was at all the times above mentioned its chief executive officer, to-wit, its president, and as such president was charged with all the duties set forth in paragraph 17, and especially charged with the duty of protecting the stockholders of, the depositors in, and all the creditors of said bank from loss, or danger of loss, by a watchful care over the loans and investments made by said bank; to see that the same were made only to solvent persons, upon satisfactory security.

27. That the defendant George W. Williams was at all the times above mentioned the vice-president of said bank, charged with the duties set forth in paragraph 17 and paragraph 26, and charged, besides, with the duty of protecting the bank from any loss through any loan made to its president; that said George W. (297)

Williams was the custodian of the evidence of debt executed by or due to the bank from President Bates; that notwithstanding such duty, said George W. Williams, as vice president, permitted said Bates and also certain corporations controlled and practically owned by said Bates and W. L. Smith, the cashier of said bank (to borrow large sums of money from the said bank upon inadequate security, and that such loans were never reported to the Treasurer of North Carolina, as they were required to be, but remained concealed; that said George W. Williams, as plaintiff is informed and believes, knowing the condition of said bank to be insolvent, and that the reports made of its condition were untrue, fraudulent and misleading, did not himself sign such reports as vice president or director, but knowingly permitted the reports to be made by other officers of the bank and attested by directors, without protest or objection, whereby the plaintiff was deceived and defrauded, as hereinafter set forth.

28. That the defendants, other than said Bates and Williams, as directors, knew or ought by due diligence to have known of the neglect of duty of President Bates and Vice President Williams, as set forth above, and yet none of them objected or protested or took any steps to protect the creditors or credit of said bank; and plaintiff is advised and avers that thereby all became liable to him for any loss sustained by him on account of the default of the president and vice president, as well as of the directors.

29. That the plaintiff, relying upon the representations and statements made, as hereinbefore set forth, and upon the proper discharge of their duties by the president, vice president and directors of said bank, permitted, as stated in paragraph 22, $15,000 deposited
(298) to his credit to remain in said bank, which was lost by the failure of said bank, in June, 1893, as set forth in paragraph 23.

30. That plaintiff, through his attorney, requested the receiver of said bank to bring an action in behalf of the creditors against the directors, the defendants above named, but the receiver has failed to do so.

31. That by reason of the neglect and fraudulent acts of the defendants, as set forth above, the plaintiff has been endamaged $15,000.

Wherefore plaintiff demands judgment for $15,000 and interest from 19 June, 1893, and for such other and further relief, etc., and for costs.

The demurrer was as follows:

The defendants Isaac Bates, G. W. Williams, John Wilder Atkinson, W. I. Gore, H. Vollers and Clayton Giles demur to the complaint

herein, and for cause of demurrer assign that it appears upon the face of the complaint—

1. That there is a misjoinder of causes of action, in that a cause of action of tort, as for deceit by said defendants, is united with a cause of action for failure to do their duty and mismanagement as directors of the Bank of New Hanover.

2. That there is a misjoinder of the causes of action, in that the causes of action against the defendants, other than Clayton Giles, are united with causes of action against him, although the causes of action against him are distinct from the causes of action against them, it appearing by the complaint that the defendant Giles did not participate in any of the acts of omission or commission of the other defendants, which constitute the first cause of action against them.

3. That there is a misjoinder of causes of action, in that the alleged acts of omission and commission by the defend- (299) ant G. W. Williams, as vice president of the said bank, which constitute the third cause of action against him, are united with the first and second causes of action against the other defendants, although they are distinct and separate from the alleged acts of deceit and negligence of the other defendants, which constitute the first and second causes of action against the said other directors.

The said defendants demur to the first cause of action of the complaint, on the ground that it appears upon the fact of the complaint—

4. That there is a misjoinder of causes of action, in that a cause of action for tort, as for deceit by said defendants, is united with a cause of action for failure to do their duty and for mismanagement as directors of the Bank of New Hanover.

5. That there is a misjoinder of causes of action, in that the causes of action against the defendants, other than Clayton Giles, are united with causes of action against him, though the causes of action against him are distinct from the causes of action against them, it appearing by the complaint that the defendant Giles did not participate in any of the acts of omission or commission of the other defendants, which constitute the first cause of action against them.

6. That there is a misjoinder of causes of action, in that the alleged acts of omission and commission by the defendant G. W. Williams, as vice president of said bank, which constitute the third cause of action against him, are united with the first and second causes of action against the other defendants, although they are distinct and separate from the alleged acts of deceit and negligence of the other defendants, which constitute the first and second causes of action against the said other directors.

7. That there is a defect of parties in the omission of the
(300) Bank of New Hanover, the said bank being a necessary party to the action, in so far as it is based upon the alleged negligence or mismanagement of the said defendants as directors.

8. That there is a defect of parties in the omission of the receiver of said bank, he being a necessary party, in so far as it is based upon the alleged negligence or mismanagement of the said defendants as directors.

9. That the plaintiff has not legal capacity to sue, in so far as this action is based upon the alleged negligence, dereliction of duty or mismanagement of defendants or as directors; that the action cannot be maintained by the plaintiff exclusively in his own behalf, but must be commenced and conducted, if at all, in the name and for the benefit of all the creditors of the said bank.

10. That the complaint, in its first cause of action, does not state facts sufficient to constitute a cause of action, in that it does not allege that the bank or the receiver has been requested to institute this action, and that it or he has refused or failed to do so.

11. That the said complaint, in the first cause of action, does not state facts sufficient to constitute a cause of action, in that upon the facts stated no trust or contractual relation or privity is shown to exist between the plaintiffs and (these) defendants, and so far as the acts of negligence and mismanagement are alleged, these defendants are not answerable to this plaintiff.

12. That the said complaint, in its first cause of action, does not state facts sufficient to constitute a cause of action, in that, if the said cause of action be construed to be a declaration in tort as for deceit,
no actionable case is stated, because there is no allegation that
(301) defendants knew or believed the bank to be insolvent when the plaintiff deposited his funds therein or when the representations or statements were made.

13. That the said complaint, in its first cause of action, does not state the facts sufficient to constitute a cause of action, in that it does not allege that the statements herein set forth, as made by these defendants, were known by them to be false, or that they made the statement to the plaintiff, or that they made said statement with a fraudulent intent, or that the loss of the plaintiff was caused by the negligent acts, as distinguished from the omission of the defendants.

The said defendants demur to the second cause of action of said complaint, and for cause of demurrer assign:

14. That there is a misjoinder of causes of action, in that a cause of action of tort as for deceit by said defendant is united with a cause

of action for failure to do their duty, and for mismanagement as directors of the Bank of New Hanover.

15. That there is a misjoinder of causes of action, in that the causes of action against the defendants, other than Clayton Giles, are united with causes of action against him, although the causes of action against him are distinct from the causes of action against them, it appearing by the complaint that the defendant Giles did not participate in any of the acts of omission or commission of the other defendants, which constitute the second cause of action against them.

16. That there is a misjoinder of cause of action, in that the alleged acts of omission and commission by the defendant G. W. Williams, as vice president of said bank, which constitute the third cause of action against him, are united with the first and second causes of action against the other defendants, although they (302) are distinct and separate from the alleged acts of deceit and negligence of the other defendants, which constitute the first and second causes of action against the said other directors.

17. That the said complaint, in its second cause of action, does not state facts sufficient to constitute a cause of action, in that if the said cause of action be construed to be a declaration in tort as for deceit, no actionable cause is stated, because there is no allegation that defendants knew or believed the bank to be insolvent when the plaintiff deposited his funds therein or when the representations or statements were made.

18. That the said complaint, in its second cause of action, does not state facts sufficient to constitute a cause of action, in that it does not allege that the statements therein set forth, as made by these defendants, were known by them to be false, or that they made the statements to the plaintiff, or that they made said statements with a fraudulent intent, or that the loss of the plaintiff was caused by the negligent acts as distinguished from the omission of the defendants.

The said defendants demur to the third cause of action of said complaint, and for cause of demurrer assign:

19. That there is a misjoinder of causes of action, in that a cause of action of tort as for deceit by said defendants is united with a cause of action for failure to do their duty and for mismanagement as directors of the Bank of New Hanover.

20. That there is a misjoinder of the causes of action, in that the causes of action against the defendants, other than Clayton Giles, are united with causes of action against him, although the causes of action against him are distinct from the causes of action against them, it appearing by the complaint that the defendant Giles did not participate in any of the acts of omission or commission of the (303)

other defendants, which constitute the first cause of action against them.

21. That there is a misjoinder of causes of action, in that the alleged acts of omission and commission by the defendant G. W. Williams, as vice president of said bank, which constitute the third cause of action against him, are united with the first and second causes of action against the other defendants, although they are distinct and separate from the alleged acts of deceit and negligence of the other defendants, which constitute the first and second causes of action against the said other directors.

22. That there is a defect of parties in the omission of the Bank of New Hanover, the said bank being a necessary party to the action, in so far as it is based upon the alleged negligence or mismanagement of the said defendants as directors.

23. That there is a defect of parties in the omission of the receiver of said bank, he being a necessary party, in so far as it is based upon the alleged negligence or mismanagement of the said defendants as directors.

24. That the plaintiff has not legal capacity to sue, in so far as this action is based upon the alleged negligence, dereliction of duty or mismanagement as directors; that this action cannot be maintained by the plaintiff exclusively in his own behalf, but must be commenced and conducted, if at all, in the names of and for the benefit of all of the creditors of the said bank.

25. That the complaint, in the third cause of action, does not state facts sufficient to constitute a cause of action, in that it does not allege that the bank or the receiver has been requested to institute this action, or that it or he has refused or failed to do so.

(304) 26. That the said complaint, in the third cause of action, does not state facts sufficient to constitute a cause of action, in that upon the facts stated no trust or contractual relation or privity is shown to exist between the plaintiff and these defendants, and in so far as the acts of negligence and mismanagement are alleged these defendants are not answerable to this plaintiff.

27. That the said complaint in the third cause of action does not state facts sufficient to constitute a cause of action, in that, if the said cause of action be construed to be a declaration in tort as for deceit, no actionable case is stated, because there is no allegation that the defendants knew or believed the bank to be insolvent when the plaintiff deposited his funds therein or when the representations or statements were made.

28. That the said complaint, in the third cause of action, does not state facts sufficient to constitute a cause of action, in that it does not

alleged that the statements herein set forth as made by these defendants were known by them to be false, or that they made the statements to the plaintiff, or that they made said statements with a fraudulent intent, or that the loss of the plaintiff was caused by the negligent acts as distinguished from the omission of the defendants.

29. That the said complaint, in its third cause of action, does not state facts sufficient to constitute a cause of action, in that it does not allege that the plaintiff or his predecessor deposited any money in the Bank of New Hanover in consequence of the statements or representations or conduct of the defendants, but that the plaintiff permitted money which had been previously deposited to remain in said bank.

That the defendants John Wilder Atkinson, W. I. Gore, H. Vollers and Clayton Giles demur to the third cause of action in the complaint, and for cause of demurrer assign:

30. That if the said declarations can be treated as a declaration in tort, there is no allegation that they knew or be- (305) lieved the said bank to be insolvent when the said statements and representations were made or when the plaintiff deposited his money therein.

Upon motion of plaintiff, W. H. Worth, Treasurer of North Carolina, was made party plaintiff.

A *nol. pros.* was entered as to Clayton Giles, and Junius Davis, receiver of the Bank of New Hanover, and the Bank of New Hanover were ordered to be made parties defendant. Plaintiff, under leave, filed an amended complaint, as follows:

The plaintiffs above named, complaining of the defendants above named, by way of amended complaint and in addition to the complaint heretofore filed, say:

1. That since the last term of this court Samuel McD. Tate has ceased to be Treasurer of the State of North Carolina by reason of the expiration of the term of office, and W. H. Worth, as his successor, is the Treasurer of the State of North Carolina, and has succeeded to all the rights, powers and privileges of the said Samuel McD. Tate, former treasurer; that said W. H. Worth has been made, by order of the court, and is a party plaintiff in this action.

2. That Junius Davis, the receiver of the Bank of New Hanover, as set forth in the complaint, has failed and neglected to bring any action against the defendants above named, former directors of the Bank of New Hanover, for the causes set forth in the complaint; that the said Junius Davis, receiver, was, as plaintiff is informed and believes, expressly requested by the agent and attorney of large depositors in and creditors of the said bank to bring such action for the benefit of all the creditors, and the said Davis, receiver, de-

(306) clined and refused so to do, and that the said Davis, receiver as aforesaid, has been made, by order of this court, a party defendant in this action.

The defendant Junius Davis, answering so much of the complaint and amended complaint as touches him, said:

1. That he has had brought and is now prosecuting an action in the Superior Court of the county of New Hanover against the directors of the Bank of New Hanover to recover of them damages for their negligence and mismanagement of the affairs of said bank, and that said action was instituted by him for the general benefit of all the creditors of said bank, and was brought before the summons in this action was served upon him and before he was apprised that any action would be taken to make him a party thereto.

2. That no request was ever made of him by plaintiffs, or either of them, to bring a similar action to this or any action against said directors.

3. That he does not intend by this answer to controvert the right of the plaintiffs to sustain this action, but simply to answer the allegations of the complaint touching him and his actions.

On the hearing his Honor ordered and adjudged that the demurrer as to the first and second causes of action be overruled.

It was adjudged that the demurrer to the third cause of action be sustained, upon the ground that the complaint did not state a sufficient cause of action as to the third cause of action.

To this order both plaintiffs and defendants excepted and appealed.

F. H. Busbee and W. R. Allen for plaintiff.

J. W. Hinsdale for defendants.

(307) CLARK, J. The grounds of demurrer, which were not cured by the amendments allowed to the complaint, and which were overruled by his Honor, are, in substance:

1. "That a cause of action for the negligence and mismanagement of the defendants is *ex contractu* and cannot be joined in an action against them for fraud and deceit."

The same point was raised in *Solomon v. Bates, post,* 311, and *Caldwell v. Bates, post,* 323, and it was there held that the plaintiff's contract of deposit was with the corporation, not with the defendant directors, and hence the cause of action against the directors for the loss of the deposit caused by their neglect and mismanagement was necessarily in tort, not in contract; but if it had been in contract it could have been joined with the causes of action for fraud and deceit, because all the causes of action "arose out of the same subject-matter."

2. "That the plaintiff, a single depositor, cannot maintain the action in his own name, but must bring a creditor's bill."

The directors being trustees for creditors and stockholders, as well as for the corporation, any creditor or stockholder who has been misled to his hurt by their fraud and deceit or injured by their misconduct and gross neglect in discharge of the trust can maintain an action for such injury against them personally in his own behalf. If this were a proceeding to wind up the affairs of the corporation and apply its assets to the debts, then a creditor's bill would have been eminently proper, but such is not the object of this action. There is no fund to be taken in hand to be administered and disbursed.

3. "That the allegation of a cause of action for fraud and deceit is not sufficient unless it is specifically charged that the defendants knew or believed the bank to be insolvent."

The allegation of the complaint is that the defendants willfully and fraudulently made false and misleading statements of the condition of the bank, and declared and paid annual divi- (308) dends of over $20,000, when there were no net earnings out of which they could be declared, and that such statements of the condition of the bank and of the declaration of the dividends were published in the press, with the knowledge and consent of the directors, and that they also willfully and fraudulently caused to be published semi-annual statements, sworn to by the president or cashier and verified by three directors, showing in substance that the bank was solvent, its capital unimpaired and that it had a surplus on hand; that this was done to conceal the true condition of the bank, which was utterly insolvent, and to induce the public to make deposits therein, and that the plaintiff's predecessor in the office of State Treasurer was misled thereby and made this deposit, and that the plaintiff, succeeding to the office, also relying upon such official statements, allowed such part of the fund as was not drawn out for incidental purposes to remain, and permitted further sums to be deposited therein to his credit by sheriffs. This is a brief summary of the allegation, which is stated more fully in the complaint. It would seem that this was a quite explicit charge, that the defendants "knew or believed that the bank was insolvent." But if it were not, the directors are conclusively presumed to know the condition of the bank. *Hauser v. Tate,* 85 N. C., 81; Morse on Banks, sec. 137; *Finn v. Brown,* 142 U. S.; *United Society v. Underwood,* 9 Bush. (Ky.), 609, and other cases cited in *Solomon v. Bates, post,* 322. If the directors did not know the bank was insolvent it was their duty to have known it. It was fraudulent in them to put forth official statements that the bank was solvent, when they did not know it to be true, and they are liable to (309)

those who were deceived thereby into having dealings with the bank or making deposits therein for any losses sustained. If this were not so, the directors of a bank would be privileged to be negligent, and the more ignorant they could manage to be about its condition the more secure they would be from any liability.

4. "That the defendants were not liable for money which the plaintiff's predecessor deposited in bank and which the plaintiff permitted to remain.

The complaint avers that the plaintiff, misled by the false and fraudulent statements put forth by the directors as to the condition of the bank, in order to conceal its insolvent condition, and relying thereon and upon similar statements made to him, as treasurer, as required by law, not only made new deposits, but permitted a part of the deposit already in said bank to remain. If the defendants are liable as to one, they are as to the other. To hold otherwise would be to make a "distinction without a difference."

5. "That it is not alleged that the bank or the receiver had been requested to bring this action and had refused."

This was not requisite, nor was the bank or receiver necessary parties to this action against the directors (*Solomon v. Bates*), but if it were otherwise, all these objections were removed by the amendment making the bank and the receiver parties to this action. All the grounds of demurrer based upon Clayton Giles being a party are also removed from consideration by the *nol. pros.* which was entered as to him.

No Error.

PLAINTIFF'S APPEAL IN SAME CASE.

CLARK, J. That the vice president permitted the president and cashier to borrow large sums of money for themselves or for
(310) corporations practically owned by them, upon inadequate security, and fraudulently suppressed such loans in making up the official reports of the condition of the bank, and that the directors knew or by due diligence ought to have known of such conduct, is admitted to be true by the demurrer. A cause of action on this ground, if otherwise sufficiently stated, is not a misjoinder, for it is simply an allegation of one of the many acts of negligence, recklessness and failure of duty which go to make up the liability of the defendants, as set forth in the first and second causes of action; nor was there a failure to state a cause of action for any of the reasons set out in the demurrer, *i. e.*, that the bank or receiver had not been requested to bring the action (which in point of fact is alleged), nor because there was no privity between the plaintiff and defendants, nor because the

deceit was not sufficiently charged, nor because the plaintiff is not averred to have made any new deposit, but had merely permitted the deposit already in the bank to remain there after his succession to office. All these grounds are disposed of by the opinion in the defendant's appeal in this case. It seems to us, however, that there was a failure to state a cause of action in the third cause of action, in that, though it is averred in the complaint that the loans recited in that cause of action were made "upon inadequate security," and were suppressed and not included in the official reports, it is not averred that they were lost or cannot now be collected, or that their loss caused the insolvency of the bank or in anywise affected the plaintiff injuriously. His Honor therefore correctly held that a cause of action was not stated in this third cause of action, for a defect of that kind can be taken *ex mero motu* by the court below, or here, though not specifically assigned by demurrer.

No Error.

Cited: Solomon v. Bates, post, 322; *Caldwell v. Bates, post,* 323, 324; *Coble v. Beall,* 130 N. C., 537; *Howell v. Fuller,* 157 N. C., 318.

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(311)

S. & B. SOLOMON v. ISAAC BATES ET AL.

ACTION AGAINST BANK DIRECTORS—JOINDER OF DIFFERENT CAUSES OF ACTION—LIABILITY OF DIRECTORS FOR DEPOSITS—CONDITION PRECEDENT—RIGHT OF DEPOSITORS TO MAINTAIN ACTION—PLEADING—LIABILITY OF BANK PRESIDENT.

1. It is not a misjoinder of causes of action to join in the same action brought against bank directors individually a cause of action for gross negligence in the discharge of their duties, whereby the plaintiff was injured, with causes of action for the fraud and deceit of the directors in making false statements and misrepresentations of the condition of the bank, whereby the plaintiff was induced to deposit his money in the care of the bank.

2. Bank directors are jointly and severally liable for their torts, and the corporation itself can be joined, or not, at the election of the plaintiff.

3. Where it is admitted by demurrer, or otherwise, that a corporation is insolvent, it is not necessary to exhaust remedies against it before suing the directors for wrongs caused by their negligence, fraud or deceit.

4. An action can be brought by a depositor or other creditor, and even by a stockholder, against the president and directors of a corporation for losses resulting from their fraud, negligence or mismanagement, without having first applied to the corporation or its receiver to bring such action and being refused.

5. In an action by a depositor against the president and directors of an insolvent bank to recover losses resulting from their fraud, negligence or mis-

management, it is not necessary to allege that "when the plaintiff deposited his money the directors knew or believed he would not get it back, or intended by deceit to get it from him or cause him to lose it," but it is sufficient to allege that, the bank being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends with a view to conceal its insolvent condition and procure deposits, and that the plaintiff was deceived thereby into making the deposit which he is seeking to recover.

6. Bank directors are liable for gross neglect of their duties, and mismanagement (though not for errors of judgment made in good faith), as well as for fraud and deceit.

7. If false and fraudulent statements of the condition of a corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by one dealing with the corporation, relying on the truth of such official reports.

8. The same liability attaches to the president and other managers as to the directors in like cases.

(312) ACTION heard before *Hoke, J.*, at April Term, 1895, of NEW HANOVER, on complaint and demurrer.

The demurrer was overruled, and defendants appealed.

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

Allen & Dortch and A. D. Ward for plaintiff.

Ricaud & Weill, H. G. Connor and D. L. Russell for defendants.

CLARK, J. This is an action brought by a depositor in a bank, which has become insolvent, against the directors thereof, personally. The first cause of action sets out that the defendants were directors; that under the by-laws adopted by the stockholders and directors it became the duty of the defendants actively to manage and superintend the business of the bank; to examine each Tuesday the discount book, containing a statement of all loans made, to whom made, the securities therefor, and when due; to appoint each three months a committee of two from the board of directors to examine the books of the bank, its valuable effects and other matters; to count the money on hand and compare with the books, and report to the board of directors; that the defendants failed to perform these duties imposed by the by-laws, and by reason of such failure large loans were (313) made by the bank to insolvent persons upon inadequate security, and the bank became insolvent about the year 1889; that after the bank became insolvent the defendants made annual statements to the stockholders, showing the bank to be solvent, its

capital stock unimpaired and a surplus on hand, and declared and paid out annual dividends of between $20,000 and $25,000; that after the bank became insolvent the defendants willfully and fraudulently caused semi-annual statements to be published in the newspapers, sworn to by the president or cashier and attested and verified by three directors, showing the bank to be solvent, its capital stock unimpaired, and that it had a surplus on hand; that such statements were made for the purpose of establishing the credit of the bank, to conceal its real insolvent condition and to induce the public to deal therewith and to deposit money therein; that the plaintiff knew of such statements, and, believing the same to be true and relying thereon, made deposits with the bank in December, 1892, and in 1893, and allowed the deposits to remain therein, and the same were lost.

The second cause of action is the same as the first, except it alleges in direct terms that the defendants knew that the statements made and published by them were false.

The third cause of action alleges the duties imposed upon the defendants, as set out in the first cause of action, and their failure to perform them; that the bank became insolvent and that the defendants had knowledge of this insolvency and, with such knowledge, negligently and fraudulently permitted the bank to continue in business, and received the deposits of the plaintiffs, who were ignorant of the insolvency of the bank.

The fourth cause of action (by mistake numbered fifth) alleges the duties set out in the first cause of action, and, in (314) addition, that from the year 1889 to 19 June, 1893, the defendants, as directors, negligently and fraudulently caused and permitted standing advertisements to be published, falsely setting forth the solvency of said bank, with the purpose of inducing the plaintiff and the public generally to deposit and keep money in said bank; that at the time said statements were so made said bank was insolvent, and the defendants knew or ought to have known of such insolvency; and that the plaintiff, relying upon such statements and believing the bank to be solvent, made the deposits, etc.

The fifth cause of action (by mistake numbered sixth) is identical with the first cause of action, except the allegations as to the cause of the insolvency of the bank. In the first cause of action it is alleged that many loans were made to insolvent persons upon inadequate security and in this cause of action that loans were made to insolvent persons, or if made to solvent persons the defendants negligently failed to collect or to cause them to be renewed, and they became worthless.

The sixth cause of action (by mistake numbered seventh) is iden-

tical with the first cause of action, except in the fifth paragraph. In this cause of action, in addition to the allegations of the fifth paragraph of the first cause of action, it is alleged that many of the insolvent persons to whom loans were made upon inadequate security were relatives and favorites of the defendants and other officers of the bank, and some of them officers of the bank.

To this the defendants demurred, on three grounds:

1. "That there is a misjoinder of causes of action, in that several causes of action in tort as for deceit by said defendants are united with a cause of action in contract against said defend-
(315) ants for failure to do their duty and mismanagement as directors of the Bank of New Hanover.

2. "That there is a misjoinder of parties defendant, in that the said defendants are severally charged with an intent and purpose to defraud the public and the plaintiff by holding out the Bank of New Hanover as a solvent institution, without alleging any conspiracy or common purpose among the defendants so to do.

3. "That the complaint does not state facts sufficient to constitute a cause of action, in this, that it appears by the complaint that plaintiffs deposited their money with the Bank of New Hanover; that the bank afterwards suspended and was insolvent and failed to pay the plaintiffs on demand, and that plaintiffs claim the whole amount of their debt as damages against these defendants on the alleged fraud, but the complaint does not allege that bank has no assets or that they cannot recover any part of the debt from the bank."

As to the first ground of demurrer: While breach of a duty imposed by statute or by express contract is *ex contractu,* the breach of a duty imposed by law arising upon a given state of facts is a tort. *Hodges v. R. R.,* 105 N. C., 170. An action for damages for breach of duty in the latter case is an action for tort. *Bond v. Hilton,* 44 N. C., 308; *Williamson v. Dickens,* 27 N. C., 259. And even if there had been a special contract or a statutory provision, the plaintiff might sue for the negligence in tort. *Robinson v. Threadgill,* 35 N. C., 39; *Purcell v. R. R.,* 108 N. C., 414. Here the failure to discharge the duties required by the by-laws was a wrong, caused by defendant's negligence —a tort—and is properly united in the same action with a tort by the fraud and deceit charged in the same complaint. Indeed, there
(316) was no contract between the directors, individually, and the plaintiff, and his remedy is for the tort—the wrong they have caused him by their misconduct. *Guion v. Richardson,* 79 Am. Dec., 255; 30 Conn., 360. But, had the failure to comply with the duties required by the by-laws been a cause of action *ex contractu,* there would still have been no misjoinder, for all the causes of action "arose

out of the same transaction, or transactions connected with the same subject of action." The Code, sec. 267 (1); *Hodges v. R. R., supra; Bank v. Harris,* 84 N. C., 206; *Adams v. Quinn,* 74 N. C., 359; *Hamlin v. Tucker,* 72 N. C., 502; *Heggie v. Hill,* 95 N. C., 303; *Benton v. Collins, ante,* 196. There is the same "subject of action" throughout, *i. e.,* the plaintiff's loss of his deposit. If this ground of demurrer had been well founded, the remedy would have been, not to dismiss, but simply to divide the action (The Code, sec. 272; *Hodges v. R. R., supra; Street v. Tuck,* 84 N. C., 605; *Finch v. Baskerville,* 85 N. C., 205), which would have caused a multiplicity of actions, with increased costs to the parties and the public as well, without any benefit, apparently, to the defendants.

As to the second ground of demurrer: The complaint does not allege several acts committed by different defendants, but that the defendants, acting together, committed the acts complained of. This would make them jointly and severally liable, and the averment of a common design or conspiracy is unnecessary. *Long v. Swindell,* 77 N. C., 176; *Mode v. Penland,* 93 N. C., 292.

As to the third ground of demurrer: The complaint alleges a demand for payment from the bank, and that the bank is "wholly insolvent." As the demurrer admits this allegation, there can be no reason why the plaintiff should not prosecute, without further delay, whatever remedy he may have against the directors, whose negligence, fraud and deceit he alleges to have been the cause (317) of his loss. Besides, if the plaintiff was induced, by the fraud perpetrated by the defendants in making and publishing the alleged fraudulent statement, to part with his money, he can sue the agents (the directors) as well as the principal (the corporation), and can proceed against them jointly or severally. 3 Thompson Corp., secs. 4096, 4138, 4145. It is further insisted, *ore tenus,* that the action cannot be maintained because a cause of action is not stated:

1. "Because the action cannot be brought by a depositor or creditor, but must be brought by the corporation or the receiver, or at least that it must appear that application has been made to them to bring such action and that there had been a failure or refusal to do so. For a breach of duty to their principal, the corporation, redress can only be had against the directors by that principal, the corporation (or its receiver), or by the shareholders, if the corporation (or its receiver) refuses to sue. But for any breach of duty towards a stranger to the company (as a creditor or depositor) such stranger may have redress against them (the directors), either at law or in equity, according to the nature of the injury, and it will be no defense

that their principal is also liable." 3 Thompson, *supra,* secs. 4132, 4138, 4145; *DeLano v. Case,* 121 Ill., 247; 2 Am. St. Rep., 81. As to national banks, this may be otherwise as to them, when a receiver has been appointed, since the manner of enforcing the personal liability of the directors is prescribed by U. S. Rev. Stat., secs. 5234, 5239; *Bailey v. Mosher,* 63 Fed., 448; *contra, Prescott v. Haughey,* 65 Fed., 653. But we do not here pass upon that proposition, for the defendants are sued as directors of a State bank.

2. "That the complaint is not sufficient as a charge of actionable deceit against the defendants, because it does not distinctly
(318) charge that the defendants, when the plaintiff deposited his money in the bank, knew or believed he would not get it back, or that they intended by deceit to obtain it from him or cause him to lose it." It is sufficient to allege that, the bank being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends—all this with a view to conceal its insolvent condition and induce the public to make deposits, whereby the plaintiff was deceived and made one deposit, which he is now seeking to recover. Indeed, the directors are liable for injury caused by relying upon a statement issued by them which they did not know to be true, as well as when they knew it to be false. *Hubbard v. Weare,* 70 Iowa, 678; *Huntington v. Attrell,* 118 N. Y., 365; *s. c.,* 42 Hun., 459; 3 Thompson, *supra,* sec. 4244. If bank directors do not manage the affairs and business of the bank according to the charter and by-laws, and use ordinary diligence to supervise the conduct of their office and to understand the condition of the bank, and loss ensues, they are liable for all losses their misconduct may inflict, either upon stockholders or creditors. 1 Morse on Banks, sec. 138; 17 Am. and Eng. Enc., 109, and cases cited. They are trustees for depositors, and can be held liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is in fact insolvent. 1 Morse, *supra,* sec. 130 (a). We adopt what is so well and forcibly said in *Delano v. Case, supra:* "Ordinarily the character of the directory for integrity and business capacity increases the degree of confidence reposed in the corporation by the public. Were depositors, when entrusting to a bank their entire fortune, to be informed that the directors, upon
(319) whose honor and careful watchfulness they were relying, owed them no duty—were under no obligation to take at least reasonable precautions to guard their money from the itching fingers of dishonorable officials—they would certainly hesitate long before surrendering it upon such terms." For false statements of the condi-

tion of the bank, published by authority of the directors, when they knew of the falsity or with reasonable care might have known it, the directors are personally liable. 1 Morse, *supra,* sec. 132, and cases cited; Bolles on Banks, sec. 4; *Shea v. Mabry,* 1 Lea (Tenn.), 319; *Townsend v. Williams,* 117 N. C., 330. "While the directors are bound to exercise ordinary skill, and are liable for losses resulting from mismanagement of the affairs and business of the bank, they are not liable for excusable mistakes concerning the law, and for errors of judgment, either as to the law or the management, when acting in good faith" (2 Am. and Eng. Enc., 115, and cases cited), though good faith alone will not excuse them when there is lack of the proper care, attention and circumspection in the affairs of the corporation which is exacted of them as trustees. *Shea v. Mabry* and *Townsend v. Williams, supra.* The degree of care required of directors depends upon the subject to which it is to be applied. They are not insurers of the fidelity of the agents whom they appoint, nor are they responsible for losses caused by the wrongful acts of such agents, unless there was gross negligence in making such appointment or in lack of proper supervision. 3 Thompson, *supra,* secs. 4106, 4113; *Briggs v. Spaulding,* 141 U. S., 132; Paine Banking Laws, sec. 1781 (2).

Where the object of the suit is to charge the directors with liability for a breach of trust, the rule is well settled that relief may be had against any or all those who concurred in the wrong, the tort being treated as several as well as joint. 4 Thompson, *supra,* sec. 4582, and cases cited. The liability of the president and vice (320) president to depositors and other creditors for losses sustained by them in dealing with the corporation on the faith of misrepresentations by such officers as to its financial condition or other facts forming a material inducement to the deposit or contract is the same as that of directors. 4 Thompson, *supra,* secs. 4670, 4671, 4672, and cases cited. While it is quite well settled that an action can be brought against the directors by the depositors and other creditors for damages caused by their gross mismanagement, neglect and false representations, and this without first applying to the corporation itself or to the receiver to bring such action, there have been authorities that a stockholder could not maintain such action without such prior demand and refusal, but it is made clear that this was only at law, and that in equity upon proper allegations a stockholder as well as a creditor may now maintain the action directly, and in the first instance against the directors. 3 Thompson, *supra,* sec. 4090; 2 Morse, *supra,* sec. 717. But both as to third parties and stockholders alike it is a good cause of action against directors that they declare the dividend, as in this case, out of the capital stock or deposits of the bank, and not

out of its earnings (2 Morse, *supra,* 717; *Gaffney v. Colville,* 6 Hill, 567), and also that they caused false reports to be published by the directors of the condition of the bank. As said above, it is not necessary that the directors should know that such reports are false. It is their duty to know that they are true. *Huntington v. Attrell, supra*; 3 Thompson, *supra,* sec. 4224, and *Hauser v. Tate,* 85 N. C., 81, citing *Bank v. Wulfekuhler,* 19 Kan., 60; *Bank v. St. John,* 25 Ala., 566, and *United Society v. Underwood,* 9 Bush, 609.

No Error.

Cited: Tate v. Bates, ante, 307; *Solomon v. Bates, post,* 322; *Caldwell v. Bates, post,* 324; *Solomon v. Daniels,* 120 N. C., 17; *Houston v. Thornton,* 122 N. C., 370; *Gattis v. Kilgo,* 125 N. C., 136; *Pritchard v. Comrs.,* 126 N. C., 915; *Richardson v. R. R., ib.,* 102; *Fisher v. Water Co.,* 128 N. C., 375; *Coble v. Beall,* 130 N. C., 537; *Fisher v. Trust Co.,* 138 N. C., 241; *Smith v. Newberry,* 140 N. C., 388; *McGowan v. Ins. Co.,* 141 N. C., 368, 369; *McIver v. Hardware Co.,* 144 N. C., 489; *Hough v. R. R., ib.,* 701; *Peanut Co. v. R. R.,* 155 N. C., 166; *Pender v. Speight,* 159 N. C., 616; *Braswell v. Bank, ib.,* 630, 632; *Mule Co. v. R. R.,* 160 N. C., 220; *Ayers v. Bailey,* 162 N. C., 212; *Lee v. Thornton,* 171 N. C., 213; *Cone v. Fruit Growers Asso., ib.,* 531.

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S. & B. SOLOMON v. ISAAC BATES ET AL.

PRACTICE—MOTION TO MODIFY OPINION.

A motion to modify an opinion of the Supreme Court by striking out a proposition of law stated therein, even though it be alleged that the part of the opinion sought to be corrected was not essential to the conclusion reached, the point in question having been discussed on the hearing and considered and decided by the court, will not be entertained.

MOTION of defendants to modify the language of the opinion in the case between same parties, *ante.*

Aycock & Daniels, D. L. Russell and H. G. Connor for defendants.
W. R. Allen contra.

CLARK, J. The opinion in this case having been filed and certified, the losing party served notice on the opposite side that on a day named he would move the court to modify the opinion by striking out the words "Indeed, the directors are liable for the injury caused by relying upon the statement issued by them, which they did not know

to be true, as well as when they knew it to be false," and also the concluding words of the opinion, "As said above, it is not necessary that the directors should know that such reports are false. It is their duty to know that they are true."

The respondent, in addition to replying to the motion on its merits, moves to dismiss the motion as being made contrary to the course and practice of the Court. It is true that where there is a mere inadvertence, as the entry of the conclusion, "a new trial," when the opinion showed that the proper conclusion should have been "reversed," a motion of this kind will be entertained (*Summer-* (322) *lin v. Cowles,* 107, N. C., 459), or "affirmed" instead of "reversed" (*Cook v. Moore,* 100 N. C., 294), or "new trial" instead of "remanded" (*Scott v. Queen,* 95 N. C., 340); and, indeed, the Court would correct such errors *ex mero motu,* if called to its attention in any way. But it was never contemplated that by a motion of this kind propositions of law stated in an opinion could be again brought up for discussion in this easy and offhand method, even though it be alleged by the mover that the part of the opinion sought to be corrected was not essential to the conclusion reached. To admit this practice would to a large extent repeal the restrictions which it has been found necessary to throw around the grantings of rehearings by requiring the strictly worded certificate of two disinterested counsel and the endorsement of a member of the court. The imperative necessity for adhering to these restrictions is pointed out in *Herndon v. Ins. Co.,* 111 N. C., 384. As a matter of fact, too, there was no inadvertence in this case. The point in question was presented in the oral argument of the cause and in the briefs filed by counsel, and was decided, not only in this case, but likewise in the three other cases of similar character, against the officers of the same bank. *Townsend v. Williams,* 117 N. C., 330; *Caldwell v. Bates, post,* 323, and *Tate v. Bates, ante,* 287. In the latter case the Court says: "The directors are conclusively presumed to know the condition of the bank. *Hauser v. Tate,* 85 N. C., 81; Morse on Banks, sec. 137; *Finn v. Brown,* 142 U. S., 56; *United Soc. v. Underwood,* 9 Bush., 609, and other cases cited in *Solomon v. Bates, ante,* 320. If the directors did not know the bank was insolvent it was their duty to have known it. It was fraudulent in them to put forth official statements that the bank was solvent when they did not know it to be true, and they are liable to those who were deceived thereby into having dealings with (323) the bank or making deposits therein for any losses sustained. If this were not so, the directors of a bank would be privileged to be negligent, and the more ignorant they could manage to be about its condition the more secure they would be from any liability." Thus,

the matter sought to be corrected is not a mere formal entry, erroneously made by inadvertence, but a deliberate decision of a proposition of law discussed on the hearing. This cannot be brought up for rediscussion upon a simple motion or notice to the opposite party.

Motion Dismissed.

Cited: *S. v. Council,* 129 N. C., 512; *Durham v. Cotton Mills,* 144 N. C., 715; *Hough v. R. R., ib.,* 701; *McIver v. Hardware Co., ib.,* 489; *Anthony v. Jeffress,* 172 N. C., 379; *Teeter v. Express Co., ib.,* 621.

L. H. CALDWELL, EXECUTOR, v. ISAAC BATES ET AL.

ACTION AGAINST BANK DIRECTORS—FRAUDULENT CONDUCT—NEGLIGENCE—MISMANAGEMENT OF BANK—RIGHT OF DEPOSITOR TO SUE DIRECTORS INDIVIDUALLY—LIABILITY OF PRESIDENT—PLEADING.

(The opinion of Associate Justice CLARK furnishes the syllabus.)

ACTION heard before *Norwood, J.,* at Spring Term, 1895, of ROBESON, on complaint and demurrer.

The demurrer was overruled, and defendants appealed.

The facts are substantially the same as those governing the cases of *Solomon v. Bates, ante,* and *Tate, Treasurer, v. Bates, ante.*

(324) *F. H. Busbee and McNeill & McLean for plaintiff.*

D. L. Russell, H. G. Connor, Ricaud & Weill and P. D. Walker for defendants.

CLARK, J. This case presents substantially the same points as *Solomon v. Bates, ante,* 311; the plaintiff in this case, as in that, being a depositor who had lost by the insolvency of the bank, and the defendants being the same in both cases. Corporate interests are increasing steadily in importance and have become intimately connected with every phase of life. It is necessary to define accurately the duties, rights and obligations of corporations; and the responsibilities of their managers to the public and to their own stockholders. Without reiterating the reasoning and authorities in the case of *Solomon v. Bates,* it is sufficient to sum up the conclusions at which the Court arrived in that case:

1. It is not a misjoinder of causes of action to join in the same action brought against the directors individually a cause of action for gross negligence in the discharge of their duties, whereby the plaintiff was injured, with causes of action for the fraud and deceit of the directors in making false statements and misrepresentations of the con-

dition of the bank, whereby the plaintiff was induced to deposit his money in the care of the bank.

2. That the directors are jointly and severally liable for their torts, and the corporation itself can be joined, or not, at the election of the plaintiff.

3. That where it is admitted by demurrer, or otherwise, that the corporation is insolvent, it is not necessary to exhaust remedies against it before suing the directors for wrongs caused by their negligence, fraud or deceit.

4. That an action can be brought by a depositor or other creditor, and even by a stockholder, for such torts against the (325) president and directors, without having first applied to the corporation or its receiver to bring such action and being refused.

5. That it is not necessary to allege that "when the plaintiff deposited his money the directors knew or believed he would not get it back, or intended by deceit to get it from him or cause him to lose it," but that it is sufficient to allege that, the bank being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends with a view to conceal its insolvent condition and procure deposits, and that the plaintiff was deceived thereby into making the deposit which he is seeking to recover.

6. That the directors are liable for gross neglect of their duties, and mismanagement—though not for errors of judgment made in good faith—as well as for fraud and deceit.

7. That if false and fraudulent statements of the condition of the corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by anyone dealing with the corporation, relying on the truth of such official reports.

8. That the same liability attaches to the president or other managers as to the directors in like cases.

The motion of the defendants made in this action to strike out all allegations of misfeasance and nonfeasance was therefore properly denied, nor was there ground to grant the motion to order a repleader.

No Error.

Cited: Tate v. Bates, ante, 307; *Solomon v. Bates, ante,* 322; *Houston v. Thornton,* 122 N. C., 370; *Cone v. Fruit Growers Asso.,* 171 N. C., 531.

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THOMAS HOLDEN v. J. L. WARREN

JUSTICE OF THE PEACE—JURISDICTION—EQUITABLE RELIEF.

While a justice of the peace has no jurisdiction to administer equity affirmatively, yet where the allegations of the complaint and the proofs show that plaintiff was entitled to judgment for a balance due on an account, he having accepted, through mistake, a sum less than was due him, he is entitled to judgment, notwithstanding in his prayer he asked for equitable relief by reformation of an accounting between him and his debtor.

ACTION tried on appeal from a justice's court, before *Starbuck, J.*, and a jury, at Fall Term, 1895, of CASWELL.

Before the jury was impaneled the defendant moved to dismiss the action for want of jurisdiction, the action having been instituted in a justice's court to reform and correct an alleged error in calculation in a settlement between the parties.

The complaint was as follows: His Honor reserved his decision in the motion to dismiss and submitted an issue to the jury as follows: "In what sum, if any, is defendant indebted to plaintiff?" Answer: "$29 and interest up to date." His Honor then granted the defendant's motion to dismiss, and plaintiff appealed.

C. D. Turner for plaintiff.
No counsel contra.

CLARK, J. A justice of the peace has no jurisdiction to administer equity affirmatively (*Doroughty v. Sprinkle,* 88 N. C., 300), though necessarily in actions of which that officer has jurisdiction an equitable matter can be set up by way of defense. *Bell v. Howerton,* 111 N.C., 69; *McAdoo v. Callum,* 86 N. C., 419. That part of the prayer of the complaint which asks that the defendant correct the settlement, being for an equitable relief, is therefore not within the jurisdiction of the justice. But the jurisdiction is governed by the matters alleged and proven, and the plaintiff is entitled to any relief these entitle him to have, without regard to the fact whether or not they are embraced in the prayer for relief. *Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601; *Simmons v. Allison, post,* 761. If the justice can give any relief upon the cause of action, it is immaterial that the plaintiff prays for another relief which the justice has no jurisdiction to grant. *Hargrove v. Harris,* 116 N. C., 418.

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The plaintiff complained that the defendant owed him a balance of $83.50; that by mistake in calculation—a mutual mistake of fact by

both parties—the balance was stated to be $54.50, and the plaintiff on that understanding accepted $50 in full payment of the $54.50, which both parties supposed to be due, but on discovering the mistake the plaintiff demanded $29 still due, and, payment being refused, brings this action. Had the agreement been to receive the $50 in satisfaction of the $83.50, the agreement would have been binding (The Code, 574), though it would have been *nudum pactum* prior to that act. *Fickey v. Merrimon,* 79 N. C., 585; *Koonce v. Russell,* 103 N. C., 179; *Coppersmith v. Wilson,* 104 N. C., 28. But there has been no settlement, other than for the $54.50, and there has been nothing paid or accepted in discharge of the remaining $29 due the plaintiff. He is entitled to bring his action at law to recover the same; and even if the defendant can show a receipt in full, this would be only *prima facie* evidence, which could be rebutted by proving above facts as alleged in the complaint. The judge submitted the issue to the jury (reserving the motion to dismiss, made on the ground of a want of juris- (328) diction), and the jury found that the defendant was indebted to the plaintiff $29, as alleged in the complaint, with interest from the date of the settlement. His Honor denied the plaintiff's motion for judgment, and dismissed the action. He was doubtless misled by the prayer of plaintiff's complaint, embracing an equitable relief. But the plaintiff, on the facts alleged and proved, was entitled to a judgment at law for the $29, and his prayer for equitable relief should have been treated as surplusage.

The facts being found by the verdict, and the exception bringing up the erroneous ruling of the judge in refusing judgment thereon for the plaintiff, a new trial is not necessary, but the judgment dismissing the action is reversed (*Bernhardt v. Brown, post,* 700) and the cause is remanded, that judgment for the plaintiff may be entered upon the verdict below.

Reversed.

Cited: Sams v. Price, 119 N. C., 574; *Parker v. R. R., ib.,* 686; *Beach v. R. R.,* 120 N. C., 507; *Gillam v. Ins. Co.,* 121 N. C., 372; *Parker v. Express Co.,* 132 N. C., 130; *Harvey v. Johnson,* 133 N. C., 358; *Levin v. Gladstein,* 142 N. C., 494; *Blackmore v. Winders,* 144 N. C., 216; *Bank v. Duffy,* 156 N. C., 87.

WROUGHT IRON RANGE COMPANY v. J. A. CARVER ET AL.

CONSTITUTION OF STATE AND UNITED STATES—LICENSE TAX—PEDDLERS—RATIFICATION OF STATUTES—SIGNATURES OF PRESIDING OFFICERS—INTERSTATE COMMERCE—INSTRUMENTS REFERRED TO IN A STATUTE.

1. Under section 76, chapter 119, Laws 1895 (the Machinery Act), the collection of an illegal and invalid tax may be enjoined.

2. *Semble*, that the exception in the above-mentioned section is as broad as the prohibition; and about all the effect the section has is to give an additional remedy to test the validity of a tax, leaving it to the discretion of the taxpayer to pay the tax and sue to recover it back, or to proceed by injunction.

3. The Legislature had the power to levy the tax on peddlers provided in section 28, chapter 116, Laws 1895, and to provide the method of collection and enforcement set forth in the Machinery Act of 1895.

4. Foreign corporations can only do business in this State by virtue of the rules of comity, under which rules they cannot be accorded greater privileges than citizens of the State.

5. A foreign corporation is not a citizen of the State creating it, within the protection of Article IV, section 2 (1), of the Constitution of the United States.

6. The tax imposed on peddlers by the Revenue Act of 1895, as it makes no discrimination in favor of citizens of this State, is valid, and not in violation of the Federal protection of interstate commerce guaranteed by the Constitution of the United States.

7. *Semble*, that an act of the Legislature of this State is valid, if regularly passed in other respects, although its ratification is not attested by the signatures of the presiding officers, upon the same principle that judgments of the courts are valid, although not signed by the presiding judge. *Scarborough v. Robinson*, 81 N. C., 409, criticised and distinguished.

8. When one deed, contract, pleading or other written instrument refers to another written instrument for important or essential particulars, the instrument thus referred to becomes a part of that referring to it; and upon the same principle, where an act of the Legislature, in all respects regular as to its passage and ratification, refers to another act about the proper ratification of which there is a serious question, the act thus referred to becomes incorporated in the act in which it is thus referred to, and becomes a valid law as part thereof.

9. *Quere*, if the counties have power to levy a peddler's tax under chapter 116, section 28, Laws 1895.

(329) ACTION heard by *Starbuck, J.*, at chambers, in Greensboro, 13 July, 1895, upon an affidavit of the plaintiff to continue the restraining order theretofore granted by *Robinson, J.*, until the final hearing.

Upon an affidavit made by the plaintiff, his Honor, *W. S. O'B. Robinson,* granted an order restraining and enjoining the defendants from the acts complained of in the affidavit of the (330) plaintiff, and ordered the defendants to show cause before his Honor, *Henry R. Starbuck,* at Greensboro, on 6 July, 1895, why the same should not be continued until the final hearing. By agreement of parties, the time of hearing was continued until 19 July, at which time his Honor heard the case, and on 22 July, 1895, rendered the following judgment:

"This cause coming on to be heard upon a motion to continue the restraining order heretofore granted by *Robinson, J.*, to the final hearing of the action, the hearing of said motion having been continued to this date, upon consideration of the complaint and affidavits filed, the motion to continue said restraining order is denied and the same is hereby dissolved; and it is further adjudged that the defendant recover of the plaintiff the costs of the injunction proceeding, to be taxed by the clerk."

Plaintiff appealed.

Shepherd & Busbee and Boone, Merritt & Bryant for plaintiff.
W. A. Guthrie and A. L. Brooks for defendants.

FURCHES, J. This is an application for an injunction to restrain the defendant, as sheriff of Person County, from collecting by distraint what he claims to be a peddler's tax. The defendant denies plaintiff's right to proceed by injunction, whether the tax be "illegal and void" or not, under section 76, Machinery Act of 1895. We do not agree with defendant in this contention.

It was agreed that plaintiff might proceed by injunction, unless he is prevented by this section, and it is true that this section does not profess to prohibit the issuance of injunctions against the collection of public taxes, except in certain cases, and it seems to us that the exception is about as broad as the prohibition, and about (331) all the effect it has is to give an additional remedy, which is left to the discretion of the party to pay the tax and then bring an action to recover the money back. But whether the exception is as broad as it seems to us or not, it in express terms excepts from the inhibition of injunction taxes that are "illegal or invalid," and that is what the plaintiff alleges in this case—that they are "illegal and invalid"; and this question of jurisdiction being disposed of, the matter comes to be considered upon its merits.

There are many grounds of objection made by the plaintiff to the legality of this tax and to the manner in which the defendant proceed-

ed to collect the same. Plaintiff says that no such tax has been *assessed* and the defendant had no warrant or order for its collection; that if defendant had authority to collect without a special order to do so, his action was illegal, as the tax created no lien on plaintiff's property and he had no right to take it by distraint or levy. But plaintiff further alleges that if defendant, as a tax collector, has the right to levy property for taxes without a special order to do so, he had no right to do so for this tax, as it was protected from taxation by the law of interstate commerce, and was unconstitutional and void. And, finally, plaintiff alleges that chapter 116, Acts 1895, was not signed by the President of the Senate and the Speaker of the House of Representatives, and therefore is not a part of the laws of North Carolina. "Taxes are the enforced proportional contributions from persons and property levied by the State, by virtue of its sovereignty, for the support of the Government and for all public needs." Cooley on Taxation, sec. 83 (8), ch. 119, Acts 1895, defines "tax," "taxes," to be any tax or assessment provided for in this act. "The power of taxation is an incident of sovereignty, and is possessed by the
(332) Government without being expressly conferred by the people." Constitution; Cooley on Taxation, 4.

"In general, it will be found that the statutes imposing taxes make special provision for their collection, and do not apparently contemplate that any others will be necessary." Cooley, *supra,* 15.

Section 37, ch. 119, Acts 1895, provides for the collection of taxes as follows: "Whenever the tax shall be due and unpaid, the sheriff shall immediately proceed to collect the same, as follows: If the party charged has personal property equal to the value of the tax charged against him, the sheriff shall seize and sell the same, as he is required to sell other property under execution." And an act for levying taxes and providing the means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the Legislature. It is therefore the law of the land, not only in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. As has been well said, "The mode of levying, as well as the right of imposing taxes, is completely and exclusively with the legislative power." Cooley, *supra,* 48-49. The work of the commissioners in assessing taxes is only to ascertain the amount due, where this is uncertain and to be determined by some general rule prescribed by the Legislature. But, besides the above authorities, the right of the sheriff to levy and sell for just such taxes as are involved in this action has been expressly decided and sustained by this Court in *Cowles v. Brittain,* 9 N. C., 207, and *Wynn v. Wright,* 18 N. C., 19, and these

cases are cited and approved by *Justice Gray* in delivering the opinion of the Court in *Emert v. Missouri,* 156 U. S. R., 309.

So it is clear the Legislature had the right—the power—
to levy this tax (leaving out for the present the question of (333)
interstate commerce), that it did levy it, and that it had the
right to provide (prescribe) the mode and manner of enforcing its collection and by whom it should be collected; and it did prescribe the mode of enforcing its collection and by whom it should be collected. And under this legislative power the defendant—the sheriff—has proceeded to make the collection in the manner pointed out in the act.

This leaves two questions to be considered—interstate commerce and as to whether chapter 116, Acts 1895, is a part of the Public Laws of the State.

It is contended by plaintiff that the first of these questions (interstate commerce) has been expressly decided by this Court in plaintiff's favor, and *S. v. Lee,* 113 N. C., 681, and *S. v. Gibbs,* 115 N. C., 700, are cited as authority to sustain this contention. But upon examination it will be found that *S. v. Lee* was expressly put on the ground that the Legislature had not imposed a tax on defendant's business, and the Court intimates the opinion that had the Legislature imposed the tax the Court would have affirmed the judgment below. The question of interstate commerce is not discussed in the opinion, but, if it was considered, the intimation of the Court is against the plaintiff's contention. The case of *S. v. Gibbs* is put upon an admission of the Attorney-General that it falls under the decision of *S. v. Lee,* and it is expressly stated in the opinion that no Federal question is presented. So it is manifest that neither of these cases decides the question or sustains the contention of plaintiff as to interstate commerce.

The case of *S. v. Lee, supra,* as was that of *S. v. Gibbs,* was put upon the definition of "peddler"; and the Court then held that the term "peddler" did not include a party who traveled over
the country carrying a sample stove, soliciting orders to be (334)
filled by another wagon following, and delivering stoves. This
was at least a very favorable construction for the defendant.

This is a privilege tax and outside of the revenue to be raised for the support of the Government. The object of such taxes is to protect the people against the frauds and machinations of this class of irresponsible traders, and to protect honest dealers with fixed places of business and who honestly bear their part of the burden of the Government. *Emert v. Missouri, supra.* And, this being so, it is apparent that neither the people nor the *bona fide* local dealers would receive any more protection against this itinerant trade, carried on in

the manner pursued by plaintiff, than if he were to sell the stove he has in the wagon in which he travels. In fact, it can be considered in no other light than as a subterfuge—a trick to evade the tax imposed by the Government. This question of taxation is elaborately discussed by *Justice Gray* in *Emert v. Missouri, supra,* and especially on page 314, where he defines the term "peddler." In Tomlin's Law Dictionary these definitions are given: "Hawkers; those deceitful fellows who went from place to place buying and selling; * * * and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it; hawkers, peddlers and petty shopmen—persons traveling from town to town, with goods, and merchandising." But it is not necessary for us to decide in this case whether the definition given to the word "peddler" in *S. v. Lee* was correct or not, as the act of 1895, ch. 116, sec. 23, has made the definition, "That any person carrying a wagon, cart or buggy for the purpose of *exhibiting or delivering* any wares or merchandise shall be considered a peddler." This para-
(335) graph was not in the acts under which *S. v. Lee* and *S. v. Gibbs* were decided. The Legislature had the right to make this definition. *Emert v. Missouri, supra.* So there can be no doubt that plaintiff's business was taxed by the act of 1895.

Then, is the plaintiff relieved from the burden of this tax by the Constitution of the United States, under the doctrine of interstate commerce? We do not think it is. The plaintiff is a foreign corporation, and can only do business in this State by the rules of comity; and it would seem that under this doctrine it ought not to claim—and if it does claim, it should not be allowed—greater privileges than our own citizens. A foreign corporation is not *a citizen* of another State, and can claim no privilege or protection under Article IV, section 2 (1), of the Constitution of the United States. *Paul v. Virginia,* 8 Wall., 168; *McCreedy v. Virginia,* 94 U. S., 391; *United States v. Crookshank,* 92 U. S., 542. But, as they are allowed to come here under the doctrine of comity, they are entitled to the same protection and are subject to the same burdens on their business as are imposed on the business of our own citizens, and no more. It is admitted that a tax imposed on peddlers is a tax on the property authorized to be sold. *Machine Co. v. Gage,* 100 U. S., 678. But a State may impose the same license tax on peddlers from other States that it imposes on its own citizens. *Machine Co. v. Gage, supra; Ward v. Maryland,* 12 Wall., 163, 418. If it discriminates in favor of its own citizens and against the citizen of another State, this will be in violation of the Constitution and void. *Machine Co. v. Gage, supra.* The nonexercise by Congress of the power to regulate interstate commerce is equiva-

lent to a declaration that it shall be free from any restrictions. *Welton v. Missouri,* 91 U. S., 275; *Machine Co. v. Gage, supra.* The case of *Machine Co. v. Gage* was almost our case. If there is (336) any distinction in the principle there decided and the case now before us, we have been unable to discover it, after a careful examination. That was an action brought by the Howe Sewing Machine Company, a Connecticut corporation, which had shipped its machines to Nashville, Tenn., and from there an agent went to Sumner County to peddle and sell these machines. A license tax similar to ours was demanded of him. He denied the right to demand this tax, but paid it, under a provision of the Tennessee statute similar to the provision of section 76 of our law, and the machine company brought an action to recover back this tax. The plaintiff in that case, as the plaintiff does in this case, contended that the tax was unconstitutional and void upon the ground of its being an interference with interstate commerce. But the Court, after a full review of all the authorities on the subject, held that, as the same rule applied to all alike, there being no discrimination against the plaintiff and in favor of the citizens of Tennessee, there was no constitutional objection to it, and that plaintiff could not recover. The same question was again before the Court, and the whole subject discussed at great length by *Justice Gray,* in which case of *Machine Co. v. Gage* was discussed and approved, as late as the 156 U. S., in *Emert v. Missouri, supra.* Upon these authorities we have no hesitation in holding that plaintiff is not protected from paying this tax by any provision of the Constitution of the United States.

This leaves one other question to be considered: "Is chapter 116, published as a part of the Public Laws of 1895, a part of the law of North Carolina, or is it, as plaintiff contends, a nullity?" This is an important question.

If we sustain the contention of plaintiff, it does not only relieve him from the payment of this tax, which we have seen he is otherwise liable for, but it also relieves all other taxpayers from the payment of their taxes imposed under its provisions. We (337) say under its provisions, because, if it is not the law, it is contended that the Revenue Act of 1893 (which is very similar to this) would be left in force. But that is not a matter now before us. The question before us is whether chapter 116 of the Acts of 1895 is the law.

There is no question in this case but that it was passed by both houses of the General Assembly, according to the provisions and requirements of the Constitution. There is no question but that it was deposited in the office of the Secretary of State as one of the public

laws passed by the General Assembly of 1895. There is no question but that the Secretary of State received it and enrolled it as one of the public laws passed at that session of the General Assembly. There is no doubt but that the Secretary of State certified that it was one of the public laws on file in his office, and that the Public Printer published it with other public acts of the General Assembly of 1895 as a part of the public laws of the State. This made it, presumptively at least, a part of the public laws of the State, and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. The Code, sec. 1339.

It was held in *Carr v. Coke,* 116 N. C., 223, that an act purporting to have been passed by the General Assembly and signed by the President of the Senate and the Speaker of the House was a record importing verity, and could not be impeached collaterally. It is true, if it be admitted that this act was not signed by the presiding officers (which we admit, for the present, for the argument only), the question is then presented as to whether it is a record or not. Plaintiff
(338) contends that it is not, for the reason that the Constitution provides and, as plaintiff says, requires it to be signed by the President of the Senate and the Speaker of the House. The Legislature and its presiding officers are bound by the requirements of the Constitution; and it is certainly true that every one ought to observe the provisions of the Constitution. If the Legislature passes any law which is in plain violation of the provisions of the Constitution, it is the duty of the courts to declare it void. But that is not the case here. It is not alleged that this act is in conflict with any of the provisions of the Constitution. It is not alleged that the Legislature has done any act in violation of the Constitution, but that the presiding officers, through an inadvertence, have failed to sign an act, and therefore it is not the law. It would seem that a judge, in the discharge of his duty, would be as much bound to observe the plain requirement of the statute law of the State as the presiding officers of the General Assembly are to observe the Constitution in discharging their official duties. Yet we have a plain provision in our statute law requiring every judgment granted by a judge to be signed by him. The Code, sec. 288. And this Court has held that this statute, apparently mandatory, should always be observed; still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge. *Matthews v. Joyce,* 85 N. C., 258; *Rollins v. Henry,* 78 N. C., 342; *Keener v. Goodson,* 89 N. C., 273; *Spencer v. Credle,* 102 N. C., 68; *Bond v. Wool,* 113 N. C., 20.

Then, suppose it be admitted that Mr. Coke's affidavit is com-

petent (which is not admitted), and that it proves that this act was not signed by the presiding officers; does it prove more than if the clerk's affidavit was allowed to prove that a judgment on file in his office had no signature of the judge, or of any judge, at- (339) tached to it? What would be the reply? *Non constat,* the judgment having been passed by the court when in session and filed as a judgment it is the judgment of the court. Critically speaking, Mr. Coke's affidavit does not prove that this act was not signed by the presiding officers; and probably it is our duty in a matter of this importance to place a strict construction upon this affidavit. Then what is the affidavit? "That said act contains no clause of ratification, and no signatures of the presiding officers of the Senate and House of Representatives, or either of them, appear thereon or are appended thereto." And it is contended by the defendant that, if it be admitted that the names of these officers are not now attached to this act, it does not necessarily follow that they never were, especially when the affiant had certified to its being the law in the following certificate: "May 23, 1895, I, Octavius Coke, Secretary of State, hereby certify that the foregoing (manuscript) are true copies of the original acts and resolutions on file in this office. Octavius Coke, Secretary of State." It is admitted that chapter 116 is one of the "acts" he certifies is on file in his office.

But it is further contended by the defendant that as this is a matter of *record* it cannot be disproved by oral testimony, and that the only way this could be done, if at all, would be by a certified copy under seal from the Secretary of State.

It is admitted that, if it is shown that the presiding officers of the General Assembly did not sign this act, the argument in the opinion of the Court in *Scarborough v. Robinson,* 81 N. C., 409, is some authority for the contention of the plaintiff that it is not a law. But no such question was presented in *Scarborough v. Robinson* as is presented in this case. In that case the allegation of the plaintiff was that the bill had not been signed, and the action was (340) for a mandamus to compel the presiding officers to sign the bills, after the Legislature had adjourned. This was the only question presented in that case. But the court, in the course of the opinion, said that an act passed and not signed by the presiding officers was not the law. That part of the opinion does not seem to be in harmony with cases above cited, in which the judgments of the Superior Court have been sustained, though not signed by the Judge, as required by the statute. Besides, this part of the opinion in *Scarborough v. Robinson* was criticised by the Court in the opinion delivered

in *Cook v. Meares,* 116 N. C., 582, and pronounced an *obiter,* both in the opinion of the Court and in the concurring opinion filed by *Justice Avery.*

But if this was not so, this case has gone much further than *Scarborough v. Robinson.* In that case the act had not been certified and published as a part of the laws of the State, as this act had been. In *Carr v. Coke, supra,* it was stated that the object of that action was to enjoin its being certified and published, and stress was put upon the fact that it had not yet been certified and published; as, if this were done—that is, certified and published as a part of the public laws—it would much strengthen if not perfect the act.

But, as there is some difference of opinion among the members of the Court as to the position above stated as to the validity of this act, there is another view upon which all agree that it is valid, and this we will now discuss, and it will be considered as the basis of the judgment of the Court.

Where one deed refers to another deed for information not set out in the last deed, or as a basis for what is contained in the last deed, the first deed becomes a part of the last. *Brasfield v.* (341) *Powell,* 117 N. C., 140. Where two instruments are contemporaneous and about the same subject-matter, they are to be taken together and construed as a whole. *Flaum v. Wallace,* 103 N. C., 296. Where one files a complaint in an action and refers to another action then pending, without stating the contents of the action referred to, except that it is about the same subject, the complaint thus referred to is made a part of the complaint in the second action. *Alexander v. Norwood, post,* 381.

In 1865 the Legislature of Kansas, in aid of the Union Pacific Railroad, passed an act, which was filed in the office of the Secretary of State and by him certified to the public, printed and published as one of the laws of the State. In 1866, and probably in 1867, the Legislature passed other acts which referred to the act of 1865 as being a part of the laws of the State of Kansas. Some time after this, one Higginsbotham brought an action to compel the issuance of the bonds provided for in the act of 1865, when his action was contested, upon the ground that the President of the Senate, by some inadvertence, had failed to sign the act, which was an admitted fact—the Constitution of Kansas, like ours, requiring that all acts should be signed by both the Speaker of the House and the President of the Senate before they should become laws. But the Court, in a long and well-considered opinion, held that, as this act of 1865 had been referred to as the law in 1866 and 1867 by other acts that were properly signed, that

was a sufficient ratification by the Legislature to supply the want of the signature of the president of the Senate to the act of 1865. *Comrs. v. Higginsbotham,* 17 Kan., 62.

It must be admitted that a failure of one of the presiding officers to sign the bill (the signature of both being required) was as defective as if neither had signed, and the Kansas case can- (342) not be distinguished in principle from ours on that account.

In our case, chapter 119, which is the accompaniment of chapter 116, being an act for the collection of the taxes levied in chapter 116, expressly refers to chapter 116 in sections 33, 102 and 116, and requires the Secretary of State to have five thousand copies of the "Act to raise revenue" (chapter 116) to be printed, and to "distribute the same among the officers of the State, whose duties it is to execute and carry the same into effect." Upon the authorities cited, as well as "the reason of the thing," we are of the opinion that it was a sufficient ratification and attestation of chapter 116, Acts 1895, entitled "An act to raise revenue," to constitute it a part of the public laws of North Carolina. But the tax levied in section 28 is State tax, and we fail to see that the county of Person has levied any tax on the plaintiff, if it has any authority to do so. Therefore the order appealed from is sustained as to the State's tax and reversed as to the county tax.

Modified and Affirmed.

Cited: Next case, *post; Comrs. v. Call,* 123 N. C., 329; *Greensboro v. Williams,* 124 N. C., 170; *S. v. Caldwell,* 127 N. C., 526; *Collier v. Burgin,* 130 N. C., 635; *S. v. Frank, ib.,* 725; *Purnell v. Page,* 133 N. C., 129; *Lacy v. Packing Co.,* 134 N. C., 571; *Range Co. v. Campen,* 135 N. C., 525; *Tobacco Co. v. Tobacco Co.,* 145 N. C., 372; *Sherrod v. Dawson,* 154 N. C., 529.

WROUGHT IRON RANGE COMPANY v. W. S. COZART

Shepherd & Busbee and A. A. Hicks for plaintiff.
W. A. Guthrie for defendant.

FURCHES, J. This case is governed by the opinion in the above case against *Carver.* But it does not appear that any claim for county tax is involved; and as the defendant was restrained and enjoined by the order below from collecting the State tax imposed by (343) section 28, chapter 116, Laws 1895, the order was erroneous and should not have been granted. There is error, and the judgment is

Reversed.

B. F. CHEATHAM, ADMINISTRATOR OF JOHN A. CHEATHAM,
v. WILLIAM A. BOBBITT

THE CODE, SEC. 590—"OPENING THE DOOR" BY PERSONAL REPRESENTATIVE OF DECEDENT—PERSONAL TRANSACTION DEFINED.

1. The term "personal transaction," as used in The Code, sec. 590, was intended to describe the whole of the negotiation or treaty between the original parties to it, out of which the cause of action arose.

2. When a personal representative "opens the door" by testifying to a transaction, etc., it is not his province, but that of the court, to decide what testimony of the adverse party may come in.

3. In an action by an administrator for the price of goods alleged to have been sold and delivered by his intestate to defendant, the plaintiff may testify to the delivery of the goods to defendant, and not thereby "open the door," because the delivery is an independent fact. But, a *purchase* being the result of negotiations between the parties, if plaintiff testifies that defendant *purchased* the goods from his intestate he thereby makes it competent for defendant to testify to conversations and transactions between himself and plaintiff's intestate which negative a sale and purchase, but tend to establish a bailment with intent to defraud the creditors of the alleged vendor.

(344) ACTION tried before *Greene, J.*, and a jury, at January Term, 1895, of GRANVILLE.

Plaintiff complained for goods sold and delivered to defendant in 1879 and 1882. Defendant denied purchasing the goods, and alleged they were delivered to him by plaintiff's intestate, who was in failing circumstances, in order to avoid the payment of his debts. Defendant also pleaded the statute of limitations.

B. F. Cheatham, plaintiff, was introduced as a witness in his own behalf, and testified that he was administrator and brother of John A. Cheatham, deceased; that John A. Cheatham was unmarried, and died after his father and mother, and that witness was one of his heirs at law; that the intestate was merchandising in the city of Raleigh in the year 1878; *that defendant purchased goods and merchandise from intestate;* that he knows of his own knewledge that his brother had delivered these goods to defendant, and that he had seen many of them delivered; that witness was not in the employ of his brother, but was often in and about the store, and, at his brother's request, delivered a portion of the goods to defendant. Witness was here shown several bills of goods, and, after objection on part of defendant, testified that two of them were in his handwriting and all the others in the handwriting of his brother; that they were the originals of the bills of goods delivered to defendant by his brother and

himself; that he delivered the goods to defendant's wagoner, at the request of his brother, the intestate. Plaintiff also introduced letters of defendant, which, after objection by defendant, witness testified were in the handwriting of defendant, and were received by the intestate, all ordering goods from the intestate and were signed by defendant. Plaintiff then rested.

William A. Bobbitt, the defendant, then testified, in his own behalf, that the goods were delivered to him by John (345) A. Cheatham, under an agreement. Plaintiff objected to any testimony as to an agreement between the witness and the intestate, and his Honor instructed the witness to confine himself to the transaction between himself and deceased about which the plaintiff had testified. Plaintiff excepted. Witness then said that in the latter part of October or November, 1879, John A. Cheatham approached him in Raleigh and told him he was bound to fail, and intended to buy a large stock of goods and then make an assignment; that he wanted him (the defendant) to let him ship a lot of the goods out to his store in Brassfield Township, Granville County, so as to get them out of the reach of his creditors, and that after the assignment he (Cheatham) would come out there and dispose of them; that all of the goods sued for were delivered, under the agreement, between 27 November and 17 December, and that these were the goods about which the plaintiff administrator had testified; that he would send his wagon, so as to reach Raleigh about dark, and have it loaded during the night and start off before day; that John A. Cheatham failed just before Christmas, 1879; that defendant himself left home early in 1880; that the goods remained at the store of R. Bobbitt & Son; that some of them were sold, some scattered and some remained there for several years; that all the goods described in the bills produced by plaintiff and in plaintiff's testimony were delivered in consequence of that agreement between John A. Cheatham and the witness. Plaintiff again objected to any evidence of conversation or transaction whatever between defendant and intestate of plaintiff.

His Honor again ruled that no testimony should be admitted except that relating to the transactions about which (346) the plaintiff administrator had testified. Plaintiff excepted.

On cross-examination, witness testified that the conversation between the witness and plaintiff's intestate took place in a room at the Yarborough House; that no one was present except himself and John A. Cheatham, and that the goods were delivered in accordance with the agreement then entered into.

His Honor submitted the following issues:

1. "Did the cause of action of plaintiff against the defendant accrue more than three years prior to the beginning of this action?" Answer: "No."

2. "Were the goods described in the plaintiff's complaint delivered to defendant in consequence of an agreement between plaintiff and defendant that defendant should assist plaintiff in avoiding the payment of his debts?" Answer: "Yes."

There was a verdict for defendant on the second issue. Rule for new trial; rule discharged. Judgment for defendant. Exception by plaintiff.

The plaintiff, B. F. Cheatham, administrator, died since the last term, and S. V. Ellis, administrator, *d. b. n.*, was made party plaintiff.

A. J. Field and J. B. Batchelor for plaintiff.
Graham & Graham for defendant.

AVERY, J. The word "transaction" is used in the statute in reference to the joinder of actions (The Code, sec. 267) in the sense of the conduct or finishing up of an affair, which constitutes as a whole the "subject of action." So the term "personal transaction," in its application to a case like the one at bar, was intended to describe the whole of the negotiation or treaty between the original parties to it, out of which the cause of action arose. The plaintiff would
(347) have steered clear of opening the door to his adversary had he gone no further than to testify to the delivery of the goods described in the bills to the defendant, because that was an independent fact, involving no account of either a personal communication or transaction between his intestate and the defendant. *Johnson v. Rich, ante,* 268. But he started out by stating that the defendant "purchased goods and merchandise" from his intestate while the latter was merchandising in Raleigh, and proceeded to testify to the delivery of the articles so purchased, and that the bills offered in evidence were "the originals of the bills of goods delivered to the defendant by his brother and himself." To purchase is to "obtain or secure as one's own by paying or promising to pay a price" (Standard Dictionary); and the question whether there was such an absolute sale by his intestate and a purchase by the defendant, as must have been inferred from plaintiff's testimony, if believed, or whether the delivery was by the terms of the treaty to vest in the defendant, in whose custody the goods were placed, only a qualified property as bailee, as defendant testified, depended upon the finding by the jury of the facts constituting the history of the whole negotiation between the parties. The plaintiff testified that the defendant "purchased"

the goods delivered to him as the result of all of the latter's chaffering and treating with his intestate. The defendant was allowed to testify that, taking the whole transaction in reference to the goods together, they were delivered to him as a bailee to assist in carrying out a certain fraudulent understanding. The plaintiff, after opening the door to contradiction by testifying that there was a purchaser, cannot close it against his adversary by claiming that he testified to a completed transaction, when his adversary's defense rests (348) upon the idea that the agreement was made at a time and place anterior to the delivery witnessed by the plaintiff, and was the most important part of the whole transaction, from the beginning to the end of the negotiation, which terminated with the delivery. It was the plaintiff's own folly if, by testifying that the whole transaction was in contemplation of law a purchase, he made competent testimony, to which he would otherwise have had good ground for objecting. The statute as passed for the purpose of protecting the estates of dead men by inhibiting living persons from proving claims against heirs or representatives upon testimony as to personal transactions or communications with such decedents. It would be dangerous to remove a barrier which prevents unscrupulous men from indulging their cupidity be resorting to perjury, when the only person who could have contradicted them is dead. But it was not intended that the personal representative should testify to the declarations of the decedent or as to a part of a transaction between him and a living person, which, if believed, would tend to fasten a liability on such living person, and then insist upon closing the mouth of the latter from explaining the whole transaction in such way as to rebut the *prima facie* case made against him. When the personal representative leaves the door open, it is not his province, but that of the court, to decide what may come in. So much of the transaction as was described in detail by the plaintiff was consistent with his summing up of the whole and declaring it a purchase. But, looked at in the light of the covinous agreement which defendant testified had been made, the billing and delivery of the goods were equally consistent with the defendant's contention as to the facts. There was no error in the ruling complained of, and the judgment must be

Affirmed.

(349)

J. McL. KELLY ET AL. A. H. McNEILL ET AL.

PAROL TRUST—STATUTE OF FRAUDS—THE CODE, SECS. 1532-1534.

1. In order to establish a parol trust under an allegation that defendant purchased plaintiff's land at an execution sale, with the agreement that the title should be held in trust for plaintiff, the plaintiff must prove an agreement to buy, entered into by the defendant *before* or *at the sale*. The agreement must be made before the purchase is actually made.

2. Parol agreements of this character, made after the purchase, are void, under the statute of frauds, whether made the next moment or the next year after the purchase.

3. Strictly speaking, any agreement that is relied upon to engraft a trust upon what appears upon its face to be an absolute deed, though it accompany the act of buying, must be made in advance of the transmission of any interest in the subject-matter.

ACTION tried at September Term, 1895, of CHATHAM, before *Starbuck, J.*, and a jury.

The action was commenced in the Superior Court of Moore County five days before W. B. Richardson died. It was thereafter removed to Chatham County. Since then Lewis Grimm has died, and his heirs at law have been made parties defendant, and have answered. The original plaintiff (Richardson) died, and Kelly was made plaintiff.

The purpose of this action was to set up a parol trust in certain lands in Moore County.

The plaintiff alleged, among other things:

1. That on and shortly before the first Monday in March, 1886, the plaintiff was indebted in a considerable amount to E. J.
(350) Lilly, Roberts, Beall & Co., A. L. Elliott & Co., with other creditors, whose claims had been reduced to judgment, execution sued out and placed in the hands of the Sheriff of Moore County, who had levied upon and advertised for sale large quantities of land and valuable real estate belonging to the plaintiff in said county.

2. The plaintiff, being unable to meet, pay off and discharge the claims and demands of said creditors and to save his lands and real estate (which at a fair price were largely more than sufficient to pay said debts) from being sacrified at execution sale, contracted and agreed with his friend and son-in-law, Lewis Grimm, and his lifelong friend and adviser, A. H. McNeill, as follows: That said Lewis Grimm and A. H. McNeill were to purchase said lands and real estate at said sale under execution for the benefit of the plaintiff, and account to the judgment creditors for the amount of such sale, or pay the bids therefor to the sheriff; that they were to hold said lands and

realty in trust for the plaintiff, to sell his interest in what is known as the "Barrett old field," near Carthage, adjoining the lands of W. T. Batley, Thomas B. Tyson and others, containing 374 acres, more or less, in different tracts, and such other lands as might be necessary to reimburse themselves for said outlay, with costs and interest, and that afterwards plaintiff should be allowed to redeem, and said defendants were to reconvey such of said lands and premises as were not necessary to sell to reimburse themselves to the plaintiff by a deed of quitclaim and fee.

3. That defendants purchased the judgments against plaintiff, procured his lands to be sold under execution, bought at such sale in furtherance of the alleged agreement and took a deed for same through the sheriff.

4. That although the amount of said bids was near $2,500, defendants, as plaintiff is informed and believes, have paid out only the sum of $1,200 and costs, applied on executions in favor of E. J. Lilly, Roberts, Beall & Co. and A. L. Elliott & Co., (351) the remainder being applied on judgments theretofore paid off by plaintiff and assigned to Lewis Grimm and A. H. McNeill for plaintiff's benefit.

5. That, as plaintiff is informed and believes, the defendants, in furtherance of said contract and agreement, have sold and conveyed that portion of land known as the "Barrett old field," adjoining the lands of W. T. Batley, Thomas B. Tyson and others, containing 374 acres in several tracts, for the sum of $1,000, and perhaps other tracts of said lands for other sums of money, which said amounts should be applied and appropriated to the extinguishment of the amounts advanced by the defendants on said sales; that such amounts as were appropriated and applied on executions issued upon judgments belonging to the plaintiff and assigned to defendants should also be credited upon the amount of said bids.

6. That after said sale by W. M. Black, Sheriff of Moore County, under said executions, the defendants procured said lands to be sold by John L. Currie, Sheriff of Moore County, under other executions, for the purpose, as plaintiff is informed and believes, of curing some irregularities in the first sale, and that at said sale, the defendants purchased said land at some inconsiderable price.

7. That the value of said lands sold is greatly in excess of the amount of bids at both sales, being more than three times the amount of said bids, and that said lands did not bring anything like a fair price, because the bystanders at said sale believed that defendants were purchasing said lands for the benefit of plaintiff, the debtor.

8. That before the commencement of this action, and within the past two years, plaintiff requested of the defendants that they come to a settlement of the trust committed to them as aforesaid, and
(352) that they receive from him such amount, if any, as may be due them on account of expenditures and disbursements in purchasing said lands and in paying said bids, together with interest and costs, deducting such amounts as they may have received from the sale of said lands, and that thereafter the defendants convey such of said lands as had not been sold in pursuance of the contract to the plaintiff; but that defendants refused to come to an account or to make any statement of any account due them as aforesaid, or to convey to the plaintiff as requested.

9. That plaintiff has heretofore been and is now willing and anxious to pay defendants whatever amounts have been expended by them, with interest and costs, under and in pursuance of said agreement and contract, and hereby tenders the same when ascertained and prays for judgment:

1. That defendants come to an account with plaintiff as to their disbursements, expenditures and receipts, had and made by reason of the contract and agreement heretofore alleged, and that the nature and extent of such dealings, together with any balance due defendants by reason thereof, be ascertained.

2. That defendants receive from plaintiff such balance, if any, with interest and costs incurred; that plaintiff be permitted to redeem said lands and real property, and that defendants, upon receiving such amounts as may be due them by reason of the aforesaid tranactions under said agreement, be compelled to convey to plaintiff such of said lands as have not been sold by them under the agreement, saving and excepting (certain lands which plaintiff does not claim).

The defendants denied the material allegations of the complaint—especially the allegation that they or those under whom they
(353) claim had purchased the judgments or lands referred to in the complaint, under any agreement to allow plaintiff to redeem or in trust for him.

The issues submitted by the court, with the responses of the jury thereto, are:

1. "Did Lewis Grimm and A. H. McNeill purchase the lands described in the complaint, in trust for W. B. Richardson, upon the agreement that they, the said Grimm and McNeill, when reimbursed for their outlay, as alleged in the complaint, would reconvey to said Richardson?" Answer: "Yes."

2. "If so, was said transaction made with intent to hinder, delay or defraud the creditors of said W. B. Richardson?" Answer: "No."

There was evidence offered by both plaintiff and defendants tending to establish their respective contentions, and there were a number of exceptions taken by the defendants to the introduction of testimony and to the refusal of the court to give special instruction prayed by defendants, and to the charge of the court as given; but as the case was determined in this Court upon one point which entitled defendants to a new trial, a statement of the other exceptions is unnecessary.

The defendants appealed.

Black & Adams and H. A. London for plaintiffs.

McRae & Day, W. A. Guthrie, J. W. Hinsdale, T. B. Womack, Shaw & Scales, H. F. Seawell and W. E. Murchison for defendants.

AVERY, J. The defendants requested the court to instruct the jury, among other things, that in order to establish the trust it was essential that the plaintiff should offer some strong, clear and convincing proof of an agreement between Grimm and McNeill and Richardson, made antecedent to the sale, to the effect that the land should be purchased by them upon the trust set up in the complaint. This instruction was not given, either in terms or in substance, and (354) the failure to grant the prayer is assigned as error.

In order to establish a parol trust of this kind, the plaintiff must prove an agreement to buy, entered into by the defendant on an occasion anterior to the time of sale or at the sale, and before the purchase was actually made. A declaration by a defendant, when the property is offered to bidders, but before the purchase is made, is said to be contemporaneous, in the sense that it is a part of the same transaction in which the sale is accomplished. But the bargain must be shown, by declaration or otherwise, to have been entered into prior to the selling, though but an instant before. Subsequent agreements by parol are void, under the statute of frauds, whether made the next moment or the next year. The declaration to uses was made before the terre-tenant had been completely invested with the legal state, and it is such declarations that has been held not to fall within the provisions of our statute (The Code, secs. 1552, 1554), substituted for 29 Car. II. So that, strictly speaking, any agreement that is relied upon to engraft a trust upon what appears upon its face to be an absolute deed, though it accompany the act of buying, must be made in advance of the transmission of any interest by the sale. *Cobb v. Edwards,* 117 N. C., 244. It is the province of the jury to determine whether the proof is clear and convincing to their minds, but they

must find that there is some evidence of the antecedent understanding, and sufficiently strong to convince them that the parties concurred in giving their assent to it. *Cobb v. Edwards, supra; Helms v. Green,* 105 N. C., 251; *Ferrall v. Broadway,* 95 N. C., 551; *Berry v. Hall,* 105 N. C., 154.

(355) It is clear that, in refusing the instruction asked, there was error which entitles the defendants to a New Trial.

Cited: Avery v. Stewart, 136 N. C., 431; *Taylor v. Wahab,* 154 N. C., 224.

ROBERTS & HOGE v. WILLIAM PARTRIDGE ET AL.

PRACTICE—APPEAL—CASE ON APPEAL, SERVICE OF—VERBAL AGREEMENTS OF COUNSEL.

1. The service of a case on appeal by counsel is a nullity, unless the defective service be waived by agreement in writing or by conduct showing a waiver, such as by returning the appellant's case, with exceptions thereto, and without objecting to the defective service.

2. Alleged verbal agreements of counsel will not be considered.

3. Where appellant's counsel handed the case on appeal to appellee's counsel, who did not accept service, but returned the case, with his exceptions, to appellant's counsel, who rejected the counter-case as not being returned in apt time, but neither sent the papers to the judge to settle the case nor caused his own case, with appellee's exceptions, to be certified to this Court: *Held,* that there is no valid case on appeal, and, there being no error apparent on the record, the judgment below will be affirmed.

ACTION tried at February Term, 1895, of GUILFORD, before *Greene, J.,* and a jury.

There was judgment for the defendants, and plaintiffs appealed.

Within the time for serving case on appeal, appellants' counsel prepared and handed to appellees' counsel his statement of case on appeal, on back of which was endorsed, "Case on appeal served on Dillard & King, attorneys for Evitt & Bro., by leaving same with said attorneys, 30 March, 1895. (Signed) John A. Barringer,

(356) plaintiff's attorney." The service was not accepted by appellees' counsel, though appellants' counsel alleges that he was given to understand that service would be accepted. This, however, is denied by appellees' counsel. The latter retained the case until 3 June, 1895, when he handed it, with his exceptions to the case, to appellants' counsel, who immediately returned the countercase, with

the following endorsement: "Received on 3 June, 1895, by being delivered to me, as attorney for Roberts & Hoge, and returned same day to R. R. King as not having been served within time allowed. (Signed) John A. Barringer, attorney for Roberts & Hoge."

Appellants' case, with the exceptions of appellees, was not sent to the judge for settlement.

In this Court the appellees moved for affirmance of the judgment below, on the ground that no case on appeal had been served on defendants.

In his affidavit appellants' counsel says plaintiffs' counsel was under the impression that the defendants' attorney had accepted the case of plaintiffs, and insists that by his conduct the defendants' attorney has misled the plaintiffs and has approved of the said case on appeal, and is now estopped from denying that it is the case on appeal. The judge had left the district and gone home.

Shepherd & Busbee for defendants.
No counsel contra.

CLARK, J. The facts as to service of the case on appeal are very similar to those in the recent cases of *Cummings v. Hoffman,* 113 N. C., 267, and *Lyman v. Ramseur, ib.,* 503. The attempted service of the appellants' case on appeal by counsel was a nullity. *S. v. Price,* 110 N. C., 599. The affidavit of the appellants' counsel that the defendants' counsel verbally agreed to accept service is de- (357) nied by the latter and cannot be considered. Rule 39 of this Court and numerous cases cited in Clarke's Code, (2d Ed.), 704, and in the supplement to the same, p. 103. The return of the appellants' case by the appellees, with exceptions thereto, if in apt time and without objecting to the defective service thereof, might have been deemed a waiver, and in such case the appellants, not having sent the papers to the judge to settle the case on disagreement, would be taken to have accepted the appellees' amendments (*Lyman v. Ramseur, supra*), and the case on appeal would be the appellants' statement, as amended by the appellees' exceptions. *Jones v. Call,* 93 N. C., 170; *Owens v. Phelps,* 92 N. C., 231. But the appellants' counsel rejected the appellees' countercase, as he had a right to do, on the ground that it was returned too late, and neither sent the papers to the judge to settle the case nor caused his own case, as amended by the appellees' exceptions, to be certified to this Court. Consequently there is no valid case on appeal before us, and the judgment must be affirmed,

unless error appears upon the face of the record proper (*Lyman v. Ramseur, supra*), and, no error appearing therein, the judgment below is

Affirmed.

Cited: Smith v. Smith, 119 N. C., 313, 317; *Lindsey v. Knights of Honor,* 172 N. C., 822.

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(358)

SULLIVAN, DREW & CO. v. E. H. C. FIELD, ADMINISTRATOR OF J. B. FIELD, ET AL.

PARTIES—MISJOINDER—DECEDENT'S ESTATE—SALE FOR ASSETS—GUARANTOR, LIABILITY OF—NOTICE OF DEBTOR'S DEFAULT.

1. A misjoinder of unnecessary parties is surplusage and is not a ground for demurrer.

2. An allegation in a complaint against an administrator that the personal and other assets of decedent's estate are insufficient to pay costs of administration and the debts of decedent, and that a sale of property fraudulently conveyed to another defendant is necessary, are sufficient allegations to charge the property so conveyed with the payment of the plaintiff's debt.

3. A guarantor is not entitled to notice of the principal debtor's default from the holder of the guaranty, when the principal debtor is insolvent.

CREDITOR'S BILL, heard before *Starbuck, J.,* on complaint and demurrer, at February Term, 1895, of GUILFORD.

The action was brought against the administrator of J. B. Field, who had made the guaranty to in the complaint (and which is set out in the opinion of *Chief Justice Faircloth*), and also against the defendant Laura Field, the widow of the intestate, to whom, the complaint alleged, the intestate had conveyed property before his death, without consideration and without reserving sufficient property to pay his debts. The complaint alleged also that the assets of the estate of J. B. Field were insufficient to pay the debts of the estate, etc., and that a sale of the property so conveyed to the defendant Laura Field was necessary in order to pay the debt of plaintiffs and other
(359) debts. It is also alleged the utter insolvency of the defendant, Mrs. Bobo, whose purchases from the plaintiffs the intestate J. B. Field had guaranteed in writing.

The defendant demurred, upon the grounds stated in the opinion of the Chief Justice. The demurrer was overruled, and defendants appealed.

L. M. Scott and Dillard & King for plaintiffs.
J. E. Boyd for defendants.

FAIRCLOTH, C. J. The plaintiffs sue the defendant administrator of J. B. Field as guarantor for the amount due by the defendant Sally E. Bobo for goods sold and delivered to her in 1890-'92. The guaranty was in these words: "In consideration of $1 to me in hand paid, the receipt whereof is hereby acknowledged, I hereby guarantee the payment in full for all goods sold and delivered by you to Mrs. S. E. Bobo, of Greensboro, N. C., on a credit of sixty days, consenting to any extension of time or any other arrangement for payment made at any time between you and her, at your option. This is to be considered a continuing guaranty and binding on the personal representatives of the parties hereto. Witness my hand and seal, this 8 October, 1890. J. B. Field."

The defendant demurs to the complaint, as follows:

1. "In the argument, a misjoinder of parties, in that the principal debtor and the guarantor are made parties defendant."

A defendant may demur to the complaint when it appears that there is a defect of parties plaintiff and defendant. The Code, sec. 239 (4). Too many parties is surplusage only, cured by judgment for costs or disclaimer. A misjoinder of one who is a necessary party is fatal, for he will not be bound by the judgment; (360) this affects the merits. A misjoinder of one who is not a necessary party is surplusage. *Green v. Green,* 69 N. C., 294. In this case no judgment is asked for or rendered against Mrs. Bobo, so that her presence is harmless.

2. "That there is no sufficient allegation that the personal assets are not ample to satisfy the plaintiffs' claim without selling the property conveyed to defendant, or that the other assets have been exhausted."

On examination of the complaint we find it substantially alleged, three times, that the personal and other assets are insufficient to pay costs and plaintiffs' debt, and that a sale of the property conveyed to the defendants is necessary.

3. "That no notice or demand was given or made to the defendant guarantor that the debt had not been paid by the principal debtor before this action was commenced."

As a general rule, a party secondarily liable is entitled to notice of the default of the party primarily liable. An endorsee is held to strict punctuality in presenting the note for payment to the endorser, on failure of payment by the maker. It is the duty of the holder of a guaranty ordinarily to make a demand of the maker, but if he be insolvent it is unnecessary, and the failure to do so will not discharge the guarantor, for he must show that by the guarantee's negligence he has sustained a loss, and herein a guaranty differs from an endorse-

ment. A guarantor's undertaking is that if the money cannot by due diligence be collected out of the principal he will pay it, but in case of insolvency of the principal an attempt to collect would do no good. *Ashford v. Robinson,* 30 N. C., 114; *Farrow v. Respess,* 33 N. C., 170; *James v. Ashford,* 79 N. C., 172. It is alleged in the complaint, and admitted, "that defendant Sally E. Bobo, who made the debt
(361) to the plaintiff firm as aforesaid, failed to pay the same at maturity or at any time since, and all the time was totally insolvent and unable to pay the same." We see no error in his Honor's judgment.

Affirmed.

Cited: Abbott v. Hancock, 123 N. C., 103; *Andrews v. Pope,* 126 N. C., 476; *Withrow v. R. R.,* 159 N. C., 225.

E. W. OAKLEY v. J. A. TATE

MALICIOUS PROSECUTION—JUDGE'S CHARGE—DIRECTING A VERDICT.

1. One who applies to a justiec of the peace for a warrant for the arrest of another is not liable, in an action for malicious prosecution, for the errors of law committed by the justice in issuing the warrant.

2. Where A mortgaged property to B, stating at the time that the property was free of incumbrances, and B, upon ascertaining this to be untrue, stated the facts to a justice of the peace and asked for an appropriate warrant for A's arrest, whereupon the justice issued a warrant against A for perjury, under which he was arrested: *Held,* that B was not liable to A in an action for malicious prosecution.

3. To submit a case to the jury upon a state of facts of which there is no evidence, or a mere scintilla of evidence, is error.

4. Where the party upon whom rests the burden of proof fails to produce evidence, or that which he does produce amounts to a mere scintilla of proof, the judge should direct a verdict against him.

ACTION in damages for malicious arrest and prosecution for perjury, tried before *Starbuck, J.,* and a jury, at February Term, 1896, of CASWELL.

(362) The following is the affidavit on which plaintiff was arrested:

"STATE OF NORTH CAROLINA—Caswell County.

"Before R. L. Mitchell, J. P.—J. W. Murray, agent for J. A. Tate, complains and says that at and in said county and in Hightower Township, on or about 4 August, 1893, E. W. Oakley did com-

mit perjury, to-wit, making a statement that there was no claim on property that he had mortgaged to said J. A. Tate, contrary to the form of the statute and against the peace and dignity of the State.

"J. W. MURRAY,
"*Agent.*

"Subscribed and sworn to before me, 8 May, 1894.
"R. L. MITCHELL, J. P."

After the pleadings were read, and the jury had been impaneled, the defendant insisted that, it being admitted that the charge of perjury upon which the plaintiff was arrested and prosecuted is that contained in the affidavit made by J. W. Murray (a copy of which is annexed to the answer), his Honor should hold as a matter of law that no charge of perjury had been made, and dismiss the action. His Honor refused to so hold, and the defendant excepted.

The issues were as follows:

1. "Did the defendant maliciously prosecute the plaintiff on a charge of perjury without probable cause?" Answer: "Yes."

2. "Was said prosecution terminated by compromise or agreement with or by procurement of the plaintiff Oakley?" Answer: "No."

3. "What damages, if any, have the plaintiffs sustained?" Answer: "We, the jury, assess damages for the plaintiffs at $350."

Judgment was rendered as follows:

"This cause coming on to be tried before his Honor, *H. R. Starbuck,* Judge presiding, and a jury, and they having (363) found all the issues submitted in favor of the plaintiff, and assessed his damages at $350, it is now, on motion of J. A. Long, attorney for the plaintiff, ordered and adjudged that the plaintiff recover of the defendant the sum of $350, with interest thereon from 21 October, 1895, until paid, and the costs of this action, to be taxed by the clerk of the court.

"HENRY R. STARBUCK,
"*Judge Presiding.*"

J. W. Murray, witness for defendant, testified: "I was in defendant's employment. Tate told me to take out a warrant for the plaintiff for stating when he gave the mortgage of August, 1893, that there was no other mortgage on the crop, when in fact there was one. He gave me the mortgage to carry to the justice, Mr. Mitchell; I did so. I explained the case to the justice; he said he supposed it was perjury, but he would write down the definition of perjury in the complaint. The justice wrote the affidavit; I signed it, and swore to it.

'Squire R. L. Mitchell, witness for the defendant, testified: "Mr. J. W. Murray came to my house at 2 P. M., 8 May, 1894, and said Mr. Tate had sent him to get a warrant against Oakley for giving a mortgage and stating there was no other mortgage, when there was one. I told Murray that I had rather have counsel before I tried it, as I did not know what head it would come under and what the punishment would be. Murray said Tate wanted it tried the next day. I got my book and read a clause in it to Murray; he said he did not know whether it came under that head or not. I told him I would put that down in the affidavit, and also state the facts as he had stated them. I wrote it out that way, and he
(364) took the warrant to the officer that evening. The clause I read to Murray in the book was under the head of perjury, and that was why that word was used." (To all this evidence plaintiff objected.) "The mortgage was present and I read it over. The trial took place at Ridgeville next day, 9 May, 1894, at 2 P. M. I read the warrant in the presence of Tate, and he was sworn, and said that was his complaint. Sharpe testified that he read the mortgage to Oakley, and that Oakley did not state that there was a mortgage due to the Taylors. The matter investigated was Oakley's giving a mortgage and stating in the mortgage that it was the only lien. Oakley was bound over to the next term of court. Some time after that I received a note from Tate; did not think that it would be needed again; do not know where it is; when I got it I did not think it would ever be needed again; have not searched for it; I remember its contents." (Plaintiff objected to witness stating contents of note.) "Tate wrote that the matter had been amicably settled, and that if I had not returned the papers that I should not do so, and wanted it stopped, at as little cost as possible. I made return of my action."

Exhibit "B."

"Return of R. L. Mitchell, J. P., to August Term, 1894:

"NORTH CAROLINA—Caswell County.

Hightower Township.

"*To* S. B. ADAMS, *Clerk Superior Court:*

"The following is a list of criminal actions tried before me and finally disposed of since the last term of the Superior Court held in Yanceyville in April, 1894:

"1. State *v.* C. F. Oakley: The judgment of the court was that defendant was guilty of fraud, but the case was afterwards amicably settled between the parties, J. A. Tate and C. F. Oakley, by
(365) Mr. Oakley paying the debt that was claimed on the mortgaged property.

"2. State *v.* E. W. Oakley: The judgment of the court and the settlement between the parties were the same as in the first case. F. A. Tate paid the costs in both cases.

"I also send herewith the papers in the above cases.

"R. L. MITCHELL,
"Justice of the Peace, Hightower Township."

On cross-examination witness testified: "I think Tate was present at the trial when I read the warrant, and I asked him if that was his complaint, and he said it was. I made my return under the head of a fraud, because I found out after the trial the defendants were not guilty of perjury."

Upon the close of the evidence, and before going to the jury, counsel stated their contentions. Counsel for defendant contended that there was not sufficient evidence upon either the first or second issues to go to the jury, and orally asked the court to so hold. The court declined to so hold, and defendant excepted.

Counsel further contended that the defendant was not responsible for the error of the justice in his definition of "perjury," and that there was no evidence that the defendant had prosecuted such a charge, and the first issue should be answered "No."

His Honor stated that he agreed to the proposition that defendant could not be held responsible for the error committed by the justice, but declined to hold that there was no evidence that the defendant had prosecuted the plaintiff for perjury. Defendant excepted.

Upon the question, "Did the defendant prosecute the plaintiff?" the court charged, in part, as follows: "That the defendant could not be held responsible for any mistake made by the justice of the peace or by Murray in believing that the facts constituted the (366) offense of perjury; but if the defendant, after the warrant was issued, connected himself with and carried on the prosecution, then, if the jury were satisfied that the prosecution was for perjury, and malicious, they would answer the first issue, 'Yes.'" To this instruction defendant excepted.

There was no exception to the charge in submitting to the jury the questions of actual and punitive damages upon the third issue, except that the question of damages should not have been submitted, for the reason that the only charge in the complaint is that an accusation of perjury was made, and when the plaintiff failed to sustain that he was entitled to no damages whatever.

Verdict for plaintiff. Motion for new trial; overruled. Judgment. Appeal by defendant.

J. W. Graham for plaintiff.
J. A. Long for defendant.

FAIRCLOTH, C. J., after stating the case: It is clear that the defendant never intended or authorized a warrant to be issued against the plaintiff for perjury. This appears from the evidence of 'Squire Mitchell, and Murray, the defendant's agent. The facts stated in the affidavit do not constitute perjury. The justice was at a loss to determine the offense, but after looking in "his book," under the head of "perjury," he concluded that must be the offense, and so he filled up the warrant and proceeded. We think his Honor properly held that the defendant could not be held responsible for the error committed by the justice. This is the common-sense of the matter, and it was so expressly held in *McNeely v. Griskill,* 2 Blackford (Ind.), 259. The defendant specially asked his Honor to hold that "upon the whole of the evidence there is no sufficient evidence to go to the jury." This was declined. This requires us to examine the
(367) whole of the evidence. The court, after exculpating the defendant for the mistake of the justice, said to the jury: "But if the defendant, after the warrant was issued, connected himself with and carried on the prosecution, then, if the jury were satisfied that the prosecution was for perjury, and malicious, they would answer the first issue 'Yes.' " Without passing upon that part of the charge as a legal proposition, we find error on another ground. We fail to find any sufficient evidence to go to the jury on that question. The justice says that "the matter investigated before me was Oakley's giving a mortgage and stating in the mortgage that it was the only lien." It is true, he says, he read over the warrant and asked Tate if that was his complaint, and he answered that it was. This must have referred to the facts stated in the warrant instead of the charge of perjury. This view accords with his own testimony and that of Murray and the justice and the course of the proceeding and the justice's return, in which he says the defendant (plaintiff here) was guilty of fraud.

We think his Honor should have directed a verdict in favor of the defendant. The sufficiency of evidence to be submitted to a jury is stated in *Young v. R. R.,* 116 N. C., 932, 936. It is unnecessary to examine the other exceptions.

Reversed.

Cited: Durham v. Jones, 119 N. C., 273.

(368)

G. W. DAVISON ET AL. v. WEST OXFORD LAND COMPANY

DEPOSITION—OBJECTIONS TO—WAIVER—APPEARANCE.

Where it appeared that a party to an action, who objected to a deposition on the ground that the commission was not signed by the clerk and attested by the seal of the court, had appeared before the commissioner and attended the taking of the deposition, in response to notice of the time and place thereof; that the person to whom the commission was issued was a commissioner of affidavits for North Carolina, and that the witness was duly sworn and examined before him, and that no objection was entered to the taking of the deposition at the time: *Held,* that such general appearance was a waiver, and the exclusion of the deposition was error.

ACTION tried before *Greene, J.,* and a jury, at April Term, 1895, of GRANVILLE.

Before the trial was begun counsel for the defendant stated that they would object to the reading of the deposition of G. W. Davison, taken in the cause, on the ground that the commission issued to W. H. Raleigh, as commissioner, was neither signed by the clerk of the Superior Court, nor was the seal of said court affixed to the same; and by consent this matter was argued before his Honor, as if the objection was regularly taken on the trial, when the deposition should be offered. Plaintiffs' counsel contended that, as W. H. Raleigh was a commissioner of affidavits for State of North Carolina, residing in Baltimore, and the witness was duly sworn and examined, and notice had been given of time and place of taking said deposition, and as course had appeared for defendants, the objection could not be taken. The clerk had endorsed on the envelope containing said deposition, "opened by consent, subject to all legal exceptions."

His Honor sustained the objection of defendants, and plaintiffs excepted. (369)

There were various other exceptions taken during the trial, but not being passed on by the court, the reporter omits reference to them.

There was a verdict for the defendants, and from the judgment thereon the plaintiffs appealed.

A. J. Field and R. O. Burton for plaintiffs.
Graham & Graham contra.

CLARK, J. The court below excluded the deposition of G. W. Davison on the ground that the commission issued to W. H. Raleigh to take the same was not signed by the clerk and the seal of the court was not affixed to the commission. This objection would have been

valid if the defendant had not appeared when the deposition was taken, or, if appearing, had entered an objection on those grounds. But it appears that W. H. Raleigh was a commissioner of affidavits for North Carolina; that the witness was duly sworn and examined before him; that notice had been given of the time and place of taking the deposition, and that the defendant appeared by counsel at the examination. The commissioner having authority to take depositions (The Code, sec. 633), the appearance of the defendant without objection was a waiver of all irregularities in the commission. *Barnhardt v. Smith,* 86 N. C., 473, 479. A similar instance of waiver is where a summons is issued to another county, without seal, or where a clerk improperly issues a summons returnable to the Superior Court of another county, the appearance of the defendant without objection is a waiver of the irregularity (*Howerton v. Tate,* 66 N. C., 431; (370) *Moore v. R. R.,* 67 N. C., 209); or, if there is no summons served at all, or irregularly served, the general appearance of the defendant is a waiver of service and of all objections to the manner of making it. *Hinsdale v. Underwood,* 116 N. C., 593; *Wheeler v. Cobb,* 75 N. C., 21; *Roberts v. Allman,* 106 N. C., 391, and other cases cited in Clark's Code (2d Ed.), pp. 126, 145; *Cherry v. Lilly,* 113 N. C., 26, and other cases cited in Supplement to Clark's Code, p. 26. The error in the exclusion of the deposition necessitating a new trial, it is useless to pass upon the exceptions to the charge, since they will probably not arise on the next hearing.

Error.

Cited: McArter v. Rhea, 122 N. C., 616; *Willeford v. Bailey,* 132 N. C., 403; *Houston v. Lumber Co.,* 136 N. C., 329.

J. N. GORMAN & CO. v. DAVIS & GREGORY COMPANY ET AL.

SUBSCRIPTION TO CORPORATION—PARTNERSHIP—WITHDRAWAL—DORMANT PARTNERS, WITHDRAWAL OF—NOTICE OF WITHDRAWAL—LIABILITY FOR DEBTS SUBSEQUENTLY CONTRACTED.

1. One who holds himself out to the public as a member of a partnership is liable for debts contracted by it subsequent to his withdrawal and until notice of his withdrawal is given to the public; whereas, a dormant, or silent, partner need not give notice of his withdrawal to escape such liability.

2. Persons who subscribe to the stock of a proposed corporation and, on failure of the company to take any steps to incorporate, withdrew and received back the money they had paid in, were at most *dormant* partners of a business carried on by some members of the proposed corporation in its name, and are not liable for debts contracted after their withdrawal.

ACTION tried before *Starbuck, J.*, and a jury, at November Term, 1895, of GRANVILLE.

The plaintiffs contended that the defendants A. J. Hester, (371) Louis Hester, John Hester, W. S. Adcock and J. S. Cunningham and others were partners at the time of the creation of the debts sued on and liable therefor. The defendants denied the copartnership and the indebtedness. On the trial much evidence was offered, and the jury found the following special verdict:

The jury for their verdict find the facts as follows:

[For convenience of expression, the jury, in using the word "defendant" in this verdict, are to be understood as referring to and meaning the defendants named in the summons, other than W. A. Davis and N. A. Gregory and J. T. Yancy, it being admitted that said Davis & Gregory have not been served with process and that no complaint has been filed against said Yancey.]

"1. That in the spring of 1891 W. A. Davis and N. A. Gregory contemplated the formation of a corporation to engage in the business of dealing in leaf tobacco in Richmond, Va.

"2. That in June, 1891, at the solicitation of said Davis & Gregory, acting through their agent, J. G. Lunsford, the defendants signed a written instrument, which was in substance a subscription for stock in a company to be known as the Davis & Gregory Company, to be incorporated under the laws of Virginia, and the business of which was to be that of dealing in leaf tobacco, said instrument containing a stipulation that the liability of the members should be limited to the amount of stock subscribed.

"3. That said subscriptions were made under and in consequence of an agreement between said Davis & Gregory on the one hand and the defendants on the other, that the said company should be incorporated, and that the defendants should by the charter be exempted from personal liability; and that Davis & Gregory, as (372) a further inducement to said subscriptions, agreed with defendants Cunningham and Adcock to repay them the amounts paid in by them on their subscriptions, with good interest, whenever they might become dissatisfied with their investment; and agreed with the defendants A. J. Hester, L. C. Hester and John Hester to repay the amounts paid in by them on their subscriptions, whenever they might demand such repayment.

"4. That neither Davis nor Gregory nor the defendants agreed or intended that the defendants should in any way become connected with the business of the Davis & Gregory Company, except as stockholders in a company to be chartered as aforesaid.

"5. That neither Davis nor Gregory nor any of the defendants

made any attempt to call a meeting of the subscribers for the purpose of considering the formation of the corporation, nor made any attempt whatever to procure a corporate charter until August, 1894, when a corporation was chartered, known as the Davis & Gregory Company, in which said Gregory & Davis were corporators, but none of the defendants were stockholders in said corporation nor had anything to do with its formation.

"6. That in June, 1891, a business (dealing in leaf tobacco) was established and conducted in Richmond by Davis & Gregory, under the style of the 'Davis & Gregory Company,' using stationery with words appearing thereupon as appears on the paper marked 'Exhibit A' and made a part of this verdict.

"6½. That said business lost money from the start and throughout its existence.

"7. That the defendants knew a concern of that name was being conducted by Davis & Gregory, but believed it to be duly incorporated.

(373) "8. That the amount of stock subscribed for by the defendants was $100 each, on which $50 was paid to Davis & Gregory at the time of subscribing; that the amounts paid were used by Davis & Gregory in the business carried on as the Davis & Gregory Company, but the defendants had no knowledge that the money was being used in an unincorporated concern.

"9. That upon payment by the defendants of said amount, receipts were issued to them, a copy of which is made a part of this verdict, marked 'Exhibit B'; that no certificates of stock were ever issued to the defendants.

"10. That a few days before Davis & Gregory opened the business referred to, they abandoned the plan of organizing the corporation, to the stock of which the defendants had subscribed, and made arrangements with one Simpson to procure money with which to conduct said business.

"10½. That Davis & Gregory regarded themselves personally liable to the defendants for the return of the money paid in by them on their subscriptions.

"11. That in July, 1891, the defendant Adcock demanded of Davis & Gregory the return of his money, and they repaid him at once.

"12. That in September, 1891, the defendant Cunningham went to Richmond and demanded of Davis & Gregory his certificate of stock, and was told by them that they had abandoned the idea of effecting an incorporation; that Cunningham then demanded the return of his money, and they promised to refund it, and did so in the spring of 1892, with interest at about 10 per cent.

"13. That in the spring of 1892 W. A. Davis remitted to A. J. Hester (who in all matters herein mentioned acted for himself and as the agent of L. C. Hester and John Hester) $30, to be divided between him and L. C. and John Hester; that this money was accepted by Hester, under the belief that the Davis & Gregory (374) Company had been incorporated and that it was a dividend upon the stock.

"14. That Davis & Gregory received all commissions made by the Davis & Gregory Company in handling tobacco, and this money remitted to Hester was paid by Davis out of the commissions so received.

"15. That after receiving said remittances said Hester bought the stock of one Thomas, subscribed for under like conditions, paying $50 therefor.

"16. That about 1 March, 1894, said Hester, for himself and L. C. and John Hester, made a demand upon Davis & Gregory for the return of the money paid on subscription; that Davis promised to pay him that fall, stating he was unable to do so then; that at the time of making this demand Hester believed the Davis & Gregory Company to be incorporated, and his main reason for making the demand was that his investment was not paying well.

"17. That said Hester never made inquiry as to whether said Davis & Gregory Company was incorporated until a few days after making said demand, upon suggestion of J. A. Long, a creditor of said company; that Hester then wrote a letter (marked 'Exhibit C') to Davis, making inquiry, and received a reply (marked 'Exhibit D') assuring him that the money paid in by him had all along been regarded in the nature of a loan; that Hester then allowed his money to remain with Davis & Gregory, under the belief that it was a loan, and made no further demand for it until the spring of 1895.

"18. That in the years 1891 and 1892 one Thorpe, while soliciting tobacco for the Davis & Gregory Company, in the course of his business, but without the knowledge of the defendants, used the names of J. S. Cunningham and A. J. Hester in speaking to various farmers in the counties of Granville and Person, stating that (375) they were stockholders in the corporation, the said Thorpe believing it was incorporated.

"19. That the defendants were not held out or known in Virginia as being in any way connected with the concern of the Davis & Gregory Company.

"20. That apart from the acts and conduct of the defendants above mentioned, the defendants had no connection with the affairs of the Davis & Gregory Company; that they did not hold themselves out

nor authorize themselves to be held out as partners or as being in any way connected with the business of the Davis & Gregory Company, and were not to their knowledge so held out.

"21. That the plaintiffs lived and did business in Richmond, Va.; that they began business dealings with the Davis & Gregory Company at its opening.

"22. That the debts sued on were contracted in a course of mutual dealings between the plaintiffs and the Davis & Gregory Company, beginning 1 June, 1893, and extending to September, 1894; that in the course of this dealing the balance remained in favor of the Davis & Gregory Company till 15 June, 1894, at which date it turned in favor of the plaintiffs.

"23. That during the said dealings, and at the time of contracting the debts sued on, the plaintiffs had no knowledge or information that the defendants were then or had been in any way connected with the business or affairs of the Davis & Gregory Company.

"24. That the defendants live in the counties of Person and Granville, North Carolina.

"If upon the foregoing facts the court shall be of the opinion that the defendants or any of them are indebted to the plaintiffs, then the jury so find, and in the sum of $3,095.25, with interest at 6 per cent on $2,596.25 from 25 September, 1894, and on $500 from
(376) 29 February, 1895. If the court shall be of opinion that in law the defendants or any of them are not indebted to the plaintiffs, then the jury so find."

Upon the foregoing facts, the court being of opinion that the defendants Cunningham, Adcock, A. J. Hester, L. C. Hester and John Hester were not partners in the Davis & Gregory Company and that they are not indebted to the plaintiffs, the jury so find, and answer this issue "No"; and the court, being of opinion that upon said special verdict the plaintiff was not entitled to recover, rendered judgment for the said defendants, and plaintiffs appealed.

Fuller, Winston & Fuller and J. Crawford Biggs for plaintiffs.

W. W. Kitchin, Winstead & Brooks, Graham & Graham and Edwards & Royster for defendants.

CLARK, J. The defendants never entered into any partnership with Davis & Gregory, nor intended to, but merely subscribed to the capital stock of a proposed corporation. When the incorporation plan failed, the defendants, one after the other, demanded and received back the money they had paid towards the stock of the proposed corporation. If this made the defendants liable as *quasi* part-

ners with Davis & Gregory (which it is unnecessary to consider), still the defendants all drew out before the debts due the plaintiffs were contracted by Davis & Gregory (Hester turning his amount into a loan), and no possible liability could attach to the defendants for such debts. This is not the case where persons hold themselves out as partners, in which event they are liable till notice of their withdrawal is given, upon the ground that they are taken to have induced people to deal with the firm upon the faith of their responsibility. But this, taking the facts in the strongest possible (377) view for the plaintiffs, is the case of dormant partners (if partners at all) who draw out before the liability is incurred by the firm upon which action is brought. In such case no notice need be given of the withdrawal and no liability attaches to those withdrawing. These defendants never held themselves out as partners of Davis & Gregory and are not shown to have authorized any agent of that firm to represent them as such. These principles are so plain and applicable that it is unnecessary to consider in detail the multitudinous exceptions of the plaintiffs. We are satisfied that substantial justice has been administered. When the action was brought the plaintiffs must have excepted to prove an entirely different state of facts from that developed by the evidence. Upon the special verdict, judgment was properly rendered in favor of the defendants.

Affirmed.

MARTHA J. HALL v. THOMAS J. WALKER ET AL.

HUSBAND AND WIFE—ABANDONMENT OF WIFE BY HUSBAND—WIFE FREE TRADER BY ABANDONMENT OF HUSBAND—CONSTITUTIONALITY OF STATUTE.

1. There is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader, section 6 of Article X being intended to protect instead of disabling her.

2. Section 1832 of The Code, which provides that a woman whose husband shall abandon her or shall maliciously turn her out of doors shall be deemed a free trader, so far as to be competent to contract, etc., and to convey her personal and real estate without the assent of her husband, is not unconstitutional.

CONTROVERSY without action, heard before *Coble, J.*, at (378) Spring Term, 1896, of ORANGE.

The agreed statement of facts was as follows:

Martha J. Hall, Thomas J. Walker and James B. Warren, parties to a question in difference, which might be the subject of a civil action, agree upon the following facts, upon which the controversy depends,

and submit the same to *Coble, J.*, riding the Fifth Judicial District, as follows, to-wit:

On 11 August, 1894, Martha J. Hall, in writing, leased her farm, containing 155¼ acres, in Orange County, North Carolina, near University Station, adjoining B. N. Duke, Mrs. McCaulay and others, for the term of three years, to Thomas J. Walker and James B. Warren, and in exchange for the said lease of said land, said parties leased to Martha J. Hall for a like period a house and lot in Durham city, on Morgan Street, where she and her family now reside, she at once taking possession of said city lot and they taking possession of the said farm, under said contract of lease; that among other provisions of said lease was the following: "And said parties of the first part hereby agree and bind themselves and their heirs that at any time during the continuance of this contract, upon the delivery of a good and sufficient deed to them conveying to them and their heirs or assigns the land first above-mentioned as having been leased to them by said party of the second part, they will make and execute or cause to be made and executed to said party of the second part and her heirs and assigns a good and sufficient deed, with the usual covenants of warranty, conveying to her and her heirs the land
(379) herein particularly described and hereby leased to her." That said Martha J. Hall is very desirous of availing herself of the above provision and of exchanging her farm for said house and lot in Durham; that her farm is worth ten or eleven hundred dollars and said house and lot is worth about the same; that the said 155¼ acres is her own individual and separate estate, heretofore acquired by her; that she has executed and tendered to said Thomas J. Walker and James B. Warren a deed in fee to said 155¼ acres, with the usual covenants of warranty, said deed dated 22 February, 1896, and has demanded of them a deed in fee to said house and lot in Durham. Said Walker and Warren decline and refuse to accept said deed, for this reason, and for this alone: said Martha J. Hall is a married woman and her husband has not joined in the execution of said deed. The facts relative to said matters are these: Martha J. Hall was deserted and abondened by her husband, Thomas J. Hall, five years ago; he has since said time been continuously out of the State, nor has he since then in any way contributed to her support or to that of her family, nor has she seen him or heard of him or from him.

Said Martha J. Hall contends that she has complied with her part of her contract, as provided by law (section 1832 of The Code), and that she can make a good and legal title to said land without the assent of her husband, if he be alive, and that she is entitled to have specific performance of the said contract by said Walker and Warren, and

that she is entitled to a deed to said Durham city lot. The said Walker and Warren contend the contrary, and refuse and decline to execute a deed for said Durham city lot to her, under the circumstances.

His Honor adjudged "that section 1832 of The Code is constitutional, and that the defendants Thomas J. Walker and James B. Warren do execute and deliver to the plaintiff, Martha J. (380) Hall, a deed to the house and lot in Durham, N. C., on Morgan Street, where she now resides, with such covenants and conditions as are contained in the contract between the parties, dated 11 August, 1894, and pay the costs of this proceeding."

From this judgment Walker and Warren appealed.

D. T. Edwards for plaintiff.
Fuller, Winston & Fuller for defendants.

FAIRCLOTH, C. J. The Code, sec. 1832: "Every woman whose husband shall abandon her or shall maliciously turn her out of doors shall be deemed a free trader, so far as to be competent to contract and be contracted with and to bind her separate property, * * * and she shall have power to convey her personal estate and her real estate without assent of her husband."

In this controversy without action the sole question is whether the above section is constitutional. The plaintiff's husband five years ago deserted and abandoned her, and has been continuously out of the State and has not been seen or heard from by her, and he has in no way contributed to the support of herself or family.

At common law a wife and her husband could not by deed convey title to her own land, nor in any other mode, except by uniting with him in levying a fine. But our statute prescribes a more simple method, to-wit, by deed and private examination, which must be strictly according to the terms of the statute.

There is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader. Article X, section 6, was not intended to disable, but to protect her.

In *Troughton v. Hill,* 3 N. C., 406, it was held that when the husband became an *alien* the wife became a *feme sole* for (381) the purpose of contracting, and might acquire and transfer property. Chancellor Kent, referring to this subject, said: "Though the husband be not an alien, yet if he deserts his wife and resides abroad permanently the necessity that the wife should be competent to obtain credit and acquire and recover property and act as a *feme sole* exists in full force," and that the "distinction between husbands who are aliens and who are not aliens cannot long be maintained in prac-

tice, because there is no solid foundation in principle for the distinction." 2 Kent Com., 157. It would be a distressing rule of law if the wife, because of her husband's neglect and desertion, could not control her separate property for the support and comfort of herself and family. It is her property. Why may she not sell or exchange it?

Affirmed.

Cited: Brown v. Brown, 121 N. C., 10, 11; *Bazemore v. Mountain,* 126 N. C., 318; *Finger v. Hunter,* 130 N. C., 531; *Smith v. Bruton,* 137 N. C., 81; *Vandiford v. Humphrey,* 139 N. C., 67; *Witty v. Barham,* 147 N. C., 482; *Scott v. Ferguson,* 152 N. C., 348; *Council v. Pridgen,* 153 N. C., 450, 452; *Bachelor v. Norris,* 166 N. C., 508.

MAGGIE ALEXANDER v. JAMES NORWOOD, ADMINISTRATOR OF A. PRATT

PRACTICE—PENDENCY OF ANOTHER ACTION—ABATEMENT.

1. Where an action is instituted, and it appears to the court by plea, answer or demurrer that there is another action pending between the same parties and substantially on the same subject-matter, and that all the material allegations and rights can be determined therein, such action will be dismissed.

2. In such case the plaintiff has no election to litigate in the one or to bring another action, and the parties cannot, even by consent, give the court jurisdiction.

3. Where the pendency of such other action appears in the complaint, advantage must be taken of it by demurrer; otherwise, by answer.

(382) PROCEEDING begun by petition before the Clerk of the Superior Court of Orange, by the heirs and next of kin of Alexander Pratt, deceased, against the defendant, his administrator, for the purpose of having the defendant increase his bond and to render an account and distribute the funds of the estate, heard by *Starbuck, J.,* at Fall Term, 1895, of ORANGE, on appeal from the judgment of the clerk sustaining the demurrer of defendant.

His Honor overruled the clerk's judgment, and defendant appealed.

The pertinent facts appear in the opinion of *Chief Justice Faircloth.*

C. D. Turner for plaintiff.
Graham & Graham for defendant.

FAIRCLOTH, C. J. The purpose of The Code system is to avoid a multiplicity of actions by requiring litigating parties to try and dis-

pose of all questions between them on the same subject-matter in one action. Where an action is instituted, and it appears to the court by plea, answer or demurrer that there is another action pending between the same parties and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed. The plaintiff has no election to litigate in the one or bring another action (*Rogers v. Holt,* 62 N. C., 108), and the court will, *ex mero motu,* dismiss the second action, as the parties, even by consent, cannot give the court jurisdiction. *Long v. Jarratt,* 94 N. C., 443.

In the case before us it appears from the complaint that there is another action pending in the same court between the same parties (reversed), in which the right of the administrator to sell lands for assets is the main question, in which the defendants therein deny the right to sell, on the ground that there is sufficient (383) funds already in the hands of the administrator to pay all debts and charges. The complaint in this action refers to the former action, which reference in effect incorporates the same into this case. The present action demands that the administrator distribute to plaintiffs their shares of the estate. This involves an account, which can be had in the first action. Where the pendency of the first action appears in the complaint the question is properly raised by demurrer. If it does not so appear, then the defense must be made by answer. The judgment overruling the demurrer is erroneous.

Cited: Range Co. v. Carver, ante, 341; *Henry v. Hilliard,* 120 N. C., 486; *Comrs. v. Call,* 123 N. C., 329; *Emry v. Chappell,* 148 N. C., 330.

ANNISTON NATIONAL BANK v. SCHOOL COMMITTEE OF THE TOWN OF DURHAM

PRINCIPAL AND AGENT—NOTICE TO AGENT—LIABILITY OF PRINCIPAL—ATTORNEY AND CLIENT.

1. Notice to an agent is notice to the principal, except where the agent is acting for himself in a transaction with the principal where his interest is in opposition to the interest of his principal.

2. Where, in an action against a school committee by the assignee of a contract to recover the balance due thereon, the defense was that the balance had been paid to an attaching creditor of the assignor, and it appeared that some months prior to the garnishment the assignor had notified the chairman of the defendant committee of the assignment of the contract to plaintiff: *Held,* that the chairman of the committee being its agent, the notice given to him was sufficient to fix the defendant's liability to the assignee.

3. The fact that the chairman of the defendant committee was also attorney for the attaching creditor of plaintiff's assignor in the garnishment proceedings neither relieved him from his duty to his principal in giving it information which he received months before the garnishment, nor the principal from the burden of the constructive notice it had through its agent.

(384) ACTION tried before *Starbuck, J.*, and a jury, at October Term, 1895, of DURHAM.

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

In deference to the opinion of his Honor, who intimated at the close of the testimony that the plaintiff could not recover, the plaintiff submitted to a nonsuit and appealed.

Manning & Foushee for plaintiff.
Guthrie & Guthrie for defendant.

FURCHES, J. This is an action by plaintiff to recover a debt originally due from defendant to the Ruttan Manufacturing Company and by it assigned to the plaintiff; and the first matter that demands our attention is a motion of defendant to dismiss the appeal, for the reason that the record has not been printed, as the rules of this Court require. Upon examination of the printed record we find that it is not as complete as it should have been for our convenience; but there seems to be nothing omitted that is required by the rules, unless it be that plaintiff has failed to print some exhibit or other part of the record referred to in the case on appeal which is necessary for us to examine in considering it. *Wiley v. Mining Co.*, 117 N. C., 489. We do not find this the case, and the motion is denied.

It is not denied that the defendants owed the Ruttan Company the debt sued on, but the defense is that C. C. Taylor, to whom the Ruttan Company owed a debt, brought suit against that (385) company, and on 4 March, 1893, attached and garnisheed this debt due the Ruttan Company and recovered judgment thereon; and in that action this debt was condemned and paid to Taylor under the order of the court. Plaintiff, not denying this, alleges that defendant had notice that the Ruttan Company had assigned this debt to plaintiff before the attachment proceeding, and garnishment was served on the defendant; and this is the only question presented by the appeal for determination.

W. A. Guthrie was a member and chairman of the school committee, and he and O. F. Tomlinson and C. C. Taylor composed the building committee and made the contract with the Ruttan Company, out of which this indebtedness arose. The plaintiff offered in evidence the

following assignment, endorsed upon the contract: "Anniston, Ala., 11 August, 1892. For value received, we hereby transfer and assign the within contract to the Anniston National Bank." (Signed by the Ruttan Company.) The plaintiff, for the purpose of showing notice of the assignment, introduced in evidence the following letter, dated at Anniston, 28 September, 1892, and addressed to W. A. Guthrie, Durham, N. C.: "Dear Sir: We have received your statement, showing a balance still due on our contract with the graded school committee of $331.11, and our superintendent writes us you do not wish to pay that until cold weather. This would be satisfactory to us, but we have assigned the balance to our bank here, with the statement that it would be due on our completing our work. Now, if you desire to retain this amount till cold weather, and will pay 8 per cent interest on the same from date of completion till paid—say not later than 15 November—we can probably arrange with them to hold it till then. Our superintendent (Mr. Stapel) states that he gave your committee a test which ought to satisfy them, and that (386) they were much pleased. The writer begs to thank you for all assistance you have rendered us, and hopes that you will look at this matter fairly and not make us pay interest for money which is due us. We hope to soon be 'out of the woods.' With kind regards of the writer," etc. (Signed by Ruttan Manufacturing Company, South; M. W. Hammond, secretary and treasurer.)

This letter was a part of a correspondence between the Ruttan Company and Mr. Guthrie about the business transactions of the Ruttan Company with the defendant school committee, out of which this indebtedness grew, and in which Mr. Guthrie was informed that this debt had been assigned to the Anniston bank. This letter antedates the attachment about five months, and if it was notice to defendant the attachment is no defense, and plaintiff is entitled to recover.

The general rule is that notice to the agent is notice to the principal; and Mr. Guthrie being the agent of defendant, notice to him was notice to the defendant. *Bank v. Burgwyn,* 110 N. C., 267. The exception to this general rule is where the agent is acting for himself in a transaction with the principal, in which his interest is in antagonism to that of the principal. Then the presumption of knowledge does not apply, as it cannot be presumed that the agent would give information which would be against his own interest. *Bank v. Burgwyn, supra,* bottom of p. 274. Mr. Guthrie, in this matter, was not acting for himself in a transaction with his principal where his interest was in opposition to the interest of his principal. And the letter of 28 September, 1892, quoted in this opinion, was notice to the defendant.

It was contended on the argument that Mr. Guthrie, being the attorney of Taylor, had no right to communicate information
(387) received by him from Taylor, it being in evidence that Taylor told him, when he retained him to bring the action and attachment proceeding, that the debt had been assigned to the plaintiff. We certainly do not intend to decide, or to say anything that can be construed as deciding, that an attorney should use or communicate to others to be used against his client any communication he had received in the confidential relation of attorney and client. Mr. Guthrie was in this case substantially the defendant, and as such, on 4 March, 1893, the day the attachment proceeding was taken out, accepted service of the same, signing his name "Wm. A. Guthrie, chairman." Whether this is a case where the confidential relation existing between attorney and client should apply, or not, we will not discuss or decide, as it is not necessary for us to do so. But his becoming Taylor's attorney in March, 1893, did not relieve him from his duty to his principal in giving them information that he had received five months before that time; nor does it relieve the defendant from the burden of the constructive notice it had through the notice given to Mr. Guthrie in September, 1892.

There is error, and the judgment of nonsuit must be set aside and a new trial awarded.

Error. New Trial.

Cited: Shields v. Durham, post, 455; *Bank v. School,* 121 N. C., 108; *Neal v. Hardware Co.,* 122 N. C., 106; *Britt v. Penny,* 157 N. C., 114; *Corporation Commission v. Bank,* 164 N. C., 358; *Miller v. Tel. Co.,* 167 N. C., 316.

(388)

E. W. ATWATER v. G. C. FARTHING

ACCOMMODATION ENDORSERS—COSURETIES—CONTRIBUTION.

Where A endorsed a note for the maker, and subsequently, but before it was discounted, F endorsed it, and A paid the note: *Held,* that F was a cosurety, and the doctrine of contribution applies for A's benefit.

ACTION heard before *Starbuck, J.,* at October Term, 1895, of DURHAM, on appeal from a judgment rendered by a justice of the peace.

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

There was judgment for the plaintiff, and defendant appealed.

Shepherd, Manning & Foushee for plaintiff.

Fuller, Winston & Fuller for defendant.

FURCHES, J. R. H. Atwater, wishing to borrow money, drew a note for $250, payable to J. F. Slaughter, Jr., cashier, and the plaintiff, E. W. Atwater, and the defendant, G. C. Farthing, endorsed the same for the accommodation of the principal, R. H. Atwater, and he procured it to be discounted at the National Bank of Durham. The plaintiff endorsed this note some days before the defendant did, but both endorsed it before it was discounted. The plaintiff afterwards paid the balance of this note, amounting to about $185; and the principal, R. H. Atwater, being insolvent and having left the State, the plaintiff demanded of the defendant contribution of one-half of the amount he had paid, which was refused, and he brings this action to recover the same.

This case is governed by *Daniel v. McRae,* 9 N. C., 590; and *Dawson v. Pettway,* 20 N. C., 531. There are a number of other cases to the same effect, but these are the leading cases, and (389) we do not care to encumber this opinion with other authorities.

It was admitted by the learned counsel who argued for the defendant that *Daniel v. McRae, supra,* was against him. But he contended that this opinion was not supported by principle and was in conflict with the adjudged cases of nearly every State of the Union, and that it had been severely criticised by this Court. But whether it was put on sound business principles or not (and we do not say that it was not), and whether it has been criticised or not (and we must admit that it has been), it has stood for itself since 1823; and although it was criticised by *Gaston, J.,* delivering the opinion of the Court in *Dawson v. Pettway, supra,* in 1839, he then said it had been too long the recognized law of the State to be reversed, even admitting that the reasoning upon which it was founded was not sound. And if it had been the recognized law in 1839 for too great length of time to be changed, how much greater is that reason now, after a period of more than fifty years since that opinion was rendered? According to this opinion, the defendants were cosureties and subject to the doctrine of contribution. We can add nothing to the argument contained in these cases, and we do not propose to reoccupy this field of discussion, exhausted by *Judge Henderson* and *Judge Gaston* more than fifty years ago. There is no error and the judgment is

Affirmed.

Cited: Shuford v. Cook, 164 N. C., 50.

(390)

BALLARD AND WILY, TRUSTEES OF B. L. DUKE, v. LELIA R. GREEN, ADMINISTRATRIX OF LUCIUS GREEN

ILLEGAL CONSIDERATION—CONTRACTS—GAMBLING CONTRACTS.

Where one lends money to another to pay losses incurred in speculation in "futures," it may be recovered, provided the lender was not connected directly or indirectly in the speculation.

ACTION tried before *Coble, J.*, and a jury, at January Term, 1896, of DURHAM.

The plaintiffs, as trustees for B. L. Duke, sued to recover from the defendant, as administratrix of Lucius Green, the sum of $14,158.65.

The defendant answered that the consideration of the contract under which the balance was alleged to be due was illegal, being for money lent to carry on speculation in futures. The jury, under the instructions of his Honor, found that, while the larger part of the account was tainted by the illegality alleged, the sum of $3,000 had been loaned by the trustor of plaintiffs independently of any connection that he, the trustor, had with the speculations. Judgment was rendered for plaintiff for $3,000, and defendant appealed.

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

Fuller, Winston & Fuller for plaintiffs.
Manning & Foushee for defendant.

FAIRCLOTH, C. J. The plaintiffs institute this action, and allege that their assignor, B. L. Duke, loaned the defendant's intestate a large sum of money, and demands judgment accordingly. The defendant admits that the assignor and her intestate were en-
(391) gaged in much speculation in products, usually called "futures" (dignified or nicknamed in the account as "adventure account"), and avers that these transactions were utterly void, according to Laws 1889, ch. 221, and pleads the same in defense to this action. Two issues were submitted to the jury:

1. "Was the consideration of the contract sued upon in this action, or any part thereof, money paid for losses in speculating in cotton or other articles mentioned in the statute, commonly called futures? If so, for how much of the amounts claimed by plaintiffs?" Answer: "Eleven thousand one hundred and fifty-eight dollars and sixty-five cents, not recoverable."

2. "How much does the defendant owe the plaintiff on lawful contracts?" Answer: "Three thousand dollars, recoverable."

Only one witness was examined, who was bookkeeper for Duke, and the witness produced an itemized account, which was introduced as evidence by defendant. The witness testified that the $3,000 allowed by the jury had no connection with and was no part of the speculative transactions; that that item was a loan of money paid by a check on Clews & Co., and that the speculations were with Daniel O'Dell & Co., of New York. The defendant made her exceptions to the evidence unimportant by introducing the paper-writing to which they referred. The third prayer for instructions was in substance given in the charge. The fifth exception must be overruled. It raises the question of "proper evidence other than any written evidence thereof" required by said act (section 2). We need not trouble ourselves with that question in this case as the witness says "the $3,000 item that I have been speaking of, I have recollection of, independently of this paper." His Honor instructed the jury that the burden is on the plaintiffs to show in what amount the defendant is indebted to them, and that the contracts sued on are lawful in their nature and purposes; and that if they failed to do so they cannot recover; also, that if said Duke & Green were engaged in any of said (392) speculations, and the former advanced money to pay losses of the latter, or was directly or remotely connected in any way whatever with said speculations, and that the contract sued on was based on such consideration, it was unlawful under the statute. On the other hand, if Duke was no party to such dealings and advanced no money to anyone directly or indirectly, to pay Green's losses, or if he advanced money as *loans* to Green at his request, which was to pay Green's losses, then such loan or advancement was a lawful contract, and plaintiff is entitled to recover money so loaned. This means, if the jury believed that Duke loaned the money and had no connection with the speculations, that it was a valid contract and plaintiff would be entitled to recover. *Williams v. Carr,* 80 N. C., 294. The fourth and sixth prayers for instruction, and the exceptions to the charge, are pertinent on the main question argued in this Court, to-wit, can a contract be enforced when a part of the consideration is illegal and a part is legal and valid? The question is scarcely presented, as the only witness examined testified that the item recovered was a separate transaction and had no connection with the illegal one; and we may assume that the jury so decided, as they ignored the entire account, containing vicious and valid items, as testified to by the witness. As the question has been long since settled, we need only refer to the authority. In *Morris v. Pearson,* 79 N. C., 253, all the cases decided

by this Court and other authorities are collected and carefully reviewed, overruling *Stone v. Marshall,* 52 N. C., 300, and the rule declared in *Morris v. Pearson, supra,* still prevails. 2 Chitty on Contracts, 973. We see no error.

Affirmed.

Cited: Burrus v. Witcover, 158 N. C., 387.

(393)

LOUIS KOOTZ v. ABE TUVIAN

PARTNERSHIP, WHAT CONSTITUTES—SHARING PROFITS—PRESUMPTION.

An agreement between two parties to share the profits of a business is, *inter se, prima facie* proof only of partnership, which may be rebutted by evidence of a contrary intent of the parties.

ACTION tried before *Starbuck, J.,* and a jury, at October Term, 1895, of DURHAM.

The facts sufficiently appear in the opinion of *Chief Justice Faircloth.*

There was judgment for the plaintiff, and defendant appealed.

J. S. Manning and Boone, Merritt & Bryant for plaintiff.
Fuller, Winston & Fuller and W. A. Guthrie for defendant.

FAIRCLOTH, C. J. This is an action for possession of merchandise goods. The plaintiff claims to be the sole owner, and that defendant was employed to attend to the business, as a clerk, and to receive for his services one-half of the net profits. The defendant contends that they were partners, and that one partner cannot maintain, for possession of the partnership property, an action against the other partner. The sole question is, were they partners? If so, the plaintiff cannot recover; if not, he is entitled to recover.

Two issues were submitted:

1. "Is the plaintiff the owner of and entitled to the possession of the goods sued for?" Answer: "Yes."

(394) 2. "What is the value thereof?" Answer: "One thousand and eighty-eight dollars."

Each party introduced evidence tending to establish his view.

His Honor, after defining a partnership to the jury and explaining the rights and powers of partners, charged them that "An agreement to share the profits of a business is the ordinary test of a partnership, and makes a *prima facie* case of partnership between the

persons making such agreement; and you are instructed that, it being admitted that the plaintiff and defendant agreed to divide the profits, a presumption is raised that they were partners in the business, and the burden rests upon the plaintiff to rebut this presumption by showing that the relationship in which he and the defendant agreed to enter was not that of partners, but that of employer and employee, and you will consider all the evidence and say whether or not it is sufficient to overcome this presumption and satisfy you that Tuvian was merely the clerk of Kootz." He also charged that if in the light of all the evidence the jury were not satisfied that the presumption raised in this case had been overcome, they would answer the first issue "No." The exceptions to evidence, the prayers for instruction, and exceptions to the charge, and the judgment, taken as a whole, point to and involve nothing more than the correctness of the charge as given. A contract to engage in business and share the profits and losses is the hightest test of a partnership. A contract to engage in business, one party to furnish the capital and the other the labor and superintendence, is *prima facie* a partnership, subject to proof of other circumstances and the intention of the parties. The proof and intention go to the jury to find and to say how the facts are, under instructions of the court. Departing somewhat from the ancient rule, it is now generally held in this country that if the jury shall be satisfied from the evidence that one of the contracting (395) parties agreed to receive one-half of the profits for his services and attention, and that such was the intention of the parties, then the *prima facie* case is removed and there is no partnership. This is the present doctrine in this State. *Mauney v. Coit,* 86 N. C., 463; *Fertilizer Co. v. Reams,* 105 N. C., 296. The same rule prevails in several of the States. *Cassidy v. Hall,* 97 N. Y., 159; *Beecher v. Bush,* 45 Mich., 188; 17 Am. and Eng. Enc., 185, note; *Berthold v. Goldsmith,* 24 U. S., 536. We have quoted a portion of the charge, which we think is the correct rule between the parties *inter se,* there being no question raised by creditors or third parties.

Affirmed.

Cited: Webb v. Hicks, 123 N. C., 247; *Lance v. Butler,* 135 N. C., 422.

O. S. CAUSEY v. EMPIRE PLAID MILLS

PRACTICE—APPEAL—DISMISSAL FOR FAILURE TO PRINT JUDGMENT—REINSTATEMENT.

Rule of Court No. 28, requiring the judgment to be printed in every appeal, will not be enforced when the record was printed before its adoption, and in a case where the judgment appealed from was simply that plaintiff take nothing by his writ.

MOTION to reinstate appeal, dismissed for failure to print the judgment below as a part of the record.

L. M. Scott and Shaw & Scales for plaintiff.
Fuller, Winston & Fuller contra.

MONTGOMERY, J. The appeal was dismissed for a failure on the part of the appellant to comply with Rule 28. The printing
(396) was done before the amendment requiring the judgment in all cases to be printed was made the rule. Before the amendment it would not have been necessary to print as a part of the case on appeal a judgment like the one in this case. The rule required 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." Upon the response of the jury that the plaintiff was not the owner and entitled to the possession of the property claimed in the complaint, there was a simple judgment that the plaintiff take nothing by his writ and be taxed with the costs of the action. To determine the matter raised on the appeal, the inspection of the judgment would not be neccessary. In *Wiley v. Mining Co.*, 117 N. C., 489, the judgment was such a one as was required to be printed before Rule 28 was amended. It covered five pages of manuscript, and one of the exceptions of the appellant read: "For that the said report and judgment based thereon do not properly regard the rights of the minority stockholders; for other reasons appearing on the face of said judgment."

For the reasons above set forth, the petition of the appellant in this case to reinstate the appeal is granted.

Motion Allowed.

(397)

JOHN C. PASS v. A. L. BROOKS, TRUSTEE

DEED OF TRUST—SALE UNDER DEED OF TRUST—PAYMENT OF DEBT BEFORE SALE BY TRUSTEE—TRUSTEE'S COMMISSIONS.

Where a deed of trust provided that, in case of sale thereunder, the trutsee should receive 5 per cent commission on the sale as a compensation for making the sale, and also that if the grantor should discharge the debt before the sale the land should be reconveyed to him; and the trustee advertised the sale, but before sale day the trustor, with the knowledge and consent of the trustee, paid off the debt and interest and the expense of advertisement and demanded his bond and trust deed: *Held,* that the debt having been paid, the trustee was not entitled to commissions.

ACTION tried before *Starbuck, J.,* a jury trial being waived, at January (Special) Term, 1896, of PERSON, upon an agreed state of facts, which were substantially as follows:

The plaintiff executed a deed to defendant in trust to secure a debt of $4,000, with power to sell upon default in payment of the bond at maturity, after advertising as prescribed in the deed, and upon sale to make title and apply the proceeds, "first retaining 5 per cent commission on the sale of the whole of said land as a compensation for making such sale, out of the proceeds of such sale," with a provision for reconveyance if the debt should be paid off by the plaintiff before such sale. Default was made and the defendant advertised. The plaintiff, before sale day, with the knowledge and consent of the trustee, paid the debt, interest and cost of advertising the sale, and demanded his bond and deed of trust, which was refused, on the ground that his commissioners were not paid. The de- (398) fendant claimed 5 per cent commissions on $4,017.77 and the right to sell for his commissions. He was enjoined from selling and ordered to reconvey, the court holding that he was not entitled to the commissions named in the deed. Defendant appealed.

Boone, Merritt & Bryant for plaintiff.

W. W. Kitchin, J. W. Graham and Shepherd & Busbee for defendant.

FAIRCLOTH, C. J. The sole question is whether the trustee is entitled to 5 per cent commissions, according to the agreement set out in the deed. We think he is not. The contract was that he should have 5 per cent for the sale of the land for making such sale, out of the proceeds of such sale. No such sale was had, by reason of the debtor having paid the debt, interest and cost of advertising before sale day, as was stipulated in the deed he might do. The condition on which

the commissions were to become due has not been performed, and although it was prevented by the plaintiff it was his right and duty to pay off his debt at his pleasure, and it was contemplated by the express terms of the deed that he could do so. Executors, guardians and administrators are allowed commissions by statute. At common law a sheriff could not demand commissions, although the debtor paid the creditor the amount of the judgment after he had received the execution and made his levy. He was allowed to do so at first under the act of 1784, now The Code, sec. 3752. There is no similar statute as to trustees. Courts may make such reasonable allowance to trustees as seems proper, under the circumstances, when they see fit to do so. The rule was stated in *Boyd v. Hawkins,* 17 N. C., 336, to be "*a just allowance* for time, labor, services and expenses, under all the circumstances that may be shown before a master." The
(399) present case is distinguishable from *Cannon v. McCape,* 114 N. C., 580, by the terms of the contract in the two cases.

Affirmed.

Cited: Smith v. Frazier, 119 N. C., 158; *Fry v. Graham,* 122 N. C., 775; *Whitaker v. Guano Co.,* 123 N. C., 369; *Turner v. Boger,* 126 N. C., 303.

J. T. BRADSHER v. LAVINIA HIGHTOWER

ISSUES—MORTGAGOR AND MORTGAGEE—VENDOR AND VENDEE—ADVERSE POSSESSION—BURDEN OF PROOF—BONA FIDE PURCHASER.

1. It is not error to refuse to submit an issue tendered, when those submitted by the court are sufficient to admit evidence of their several contentions and to meet the merits of the issues raised by the pleadings.

2. One who holds possession of land under a bond for title does not hold adversely to his vendor, in the absence of some hostile act on the part of the vendee under a claim of right, with intent to assert such right against the vendor.

3. In such case the burden of proving adverse possession is on the vendee.

4. A devisee of land given as a bounty by a testator is not a purchaser for value, but takes only the interest of the testator, subject to all equities.

ACTION on a bond for title to land, brought on the ground that the defendant devisee of the vendee had failed to pay the purchase money, tried before *Starbuck, J.,* and a jury, at August Term, 1895, of CASWELL.

On the pleadings filed the following issues were tendered by the plaintiff:

1. "Did the testator of defendant contract to purchase the land described in the complaint from the plaintiff for the (400) sum of $210?"

2. "Has the said purchase money been paid? If not, how much is due?"

3. "Is the action of plaintiff barred by the statute of limitations?"

Issues tendered by the defendant:

1. "Was the deed of Mary B. Johnston to the plaintiff, dated 14 February, 1879, executed by her under false and fraudulent representations by the plaintiff that said deed was a mortgage to secure the payment of $210 that day loaned her by plaintiff?"

2. "Has the defendant been in the actual adverse possession of the land described in the complaint, under known metes and bounds, under color of title, for seven years prior to the issuing of the summons in this action?"

3. "Is plaintiff's claim barred by the statute of limitations?"

To the refusal of the court to submit the second issue tendered by the defendant the defendant excepted, the court holding that the issue was embraced in the fifth issue submitted. His Honor submitted the following as the issues, to which there was no objection:

1. "Was the deed of Mary B. Johnston to the plaintiff, dated 14 February, 1879, executed by her under the false and fraudulent representation of the plaintiff that said deed was a mortgage to secure the payment of $210 that day loaned her by plaintiff?" Answer: "No."

2. "Did the testator of the defendant contract to purchase the land described in the complaint from the plaintiff for the sum of $210?" Answer: "Yes."

4. "Has said purchase money been paid, and if not, how much is due?" Answer: "No; due, $210, with interest from 13 February, 1880."

5. "Is the action of plaintiff barred by the statute of limitations?" Answer: "No."

6. "Was defendant induced by the fraudulent representations of the plaintiff to enter into said contract?" Answer: "No."

Upon the close of the evidence the defendant tendered the following issue: "Was the deed of 14 February, 1879, and the obligation of the same date, intended by the parties to be a (401) mortgage to secure the payment of $210 that day loaned by plaintiff? His Honor refused to submit the issue, and the defendant excepted.

The plaintiff, in order to maintain his contention, offered the following evidence:

1. A deed executed by Mary B. Johnston, dated 14 February, 1879, proven 2 January, 1881, and recorded 21 November, 1885, being an absolute conveyance to J. T. Bradsher in fee.

2. R. P. Smith, attesting witness, introduced by plaintiff, testified that he was the subscribing witness to the deed and the contract to convey, both dated 14 February, 1879, which said contract is in the following words:

"NORTH CAROLINA—Caswell County.

Whereas J. T. Bradsher sold a certain tract of land to Mary B. Johnston, being the land she now lives on, containing by estimation 120 acres, more or less, I, J. T. Bradsher, bind and obligate myself in the sum of $350 to make her a good title to the land mentioned above, when she pays the principal money, being $210, with interest at 8 per cent, and taxes, and all other costs which may accrue, etc., on or before 1 January, 1881; and if she fails to comply with the above obligation it will be null and void, and otherwise it will be in full force and effect.

"Whereunto I set my hand and seal, this 14 February, 1879.

"JAMES T. BRADSHER. [Seal.]

"Witness: R. P. SMITH."

The witness further testified that at the time of the signing of the deed Mary B. Johnston was old and that she made the mark to the deed; that witness did not know whether she could write; that witness was sent for to witness the paper; that Bradsher loaned Mary
(402) B. Johnston $210 to finish paying for one-half of the land which she had first bought at $350; that Bradsher took an absolute deed as security and executed to Mary B. Johnston the bond to make title; that Bradsher was never in the possession, but that Mary B. Johnston was then in actual possession of it, and that her daughter, the defendant, had been in actual possession ever since her death. "Before this suit was brought, the plaintiff sent for me. He said he did not wish to throw the defendant out of the land, and asked me to see if defendant would borrow money from me and pay the plaintiff and give a mortgage on the land to secure me." Witness had no money to lend, and declined to do this. The land was worth at the date of the deed $600. Mary B. Johnston lived about two years after the deed was made. The plaintiff never exercised any control over the land or had it in possession. "Mrs. Johnston sent for me to witness the execution of the papers, and I did so. After Mrs. John-

ston died I was requested by the defendant to look over her papers, and found the contract of sale and advised defendant to take care of it; that it was the contract to reconvey." Defendant told witness some six or seven years ago that plaintiff objected to her selling timber from the land, and she complained of his objection, but afterwards sold timber.

The plaintiff here rested his case, and the defendant offered the following evidence:

1. Receipt for $16.79, dated 23 February, 1880.
2. Will of Mary B. Johnston devising the land to defendant.

Defendant then offered as a witness in her behalf H. F. Brandon, who testified as follows: That he qualified as executor of Mary B. Johnston and gave the notice of his qualification in the newspapers in the county and by handbills for all creditors to present the claims against the estate, and that plaintiff never presented (403) his claim; that Mrs. Johnston was ignorant and could not read or write; that in his opinion the land was worth in 1879 from six to seven dollars per acre.

J. A. Long, a witness for defendant, testified that he was counsel for Mrs. Johnston in 1879, when she bought the half interest in the land, and at the time her health was poor and she was confined to her bed; that the plaintiff, at the term to which this suit was brought, asked witness what his client was going to do; said he loaned her the $210 to help pay for the half interest, and that all he wanted was his money; that Mary B. Johnston paid $350 for one-half interest, and that the object was to give him a mortgage to secure the loan; that it was more convenient for him to take an absolute deed and to execute a bond to make title, and that such was his custom.

After the conclusion of the evidence his Honor instructed the jury, if they believed the evidence, to answer the issues as set out in the record, and the jury so answered. To the instruction the defendant excepted. It was agreed, if the fourth issue should be found in the negative, that the amount due the plaintiff would be $210, with interest from 13 February, 1880. His Honor then rendered judgment directing the land to be sold for the payment to plaintiff of $210 and interest from 24 February, 1880, allowing the defendant sixty days in which to pay said sum. From this judgment defendant appealed.

Graham & Graham and A. L. Brooks for plaintiff.
J. A. Long for defendant.

FAIRCLOTH, C. J. Both parties excepted to the refusal of the

court to submit issues tendered by them. These exceptions were properly overruled, as we see that the issues submitted by
(404) the court were sufficient to admit evidence of their several contentions and to meet the merits of the issues raised by the pleadings. There are no questions of the rights of creditors in the case, nor any question of fraud or fraudulent misrepresentation, as the jury have said by their response to the first issue that there was none.

The whole matter, then, is limited to the dealings between the parties, treating Mary B. Johnston for the present as the defendant. The rights of the defendant Hightower (daughter and devisee of Mary B. Johnston) will be considered later.

It was competent for the parties to make the deed absolute in form, but to be held as a security for the money loaned by the plaintiff, subject to be void upon payment of the debt and to be canceled. The burden of showing this to have been the intention rested upon the party so alleging. It was equally competent for the parties to have agreed that the deed should be absolute and irrevocable, with a simultaneous agreement in writing that upon payment of the agreed price the plaintiff should convey and make title of the same land to the defendant; and the jury, in response to the second issue, find that the testatrix of the defendant did contract to purchase the land at the price of $210, and the plaintiff executed and delivered his bond for title accordingly, which appears in the record.

The testatrix remained in possession until her death, in 1880 or 1881, and the defendant has been in possession ever since. On 23 February, 1880, a small payment was made by the testatrix on the contract. This contract established the relation of vendor and vendee, similar in many respects to that of mortagagee and mortgagor. The possession of defendant's testatrix was not hostile to the claim of the plaintiff, and could not be an adverse possession, so as to put
(405) the statute of limitations in operation without some act on the part of the vendee under a claim of right, with intent to assert such claim against the vendor and thereby give him notice that any further delay in the assertion of his right to possession or to foreclose the contract would be at his peril. The burden of showing such a hostile attitude towards the vendor would devolve upon the party so alleging it. No proof of such possession or action was shown to exist on the part of the defendant or her testatrix. The statute of limitations does not expressly mention this trust relation between vendor and vendee, and it could be only included under section 158 of The Code, and we have held that it would then be allowed only where the possession was adverse or where it was necessary to prevent

some wrong or gross injustice. To obtain assistance from a court of equity the parties must observe the maxim that "he who seeks equity must do equity"—a principle based upon conscience and good faith.

The defendant, as devisee of her mother, was in possession before the deed was registered and, so far as appears, before she had notice of the bond for title, and she claims to have the rights of a purchaser without notice. The difficulty in that position is that she is not a purchaser for *value* and has no more rights than her mother had, which was an equitable estate without the legal title, whereas the plaintiff has the legal estate and the elder and stronger equity, because of a valuable consideration paid to her testatrix. *Inter partes,* deeds and contracts are binding without registration, and the defendant takes her mother's equity subject to prior equities, with or without notice, with the same right of redemption. A purchaser at a sheriff's sale under a *fi. fa.* takes subject to all encumbrances on the property, whether he has notice or not, and whether he buys an equitable or legal estate, and this defendant certainly can have no better claim.

There are instances in which this Court would interfere (406) and protect the defendant. For instance, if the delay of a party to assert his claim should have been so long as to presume abandonment, or any unfair dealing or gross injustice was present, the Court would see that the innocent party should not be disturbed. As nothing of the kind appears here, however, we will not interfere with the judgment below.

Affirmed.

Cited: McNeill v. Fuller, 121 N. C., 212; *Coley v. Statesville, ib.,* 315.

R. H. COWAN v. AL. FAIRBROTHER AND WIFE

CONTRACTS IN RESTRAINT OF TRADE—FRAUDULENT CONTRACTS—FREEDOM OF THE PRESS—CONSTITUTION, ART. I, SEC. 20—ACTION TO VACATE CONTRACT OF SALE FOR FRAUD.

1. A contract whereby the editor and owner of a newspaper sold his printing outfit and newspaper to another and covenanted not to edit, print, conduct or be in any manner connected with a newspaper to be published in this State within a specified period, is not invalid as being unduly in restraint of trade or in violation of the constitutional guaranty of freedom of the press.

2. The extent to which individuals and corporations may legally bind themselves not to prosecute a particular business or calling within a certain territory discussed.

3. It is not fraudulent to buy property through an agent secretly—that is, to have the agent take the title in his own name and fail to disclose to the vendor that the purchase is made for another.

4. A vendor who seeks the aid of a court of equity to set aside a contract of sale on the ground of alleged fraud must offer to return the price received for the property. He must offer to place the vendee in *statu quo.*

5. The freedom of the press guaranteed by the Constitution, Art. I, sec. 20, exempts from censorship and secures against laws enacted by the legislative department of the Government and measures resorted to by either of the other branches of government for stifling just criticism or muzzling public opinion. This provision of the Constitution has never been held to be a restriction upon the right to sell anything of value that is the creature of one's brain, provided society would not suffer by the transaction.

(407) ACTION in DURHAM, for an injunction. There was a restraining order issued, and the case was heard by *Graham, J.*, at chambers, in Oxford, GRANVILLE County, on 29 July, 1895, on plaintiff's motion for an injunction to the final hearing.

The summons issued 1 July, 1895. The plaintiff alleged that on 29 December, 1893, the defendants Al. Fairbrother and M. H. Fairbrother, being then the owners and editors of the Durham *Daily Globe* and the Durham *Weekly Globe* and of other property connected with and necessary to their publication, and being then engaged in publishing the same, made and executed with John Wilber Jenkins the contract and bill of sale, a copy of which is as follows:

"For value received, $3,500, this day to us in hand paid, the receipt of which is hereby fully acknowledged, we, Al. Fairbrother and Mrs. M. H. Fairbrother, have bargained and sold, and do by these presents, bargain, sell, transfer, assign, set over, deliver and convey unto John Wilber Jenkins, absolutely and free from all claims by us, the Durham *Daily Globe* and the Durham *Weekly Globe,* newspapers now published in said county and State, and also all type,
(408) printing presses, racks, imposing stones, subscription books and accounts thereon, except those which have already been earned and are now due, one iron safe (Cary), one caligraph, desks, tables, chairs, inks, paper and all material now on hand, 1 January, 1894, the subscription lists of said newspapers and all office furniture and materials now used by us in conducting said newspapers and all now contained in the office of said newspapers, on the northwest corner of Main and Church streets, in the town of Durham, and the good will of said newspapers and the business of conducting the same. And we hereby agree with said purchasers and his assigns, each for himself and herself, that for a period of ten years from and after January,

1894, said Al. Fairbrother shall not edit, print or conduct a newspaper or magazine nor be in anywise connected with one printed anywhere in the State of North Carolina; and that for a like period Mrs. M. H. Fairbrother shall not edit, print or conduct a newspaper or magazine nor be in anywise connected with one anywhere in the county of Durham, said State, without the consent of said purchaser or his assigns. And we hereby warrant that all of said above-mentioned property is free and clear from all encumbrances of any kind whatsoever, and that we have good right to convey the same, as we have done.

"Witness our hands and seals, this 29 December, 1893.

"AL. FAIRBROTHER, [L. S.]
"M. H. FAIRBROTHER. [L. S.]"

That the price paid for the property mentioned in the contract was far greater than the value of the tangible property, and the inducements for paying so great a price was the agreement of the defendants not to edit, print or conduct a newspaper, etc., nor be in anyway connected with one in Durham County; that (409) on 30 December, 1893, John Wilber Jenkins transferred the contract with defendants and the property therein described to George W. Watts; Watts transferred a half interest in same to B. N. Duke on 25 July, 1894, and Watts and Duke loaned the property to plaintiff, on 29 July, 1895; that the said defendants had purchased or contracted to purchase the Durham *Recorder*, a newspaper published in the town and county of Durham and the State of North Carolina, and had assumed the charge and management thereof, and would, on 1 July, 1895, edit, print and conduct a newspaper or magazine in the county of Durham or be in some way connected with a newspaper or magazine published in said county of Durham, without the consent obtained of the plaintiff or purchaser, John Wilber Jenkins, or of his assigns, contrary to and in violation of the terms and agreements of the contract.

The defendant Al. Fairbrother admitted the execution of the contract and the receipt of the consideration therein recited, and set up as defenses that the publication of the newspapers referred to in the contract had been in effect abandoned by John Wilber Jenkins and his assigns before defendant entered into any arrangement for taking charge of and managing the publication of a newspaper in Durham; that plaintiff knew of defendant's intention to connect himself with a newspaper in Durham before he (plaintiff) took any lease from Watts and Duke; that George W. Watts was hostile in feelings towards defendant prior to the execution of the contract between defendants and Jenkins, and procured Jenkins to enter into the contract

with defendants; that this was done with the fraudulent in-
(410) tent to deceive defendants by representing that Jenkins was buying for himself, whereas in fact he was acting as the agent of Watts; that both Watts and Jenkins knew at the time that defendants would not, if they knew it, have entertained any proposition coming from Watts.

Defendant set up the further defenses that the contract was void (1) because it tended to restrict the freedom of the press; (2) because it was in restraint of trade and contrary to public policy.

The order granted by the judge below is as follows:

"This cause coming on to be heard at chambers, at Oxford, on 29 July, 1895, and having been heard upon affidavits, pleadings and exhibits filed, including the affidavit of B. N. Duke, filed by permission of the court, the court doth consider and adjudge that the temporary restraining order heretofore granted against Mrs. M. H. Fairbrother be and the same is hereby vacated, for the reason that she disclaims by her answer any intention on her part to violate any of the terms of the contract executed by her and said Al. Fairbrother 29 December, 1893, a copy of which is annexed to the complaint. She will recover her costs and disbursements made herein. The court doth further consider and adjudge that, upon the plaintiff executing a justified bond in the sum of $1,500, conditioned as required by law, with sureties, to be approved by the Clerk of the Superior Court of Durham County, the said defendant Al. Fairbrother be and he is hereby restrained, enjoined and forbidden to edit, print or be in anyway connected with any newspaper or magazine published in the State of North Carolina until the final hearing of this cause, and this cause is retained for further orders."

The pleadings, affidavits and exhibits were very volumi-
(411) nous, but the foregoing synopsis is deemed sufficient for a comprehension of the facts which form the basis of the opinion of the Court.

The defendant Al. Fairbrother appealed.

Fuller, Winston & Fuller, Boone, Merritt & Bryant and Shepherd, Manning & Foushee for plaintiff.

William A. Guthrie for defendants.

AVERY, J. Where a person acquires a reputation for skill and learning in his profession as a lawyer or a physician, he often creates an intangible but valuable property by winning the confidence of his patrons and securing immunity from successful competition for their business. So, where an editor, by reason of his style, his power, his pa-

thos, his humor, his learning or of any gift or attainment, attracts subscribers solely by such personal qualities, he imparts a peculiar value to the good will and property of a newspaper, which goes with him, to its injury, when he leaves it, and lends the talent and accomplishments that have given it patronage and popularity to a rival journal in the same vicinity. Where he owns the press and plant, the enhanced value so imparted by him becomes an element of his property, with the same incidental power to dispose of it as attaches to any other of his acquisitions which has a market value. *Beal v. Chase,* 31 Mich., at p. 529. But it is not like other property which ordinarily passes by delivery or assignment to the purchaser. Neither an editor, a lawyer or a physician can transfer to another his style, his learning or his manners. Either, however, can add to the chances of success and profit of another who embarks in the same business, in the same field, by withdrawing as a competitor. So that, the one sells and the other buys something valuable, and the policy of the law limits the right to enter into such contracts of sale only to the extent that (412) they are held to injure the public by restraining trade. The one sells his prospective patronage and the other buys the right to compete with all others for it and to be protected against competition from him vendor. The law intends that the one shall have the lawful authority to dispose of his right to compete, but restricts his power of disposition territorially, so as to make it only coextensive with the right to protection on the part of the purchaser. To the extent that the contract covers territory from which the vendor has derived and will probably in future derive no profit or patronage it needlessly deprives the public of the benefit of open competition in useful business and of the services of him who sells without any possible advantage to his successor. When the reason upon which a law is founded ceases, the rule itself ceases to operate. The older cases in which the courts attempted to fix arbitrarily geographical bounds beyond which a contract to forbear from competition would not be enforced have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed. *Nordenfelt v. The Maxim Co.,* Appeal Cases, 1894 (L. R.), 535; *Hitchcock v. Cocken,* 6 Ad. and E. (En. C. L. R.), at p. 106; *Hernshoff v. Bontenean,* 17 R. I. Rep., 3; *Benefit Co. v. Hospital Co.,* 11 L. R. A., 437; *Beal v. Chase,* 31 Mich., 490; *Tallis v. Tallis,* 1 El. and Bl., 391 (18 E. L. & E., 151); *Oregon Co. v. Minsor,* 20 Wallace, 64; 10 Am. and Eng. Enc., 947, note; 3 Am. and Eng. Enc., 885, note; *Gibbs v. Gas Co.,* 130 U. S., 396.

Where the nature of the business was such that complete protection could not be otherwise afforded, the restraint upon the right

to compete has been held good in one or more instances where
(413) it extended throughout the world, and in other cases where it applied to a State or to a boundary including several States.

In *Nordenfelt v. Maxim, supra,* the plaintiff had covenanted with the respondent company "not to engage, except on behalf of such company, either directly or indirectly, in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company." On appeal to the House of Lords, the case of *Horner v. Graves,* 7 Bing., 743, was cited, and the validity of such contracts was declared to depend upon the question "whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." *Lord Herschell, L. C.,* said further: "Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and if oppressive it is in the eye of the law unreasonable. The tendency in later cases has certainly been to allow a restriction in point of space, which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held to be too much in some cases. For the same reason, I think a restriction applying to the entire kingdom may in some cases be requisite and justifiable."

In *Beal v. Chase, supra,* at p. 530, *Judge Campbell* quotes with approval the language of *Chief Justice Chapman* in *Morse v. Morse,* 103 Mass., 77, where he said: "In this country there are periodical publications that have a very wide circulation, and it is obvious that a purchaser of the proprietorship cannot afford to pay the full value unless he can obtain from the vendor a valid restriction
(414) against competition, which restriction shall be as extensive as the interest requires, though it may cover the whole of a State or the whole of a country. The same would be true as to some books. For example, the author of a popular school book could not sell its proprietorship for its full value unless he could bind himself not to prepare another book which should be used in competition with it."

The rule which concedes the right to make the area in which the vendor is to be restricted from competition as broad as is necessary to afford ample protection to the purchaser is subject to the qualification that no agreement will be upheld which is injurious to the public interest. *Nordenfelt case, supra,* at p. 549. There are two familiar classes of contracts that will in no event be enforced, because contrary to public policy, and these constitute exceptions to the general rule governing sales of the right of competition: (1) A *quasi* public cor-

poration cannot disable itself by contract from performing the public duties which it has undertaken to discharge in consideration of the privileges granted to it. *Logan v. R. R.*, 116 N. C., 940; *Gibbs v. Gas Co.*, 130 U. S., 410. (2) Any agreement in contravention of the common or statute law generally, or any combination "among those engaged in a business impressed with a public or *quasi* public character which is manifestly prejudicial to the public interest, is void as against public policy, and upon the same principle no agreement tending to create a monopoly or designed to utterly destroy fair competition amongst public carriers will be enforced." *S. v. Oil Co.*, 34 Am. St., 541 (49 Ohio St., 137); *Emery v. Candle Co.*, 21 Am. St., 819, and note (47 Ohio St., 320); *Hooker v. Vandewater*, 47 Am. Dec., 258 (4 Denio, 349).

But the contract of which the plaintiff claims the benefit as assignee through John Jenkins is one which in no way affects the public, unless it unreasonably deprives the people of the (415) State of the benefit of the industry of the defendants or unnecessarily precludes them from supporting their family by pursuing their occupation. *Oregon Nav. v. Windsor*, 20 Wallace, at p. 68. The stipulation was that the defendant Fairbrother "would not edit, print or conduct a newspaper nor be in anywise connected with one printed anywhere in the State of North Carolina, and that for a like period Mrs. Fairbrother shall not edit, print or conduct a newspaper or magazine nor be in anywise connected with one anywhere in the county of Durham, said State, without the consent of said purchaser or his assignees." This contract was assigned to Watts and Duke by Jenkins, and the assignees who own the property have leased to the plaintiff, Cowan, who is now publishing the *Globe* newspaper, and seeks to enjoin the defendant Al. Fairbrother and the other defendant from publishing another newspaper in Durham, as it is conceded they propose to do if the court should not interfere. Since the use of steam, space has been in a measure annihilated, and it is a fact of which the courts may take notice that a newspaper may be carried by mail to the most remote parts of the State within from twenty-four to forty-eight hours. So that, if there has ever been a time in the history of the State when an editor could not acquire a reputation for excellence in some particular line of that business which would enable him to give a paper with which he might be connected popularity throughout its limits, there is no reason to doubt now that one who would rid himself of a competitor in that business is not describing an unreasonable boundary when he extends the restriction against competition to the State lines. No better proof of that fact could be adduced than is set forth in the uncontradicted affidavits of

(416) the defendants themselves, that they injured their successor, John Jenkins, in the conduct of the Durham *Globe,* after the contract was entered into, by publishing a paper in Lynchburg, Va. If the right to compete for popularity as an editor may become valuable, and pass by a contract of sale, like the good will of a newspaper, it follows necessarily as a logical sequence that the purchaser may sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the transaction would be held valid for the same reason that renders the original sale enforcible. 3 Am. and Eng. Enc., p. 885, and note, with authorities collected; *Beal. v. Chase, supra; Perkins v. Clay,* 54 N. H., 518; *Hedge v. Lowe,* 47 Iowa, 137; *Gampers v. Rochester,* 56 Pa. St., 194. It is settled law that such contracts in restraint of trade as are valid, may be enforced in equity, like other contracts, and that breaches of them will be restrained by injunction, on the ground that no other remedy is adequate. 3 Am. and Eng. Enc., 885, and note; *Thompson v. Andrus,* 73 Mich., 557. A covenant on the part of a publisher not to publish a paper is considered in the same light as a contract to sell a particular business or the right to practice a profession in a given area, and courts of equity will interpose in order to prevent a violation of the one as well as of the other. 10 Am. and Eng. Enc., 947, note.

The plaintiff's lessors swear that they had never abandoned at any time the purpose to continue the publication of the newspaper, and that during the suspension they kept up continual negotiations with that end in view. They say further that the suspension was prolonged by giving an option to one with whom they had good reason to expect they might conclude a contract to again issue it regularly.

A review of all the cases where it has been held that parties have abandoned rights will furnish no analogy to support the (417) contention that the benefit of a contract like that which is the subject of the action must be deemed in law abandoned for failure to find a suitable editor for so short a time, especially where it appeared that reasonably diligent efforts were being made to have the business continued. The concealment by Jenkins of the fact that he was buying for another was not, *per se,* a fraudulent act, and there is no allegation on the part of defendants that he practiced any fraud upon them. Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take title in his own name. If the defendants had set up a state of facts which in law amounted to fraud, and had asked the court to rescind the contract upon the principle that he who asks equity must do equity, they would have been required to offer to return the money received. In order

to avail themselves of that remedy they should have brought suit to set aside the agreement upon the discovery of the fraud, if there was fraud, and should have offered to place the purchasers in *statu quo. Cal. Co. v. Wright,* 8 Cal., 585, 592.

It is contended for defendants that the contract is illegal and void because it is in contravention of the provision of the Constitution (Art. I, sec. 20), which guarantees the freedom of the press. When the framers of our Constitution declared that the freedom of the press was one of the bulwarks of liberty, and therefore ought never to be restrained, but that every individual should be held responsible for the abuse of the same, they entertained no purpose to restrict the power of any person to dispose of anything of value, which, as the creature of his own mental or physical exertions, had become his property. The right is as much a fundamental one as is that to use the press without violation of reasonable laws intended to protect others from libel and slander. In its broadest sense, freedom (418) of the press includes not only exemption from censorship, but security against laws enacted by the legislative department of the Government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion. Black Const. Law, pp. 472, 473; Cooley Const. Lim., pp. 517, 518; Ordinaux, Const. Leg., p., 236, *et seq.;* 3 Story Const., p. 731. An indefinite number of authorities might be cited to show the universal interpretation placed upon the provision in the Constitution of the United States that the freedom of the press shall not be abridged, and upon similar clauses in State constitutions. It has never been held anywhere that these provisions could be made engines of oppression by construing them as restrictions upon the right to sell anything of value that is the creature of one's brain, provided society would not be made to suffer by the transaction. Upon a review of all the assignments, we discover no error in the rulings below, and the judgment is therefore

Affirmed.

Cited: Whitehead v. Hale, post, 603; *Kramer v. Old,* 119 N. C., 7, 8, 10; *Hauser v. Harding,* 126 N. C., 299; *Teague v. Schaub,* 133 N. C., 467; *Disosway v. Edwards,* 134 N. C., 257; *Nicholson v. Dover,* 145 N. C., 20; *Anders v. Gardner,* 151 N. C., 605; *Foust v. Rohr,* 166 N. C., 191; *Sea Food Co. v. Way,* 169 N. C., 683, 684, 688.

W. O. BLACKNALL v. W. H. ROWLAND ET AL.

EXECUTED CONTRACT—SALE—WARRANTY, BREACH OF.

Where, in a contract of sale of stock in an incorporated company, there was a warranty by the seller as to the condition of the company, and also a further clause in the nature of a defeasance that the buyer might have the representations examined into, the fact that the buyer did not avail himself of the privilege of making the investigation, but accepted and paid for the stock, did not deprive him of his right to recover on the warranty.

(419) PETITION of defendants to rehear case between same parties reported 116 N. C., 384. The petition to rehear was accompanied by the certificate of Hon. M. V. Lanier, of Oxford, which was as follows:

"This is to certify that, by request of defendant's counsel in the case of W. O. Blacknall against W. H. Rowland *et al.*, from the county of Durham, decided in the Supreme Court of North Carolina at February Term, 1895, I have carefully examined the case and the law bearing upon the same, and the case in 108 N. C., 554, cited in the opinion of the Court, and that, in my opinion, the decision is erroneous. The contract of sale and purchase of the stock was an executory contract, and the trade was expressly conditioned upon the representations made therein, *being verified upon examination of the affairs of the company by an expert bookkeeper of plaintiff's selection and at his expense,* and upon condition that plaintiff's title to the land named in said contract was good—that is to say (as I understand the matter), if upon such examination the representations were found to be untrue, or if the title to the land was found to be defective, the plaintiff in the former case was not to be bound by the contract, and the defendants in the latter case were not to be held bound; or, in other words, the contract was to be void and of no effect—in the former case at the option of the plaintiff, and in the latter at the option of the defendant. The plaintiff, after ample time and opportunity to make the examination (which, in so far as appears, he was not prevented by any act of defendant from making), chose to waive the condition, as far as he was concerned, and executed the contract by accepting an assignment of the stock and conveying the land in payment for it. The court was of the opinion that the contract itself

(420) was or contained a warranty of the truth of the representations made, and that the plaintiff was not affected by his waiver of the conditions upon which he was to be bound to its performance on his part. In this, it seems to me, there was error.

"Suppose, on the other hand, the plaintiff had represented his title to the land to be good, and the defendants had chosen to make

no examination of it and to accept a deed without warranty, could they have maintained an action upon the contract as a warranty of title? It seems to me not. The action, in so far as appears, was not for a rescission of the transaction for fraud, but for a breach of a supposed and alleged warranty contained or implied in the terms of the same. Such a warranty seems to me to be negatived by the fact by the agreement the plaintiff was not to be entitled to damages if the representations were found to be untrue upon the examination to be made, but was *not to be bound by the contract at all.* Suppose the plaintiff had, with or without examination, found the representations to be untrue, and had refused to accept an assignment of the stock or to convey the land in payment for it (which would have been a repudiation of the contract on his part, which he would have had a right to do), could he, notwithstanding, have maintained an action against defendants for a breach on their part of the supposed warranty, expressed or implied therein, of the truth of the representations? Or could he have repudiated the contract on his part and affirmed it as against the defendants? It seems to me not.

"I think the court was in error in treating the contract as other than executory, and just as if the part on which its binding force was conditioned were not in it.

"I further certify that I am a practicing attorney and a member of the bar in North Carolina, and that I have no (421) interest in the subject-matter of said action, and am not and never have been of counsel for any party to the said suit.

"With due and respectful deference to the opinion of any who may not concur with me in this case,

"M. V. LANIER."

J. W. Graham, Boone, Merritt & Bryant and Fuller, Winston & Fuller for petitioners.

Shepherd, Manning & Foushee contra.

CLARK, J. This is a petition to rehear the case in 116 N. C., 389, where the contract is set out in full. It was an executed contract, reciting that one party "proposes to sell" and the other "agrees to buy." Further, the seller gave a warranty; and as an additional safeguard there was a further clause, in the nature of a defeasance, that the buyer might have the representations examined into. As pointed out by *Merrimon, C. J.,* when this case was here the first time (108 N. C., 554), this last was a privilege to the buyer, which he could exercise, or not, as he chose. He might waive it and rely solely upon the warranty given by the seller. The buyer's waiver of such privi-

lege certainly could not be deemed a waiver of the warranty on the part of the seller, but on the contrary showed an intention more distinctly to rely upon the warranty alone. If this were not so, the contract would be construed as meaning that, if on examination the representations were found correct, the seller's warranty was binding; otherwise it would be null and void—a palpable absurdity. Why insert a warranty if there was to be no sale or liability, unless the buyer made the examination and found the representations to be true? It may not be amiss in this case to repeat what was said in *Herndon v. Ins. Co.*, 111 N. C., 384, 389, to-wit: "Errors are committed by all courts, but they are by no means so numerous and alarming (422) as they must seem to counsel who lose their causes. They should reflect that they have against them the opinion of the opposite counsel and of the five disinterested lawyers who have heard the cause debated."

Petition Dismissed.

Cited: Wrenn v. Morgan, 148 N. C., 106.

HENRY HARRIS v. T. D. WRIGHT ET AL.

PARTITION—JURISDICTION—DEVISEE UNDER WILL—CONDITION PRECEDENT—WRONGFULLY PREVENTING PERFORMANCE.

1. Where there has been an ouster, or where the defendant controverts the plaintiff's title, thereby admitting ouster, a covenant may bring his action for partition to term instead of before the clerk.

2. Where a testator gave his plantation to his widow for life, remainder to his nephew, whom he requested to remain with her until her death, and directed that if two servants remained with his wife and nephew until the wife's death they should each have fifty acres of land, and the widow and nephew removed from the land to town before her death, and one of the servants refused to accompany them to serve for wages: *Held*, that refusal was not a failure to perform the condition precedent to his right to the fifty acres.

3. One who prevents the performance of a condition or makes it impossible by his own act will not be permitted to take advantage of the nonperformance. *Hence*,

4. Where plaintiff, to whom a portion of a tract of land was devised, upon condition that he should remain with the widow of the testator until her death, was wrongfully ejected from the land by the agent of the widow (who was the devisee of the land of which the plaintiff's was a part), the plaintiff's estate upon the widow's death cannot be defeated on the ground that the condition was not performed by plaintiff not remaining on the plantation until the widow's death.

ACTION tried before *Starbuck, J.*, at January (Special) (423) Term, 1896, of PERSON.

A jury trial having been waived, his Honor found the facts, the material parts of which are set out in the opinion of *Associate Justice Montgomery.* His Honor rendered judgment for the defendants, and plaintiff appealed.

W. W. Kitchin and Graham & Graham for plaintiff.
Manning & Foushee for defendants.

MONTGOMERY, J. In his last will and testament James H. Harris devised a tract of land of 1,200 acres to his widow for her life, with remainder in fee to his nephew, Thomas D. Wright, the defendant in this action, but charged it with an interest in favor of Jesse Harris, and Henry Harris, the last named being the plaintiff in this action, as follows: "However, I request that Jesse and Henry Harris, former slaves of mine, remain with my wife and nephew until the death of my wife, and if they shall remain with them during that time that they, Jesse and Henry, shall have at some suitable place fifty acres of land." This Court decided, in the case of *Wright v. Harris,* 116 N. C., 462, that Jesse Harris (who was the defendant in that case) was a tenant in common with the plaintiff (who is the defendant in this action) in the 1,200-acre tract, to the extent of the fifty acres devised to him in the will of James H. Harris, and was entitled to partition.

This action was brought by the plaintiff, Henry Harris, to have allotted to him the fifty acres devised to him in the will and to be put in possession of the same, the widow having died before the commencement of the suit. The defendant demurred to the complaint, in substance: (1) That the court had no jurisdiction, because the action was for the partition of real estate and should have (424) been commenced by special proceedings before the clerk, and not before the judge in term; (2) that the complaint did not state a cause of action, in that it appears therefrom that the estate claimed by the plaintiff depended upon a condition precedent which was not actually performed.

The objection to the jurisdiction is without merit, and his Honor properly overruled that feature of the demurrer. The complaint showed that the plaintiff was not in possession of the land, that he had been ousted by the defendant and forbidden to come upon the land, and that the defendant disputed and denied the plaintiff's right to any part of it. Where there has been an ouster, or where the defendant controverts the plaintiff's title, thereby admitting ouster, the plaintiff may bring his action to the term. *Jones v. Cohen,* 82 N. C., 75; *Withrow v. Biggerstaff, ib.,* 82.

As to the second ground of demurrer, his Honor held that if the plaintiff, as he alleged in his complaint, could show that he was prevented from performing the condition by the wrongful conduct of the defendant, he would be entitled to recover and overruled the same. This was a correct ruling. *Nav. Co. v. Wilcox,* 52 N. C., 481. The defendant, in his answer, which is verified, denies the right of the plaintiff to recover, averring that his right to recover depended upon the condition precedent contained in the will, and that the plaintiff had not performed the condition. The averment in the answer is that, "In the year 1887 Mrs. Harris, the widow, by her agent, the defendant, Thomas D. Wright, on account of the bad conduct and unfaithfulness of the plaintiff, Henry Harris, instituted summary proceedings in ejectment against said plaintiff, and by the judgment of the court the plaintiff was ejected from the said premises." By consent of parties, his Honor found the facts, and in one of these find-
(425) ings it appears that the decision of the justice of the peace, under which the plaintiff in this action (defendant in that proceeding) was ejected, was based, not on the bad conduct or unfaithfulness of Henry Harris, but because of his failure to pay rent.

It appears from the facts found by his Honor that the testator died in 1871, and that the plaintiff lived on the land from that time until 1887 as the tenant of the widow, rendering yearly rent and falling in arrears during the later years; that for the year 1887 there was no rental contract, but the defendant permitted the plaintiff to live on the place until November of that year, when, as the agent of the widow, he instituted proceedings before a justice of the peace, alleging that the plaintiff owed rent, and ejected him; that the sheriff removed the plaintiff from the land and forbade him to return; that the defendant left the farm in 1885 and the widow left the next year, going to live with the defendant in Durham. His Honor further found that the defendant, just before he had the plaintiff ejected by the order of the justice of the peace, tried to employ the plaintiff and his wife to live with him in Durham for wages, and that the plaintiff declined the offer. Upon these facts the court was of opinion "that it was the intention of the testator, as expressed in the will, that the plaintiff should have the fifty acres upon serving the widow and nephew of the intestate during the lifetime of the widow, wherever and in whatever manner they might reasonably require, and upon reasonable terms; that the request made by the defendant that plaintiff should go to Durham to serve the defendant as a family servant at the wages of $10 per month, and, further, of offering to employ the wife of the plaintiff in household service, was under the circumstances a reasonable request and proposition, and that

the refusal to comply with the request was a breach of the (426) condition, the performance of which was necessary to vest in the plaintiff the fifty acres of land as provided for in the will. It is therefore adjudged that the plaintiff take nothing by his suit, and that the defendant go without day."

The judgment of the court is founded on the view which his Honor took of the reasonableness of the offer made by the defendant to employ the plaintiff and his wife as servants in the household at Durham and the obligations imposed upon the plaintiff by the will to perform this service. We do not agree with his Honor in the construction which he put upon the intention of the testator as to the rights and interests of the plaintiff under the will. We think that it never entered his mind that his widow and nephew would leave the plantation. He required that Jesse and Henry, with their families, of course, should remain with his widow and nephew (the defendant) until the death of the widow. We think the testator used the word "remain" in its commonplace meaning—that is, to continue unchanged, to abide in the place where they were when he wrote the will. He either supposed that his widow would not very long survive him, or that if she did his nephew would make his home with her and never leave her; else, how could the plaintiff always live with them both? He certainly did not have in his mind that the nephew might take on an adventurous spirit, leave the farm, and engage in other pursuits in other places. If so, he would have provided for that contingency and required the plaintiff to live with the widow in that event. This view is strengthened when it is remembered that the same requirement was made also of Jesse. It is not reasonable to suppose that the testator anticipated that his widow would leave the plantation for town life, and that both Henry and Jesse and their families (427) would attend her, as her servants, as being necessary for her comfort. The reasonable construction certainly is that the testator contemplated the farm to be the home of the widow during her life; that the fee-simple interest in 1,200 acres of land would be a sufficient inducement for the nephew to remain with his aunt during her life, and that fifty acres each to Jesse and Henry would induce them to remain on the farm, and that by means of all such arrangement the widow would be in association with and under the protection of her nephew and attended by the faithful servants of the family. The plaintiff remained on the farm with the widow fifteen years, paying full rent for nearly the whole time and rendering proper service, in addition, to the widow; for, although the defendant averred in his answer that the plaintiff had been ejected from the land on account of bad conduct and unfaithfulness, there was not a syllable of proof

going to show this, except that he refused to go to Durham to live with the defendant.

The action of the justice of the peace in ejecting the plaintiff at the instance of the defendant, claiming to be the agent of the widow, is not to affect the result of this case. The justice had no jurisdiction in the matter. The defendant testified in this case before the court below that he had no contract with the plaintiff for the year 1887, and that he left him to stay on the plantation, allowing him to cultivate a part of the land, because he was mentioned in the will. And, besides, the will, while it gave the plaintiff a conditional estate, gave him also the right to remain on the land as long as he performed the condition or stood ready to perform it. He was not a tenant for the year 1887, and the justice had no jurisdiction of the matter and no right to order his ejectment. *Parker v. Allen,* 84 N. C., 466; *Hughes v.* (428) *Mason, ib.,* 472. In that proceeding, then, the defendant was acting in his own right as well as for the widow (if, indeed, he was acting for her). The question before us, then, comes right down to this: Will the defendant be allowed to defeat the interest of the plaintiff under the will, when by his own wrongful act he prevented the plaintiff from performing the condition upon which his interest vested? He will not be allowed so to do. *Nav. Co. v. Wilcox, supra.* In that case *Chief Justice Pearson,* who delivered the opinion of the Court, said: "One who prevents the performance of a condition or makes it impossible by his own act shall not take advantage of the nonperformance," and cited *Lord Coke's* illustration of the rule. We are not deciding that the rights of property, which depend upon the performance of conditions precedent, shall vest in cases where the conditions are not absolutely and unconditionally performed. We know that these conditions must be performed, and that even the act of God is no excuse for nonperformance. We are not weakening that principle of law, but we are asserting another rule, equally as old and equally as binding, when we declare that where a person interested wrongfully prevents the performance of the condition precedent he shall not be allowed to take advantage of his own wrong.

We think there is error in the judgment of the court below, and the same is reversed. The plaintiff is a tenant in common with the defendant in the tract of land mentioned in the complaint, is entitled to partition, and the court below will take such steps as are necessary to have allotted to the plaintiff fifty acres thereof and to have him put into possession of the same.

Reversed.

Cited: *Harwood v. Shoe,* 141 N. C., 163; *Whitlock v. Lumber Co.,* 145 N. C., 125; *Lynch v. Melton,* 150 N. C., 596; *Caudle v. Caudle,* 159 N. C., 55.

(429)

J. D. ROBERTS v. LIFE INSURANCE COMPANY OF VIRGINIA

JURISDICTION—COURTS—CONTRACTS—USURY—STATUTORY ACTION.

1. A contract made with the local agent of a foreign corporation maintaining an office and agency and doing business in this State is a North Carolina contract, and the courts of this State have jurisdiction of an action founded thereon, whether or not the plaintiff is a resident of this State.

2. The act of 1895 (chapter 69), which provides for the recovery of usurious interest if the action is brought within two years after the payment in full of the indebtedness, by its express terms, does not apply to contracts antedating its ratification, and the right of plaintiff to recover at all is governed by section 3836 of The Code, which allows the recovery of twice the amount of interest paid, provided action therefor be brought within two years from the date of the usurious transaction.

3. The right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action; hence the defense that the usurious interest was paid and received more than two years before action brought need not be specially pleaded, as is required in case of the plea of the statute of limitations.

4. The findings of fact by a judge, where a jury trial has been waived, can no more be reviewed, when based on correct principles of law, than if the facts had been found by a jury.

ACTION begun 11 March, 1895, by the plaintiff against the defendant, a Virginia corporation, to recover for usurious interest paid defendant on a loan of money. The action was tried before *Starbuck, J.,* at October Term, 1895, of DURHAM.

The following issue was submitted: "What amount, if any, is the plaintiff entitled to recover?"

J. D. Roberts, the plaintiff, testified as follows: "I bor- (430) rowed $900 from the defendant in May or June, 1891; received $400 on 3 June, 1891; then $500 on 4 August, 1891. I executed note and mortgage of deed of trust to secure the money borrowed. I borrowed it to build a house in the town of Durham. I made payments as follows: $9, 22 May, initiation fee; $10.80, 30 May, 1891, and $15.30 per month thereafter for twenty-eight months; during May, June, July and August, 1893, I paid $9 in fines; 20 March, 1894, I paid $769.07, balance claimed by defendant as due on loan. I conducted the transaction of negotiating the loan through Mr. J. F.

Slaughter. I was a borrower from the defendant. Mr. Slaughter held an office in the local board which was organized in Durham, and managed the local business here. He negotiated this loan for the company. He examined, with two others, my property and appraised it. He received the application for this loan; got the $900 through Mr. Slaughter. He was cashier of the Fidelity Bank." Payments were made to me by check on the Fidelity Bank." Plaintiff offered a receipt, signed by J. F. Slaughter, agent, for $8 for subscription fee for eight shares of stock in defendant company. Defendant objected, on the ground that agency was not proved; objection overruled. Defendant excepted. "I applied to Mr. Slaughter for money. He said: 'You can get money. If the company does not have it when you need it you can get it from the bank, which would advance it.' I told him that I wanted money to build a house." The defendant objected to all this evidence; objection overruled. Defendant excepted.

The plaintiff offered an endowment certificate. "I took nine shares of stock in defendant company. All the agreements with the company were made on the same day. I was charged $1.20 (431) per share on the stock. When I applied for the loan, two propositions were made me by Mr. Slaughter—one to invest, the other to borrow; I chose the latter." Defendant objected; objection overruled. Defendant excepted. "The monthly payments were made to the local treasurer of the defendant; J. F. Wily, first local treasurer; J. B. Mason, second; W. W. Whitted, third. The defendant had a local board here. Mr. Slaughter and B. N. Duke assessed my property. The deed of trust was made to F. L. Fuller and J. F. Slaughter. The bond and deed of trust have been paid. The deed was marked 'Satisfied, March 31, 1894.'"

On cross-examination plaintiff said: "Got money from the company when I needed it. Checks were given on Fidelity Bank, signed by company. Slaughter was cashier of this bank. Mr. F. L. Fuller filled up the mortgage. I was a resident of Durham when I borrowed this money; property situated here. I wanted to leave the State. I left the State on 19 March, 1894, and have since then resided in Florida; reside there now; reached Florida on 20 March, 1894. Before leaving Durham I left money to pay defendant with my attorneys, Fuller & Fuller. I saw Mr. W. W. Fuller write a check to the company. The $769.07 was paid to the defendant at its office in Richmond, Va.; it was not paid to the local treasurer."

At the close of the evidence defendant requested his Honor to instruct the jury as follows:

"1. That the plaintiff, having full knowledge of the facts and

having paid the alleged usurious interest, cannot recover the same, and the issue should be answered 'No.'

"2. That, having paid said sum for more than two years (432) since the commencement of this action, the issue should be answered 'No.'

"3. That the contract under which the money was paid was not usurious.

"4. That, so far as this action is concerned, the contract is governed by the laws of Virginia, and is therefore not usurious.

"5. That upon the whole evidence the plaintiff is not entitled to recover.

"6. That both the plaintiff and defendant were nonresidents of this State when the alleged cause of action occurred and when this action was commenced, and, this alleged cause of action having arisen in Virginia, the court has no jurisdiction of this action."

After argument of counsel it was agreed that a jury trial should be waived and that the court should find and answer the issue instead of the jury. The court, upon consideration of the testimony, admissions and exhibits, answered the issue $445.54, the said amount being double the interest found by the court to have been paid by the plaintiff to the defendant within two years prior to the beginning of the action, 11 March, 1895, the interest so paid, consisting of seven monthly payments, beginning with 25 March, 1893, of $4.50 each, paid and received as interest, and various sums amounting to $9 paid as fines during 1893, and $182.27 included in the sum of $769.07, paid 20 March, 1894, in the final settlement, all of said sums aggregating $222.77.

The court held that the plaintiff was not entitled to recover the interest paid prior to 11 March, 1893, consisting of twenty-one monthly payments of $4.50 each, paid and received as interest, aggregating $94.50, and the subscription fee of $9. (433)

The court adjudged that the plaintiff recover of defendant $445.54, with interest from 7 October, 1895, and costs. From this judgment plaintiff appealed, assigning as error that the same adjudges that the plaintiff was not entitled to recover the interest paid prior to 11 March, 1893, and also that said judgment, given upon the usurious payments made within two years before bringing this suit, ought to have been $655.44 and not $445.54.

The defendant also appealed, contending that if his Honor should answer the issues for the plaintiff he should only find the sum of $251.52, and at the request of his Honor, submitted a calculation as to the manner of ascertaining and arriving at said amount, excepting also to the amount fixed by his Honor.

Fuller, Winston & Fuller for plaintiff.
Manning & Foushee for defendant.

FURCHES, J. This is an action to recover back usurious interest paid to the defendant by the plaintiff, commenced 11 March, 1895. It was admitted on the argument here that *Miller v. Insurance Co., post,* 612, decided all the matters involved in this case, except three: First, whether the plaintiff, being a nonresident, could maintain this action; secondly, whether this was a Virginia contract or a North Carolina contract; and thirdly, as to whether the interest paid by plaintiff more than two years before the commencement of the action should be included in the recovery or not.

The answer to the second proposition will substantially answer the first. The defendant is a Virginia corporation, but by comity is doing an insurance business in this State and has an office in the town of Durham and an agent located at that place. The local
(434) agent negotiated this loan in Durham, which defendant alleges is a part of its business and is authorized by its charter. All the interest on this loan was paid to the local agent in Durham, upon whom service of process in this case was served. It was a North Carolina contract.

The court had jurisdiction of the subject-matter and of the defendant by personal service, made according to law. And as defendant failed to show authority for this contention, we are at a loss to know upon what ground it is put, and we must sustain the jurisdiction of the court. In *Sherrill v. Tel. Co.,* 109 N. C., 527, and 116 N. C., 655, and a number of other cases similar to this, the courts have acted upon the idea that they had jurisdiction. But it does not appear in these cases that this question was directly presented. It may have been an oversight in the counsel in these cases not to do so; and while these points are made in the case on appeal, we do not think they were seriously relied on here. The main point in the case, argued and relied on here, was the question of time for which the plaintiff should be allowed to recover, plaintiff contending that he should recover double the amount of all the usurious interest he had paid, and defendant contending that he should not be allowed to recover for any interest paid more than two years before the commencement of the action. The court held with the defendant on this point, and the plaintiff excepted.

This contract, by which the plaintiff borrowed $900 from the defendant, was made in June, 1891, as plaintiff alleges; and plaintiff's right of action therefore rests upon section 3836 of The Code. Chapter 69, Laws 1895, was ratified 21 February, 1895, but it expressly

provides that it is not to apply to any contracts entered into before its ratification. If the act of 1895 had applied, the (435) contention of plaintiff would have been correct, as it provides for bringing an action to recover back double the amount of usurious interest paid if the action is brought within two years after the *payment in full* of such indebtedness, in this respect changing from 3836 of The Code, which provides that "the action must be brought within two years from the time the *usurious transaction occurred.*"

It was contended for the plaintiff that the statute of limitations must be pleaded, and as the defendant had not done so in this case he could not have the benefit of this defense, and cited authorities to sustain this position. The plaintiff is correct in his law, but it has no application to this case. The defendant's contention does not depend on the statute of limitations, but upon plaintiff's right of action. His right to recover anything depends upon the statute. It is purely a statutory action, and he must comply with the terms of the statute or he cannot recover. Therefore, under section 3836 of The Code, unless he commences his action within *two* years from the usurious transaction, he has no cause of action. *Taylor v. Iron Co.*, 94 N. C., 525; *Best v. Kinston*, 106 N. C., 205. There is no error and the judgment is affirmed.

DEFENDANT'S APPEAL.

FURCHES, J. We see no error in this appeal. The question of time for which plaintiff is allowed to recover is decided in plaintiff's appeal—that there was no error in the court's holding that plaintiff could only recover for usurious interest paid within two years next before commencing his action; and the only other question presented by this appeal is as to what amount the plaintiff should recover. A jury trial was waived and the judge found the facts, and his findings of fact can no more be reviewed by this Court than if they had been found by a jury. *Walnut v. Wade*, 103 U. S., p. 688 (436) We can only review him upon questions of law. The counsel on both sides contend that his findings of fact—the amount of plaintiff's recovery—are not correct, plaintiff contending it should have been for more, and defendant contending it should have been for a less amount. But as we find that his findings were based upon correct principles of law, they are conclusive. There is no error and the judgment is

Affirmed.

Cited: Smith v. Loan Assn., 119 N. C., 255, 261; *Hollowell v. Loan Assn.*, 120 N. C., 287; *Gillam v. Ins. Co.*, 121 N. C., 373; *Carter v.*

Ins. Co., 122 N. C., 339; *Churchill v. Turnage, ib.*, 433; *Meares v. Butler*, 123 N. C., 209; *Tayloe v. Parker*, 137 N. C., 419; *Matthews v. Fry*, 143 N. C., 385; *Gulledge v. R. R.*, 147 N. C., 235; *Hall v. R. R.*, 149 N. C., 110; *Stokes v. Cogdell*, 153 N. C., 182; *State's Prison v. Hoffman*, 159 N. C., 568; *Buchanan v. Clark*, 164 N. C., 61.

FARMERS BANK OF ROXBORO v. R. E. COUCH ET AL.

ACTION ON NOTE—NEGOTIABLE INSTRUMENT—DELAY IN DELIVERY—LIABILITY OF SURETIES.

1. Where a note made payable to a bank was executed and delivered by the principal maker to the president, who received it individually and not as president, and advanced the money thereon, but did not discount it immediately at the bank, as he intended to do, and forgot to do so until two years thereafter: *Held*, that the note being eventually discounted by the bank, the delay did not vitiate it nor render the delivery to the bank invalid, there being no evidence that the sureties were prejudiced by such delay.

2. Where a note made payable to a bank contained a provision that the sureties should remain bound, notwithstanding any extension of time to the principal, and notice of extension was waived, the fact that the note was not delivered to the bank for two years will not release the sureties.

(437) APPEAL from a judgment of a justice of the peace, heard by *Starbuck, J.*, at January, 1896, Special Term of PERSON.

The action was on a note, signed by R. E. Couch as principal and J. T. Walker and C. B. Brooks as sureties. The defendant Couch did not appeal from the justice's judgment.

By consent, his Honor found the facts as follows:

That the defendants Walker and Brooks signed the note sued on, which was as follows:

"$75. ROXBORO, 20 December, 1892.

"Thirty days after date, I, R. E. Couch, principal, and J. T. Walker and C. B. Brooks, the other subscriber's sureties, promise to pay the Farmers Bank of Roxboro, or order, $75, negotiable and payable at the office of the Farmers Bank of Roxboro, with interest at the rate of 8 per cent per annum, after maturity, until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for the payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint E. G. Thompson, cashier, my true and lawful attorney, to sell any or all col-

lateral he may have in his hands to pay this claim, if I should fail to do so when said claim falls due, after giving ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

"R. E. COUCH,
"J. T. WALKER,
"C. B. BROOKS."

Upon the back of said note is the following endorsement: "Received in part payment of within $18, 6 February, 1893." That they signed said note as sureties of Couch, believing the note was to be delivered to and discounted at the Farmers Bank of Roxboro; that Couch handed the note to C. S. Winstead on 20 Decem- (438) ber, 1892; that said Winstead, as an attorney, held certain claims for collection against said Couch and received the note from Couch in satisfaction of said claims, and thereupon paid said claims out of his own pocket; that Winstead was the president of the bank; that in receiving the note Winstead acted not for the bank, but for himself; that he considered the note as his individual property, but intended to immediately discount it at the bank; that he forgot to do so, and did not discount it at said bank until December, 1894; that until that time none of the bank officials and officers, other than Winstead, had ever heard of the note; that the said defendant sureties never made any inquiry as to the whereabouts of the note; that the defendant Couch left the State in September, 1894; that when the note was executed and when Couch left the State he had from $500 to $1,000 worth of personal property."

Upon the foregoing facts the court was of the opinion that no valid delivery of the note was made, so as to bind defendant sureties. It was therefore adjudged that the defendants J. T. Walker and C. B. Brooks go without day and recover their costs.

The plaintiffs excepted and appealed.

W. W. Kitchin and A. L. Brooks for plaintiff.
Boone, Merritt & Bryant for defendants.

CLARK, J. The note was signed in December, 1892, and was made payable to the plaintiff bank. It was handed to the president of the bank, who received it individually and not as president, and advanced the money for the amount of the note, paying therewith certain claims in his hands, which he held as a lawyer against the principal in the note. The president intended to discount the (439) note immediately at the bank, but forgot to do so till December, 1894. This, though delayed, was a valid delivery. *Parker v.*

McDowell, 95 N. C., 219, and similar authorities relied on by the defendants do not apply, because here the note was eventually discounted by the payee bank, and suit is brought by it as a *bona fide* holder; nor did the temporary holding of the paper by Winstead and his advancing money on it vitiate it. 1 Daniel Neg. Inst., sec. 792. There is no evidence that the defendants, the sureties, were in anywise prejudiced by the delay; besides, the note contains the following express stipulation: "The said sureties hereby agreeing to continue and remain bound for the payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee." No agreement to extend time is shown, and certainly a mere delay (not amounting to the bar of the statute of limitations) cannot release the sureties, when they have contracted that an express extension, though made without notice, shall not discharge them. Upon the facts found judgment should be entered below in favor of the plaintiff.

Reversed.

Cited: Rouss v. Krauss, 126 N. C., 668; *Fitts v. Grocery Co.,* 144 N. C., 469.

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(440)

J. W. JONES, ADMINISTRATOR OF J. J. JONES, ET AL., v. THOMAS J. JONES

ADMINISTRATORS—MISTAKE—CANCELLATION OF NOTE DUE THE ESTATE—EXECUTOR DE SON TORT—RATIFICATION—DEVASTAVIT.

1. An administrator, by relation, may ratify and make valid any act of his before qualification that he might have done in the course of his administration after his qualification.

2. Where some of the children of an intestate, in ignorance of the law respecting a certain conveyance of land to a son of intestate as an advancement, agreed that the administrator thereafter to be appointed should cancel the greater part of a note given by the son to the decedent for borrowed money in order to equalize the advancements in personalty, and the son afterwards disclaimed any share in the estate and kept the land, for which he did not account: *Held,* that the administrator (who as one of the heirs of decedent had been a party to the agreement) could not, after his qualification, maintain an action to recover the amount of the canceled note on the ground of a mistake. (CLARK, J., dissents.)

3. In such case the administrator, having canceled the note, is liable for a *devastavit* to such of the distributees as did not assent to the cancellation of the debt.

ACTION heard before *Starbuck, J.,* at January (Special) Term, 1896, of PERSON.

The material facts as found by his Honor below are stated in the opinion of *Associate Justice Furches.*

Both parties appealed.

Boone, Merritt & Bryant for plaintiffs. (443)
Graham & Graham and A. L. Brooks for defendant.

DEFENDANT'S APPEAL.

FURCHES, J. J. J. Jones died intestate in the county of Person, leaving him surviving five children, and grandchildren by two deceased daughters, his heirs at law and next of kin. Before his death the intestate had advanced a part of his children in money and personal property—three of them to the amount of $500 and others in smaller amounts and some of them nothing. He had advanced George in land to the value of $800, and the defendant Thomas J. in land to the value of $1,500. The deed to Thomas expressly stated that it was intended as an advancement and was valued in the deed at $1,500, and this deed had been duly probated and registered for more than a year before the death of the intestate. The defendant Thomas had also borrowed $600 of the intestate not long before his death, for which he executed his note. A few days after the death of the intestate the children (all of whom, it seems, were twenty-one years of age) met at the homestead to consult about the estate and to determine who should administer on the same. The infant children of the two deceased daughters were not present, and, though the father of one set and the uncle of the other professed to represent them, they had no authority to do so. At this meeting the different children made statements as to the amount each had been advanced in personalty; and as three of them had been advanced to the amount of $500, and as it was supposed the personal estate would be sufficient to make them all equal to that amount and more, it was agreed that (444) the defendant Thomas should execute a note to the administrator, when appointed, for the difference between $500 and the face value of the $600 note, and that said note should be given up to him or destroyed. This was to make him equal in the personal estate with those who had been advanced to that amount, and to which amount all were to be made equal before any further distribution should be made.

When this was done, it seems that the other children of the intestate, except the defendant, did not have *actual* notice of the provisions of their father's deed to Thomas, and they were of the opinion that Thomas would have to account for his land, at its value, upon

a partition of the lands of the intestate. But when they came to divide the lands, Thomas, by that time, if he had not before, had found out that if he made no claim for any part of his father's estate his advancements could not be brought into hotchpot, and he filed a disclaimer, and the other lands, including that advanced to George, were divided among the other children, except the defendant Thomas, and were valued at $882 per lot.

After Thomas refused to allow his advancements to be brought in, and claimed nothing further from the estate, the administrators, J. W. Jones and Green B. Williams, bring this action to recover from Thomas the balance of the $600 note he owed to their intestate at the time of his death; and, by order of the court, all the distributees were made parties and joined the plaintiffs in prosecuting this action. Defendant answered and said that it was agreed at a meeting of all the parties interested, a few days after the death of the intestate, that inasmuch as he had received no personal advancement from his
(445) father he should have $500 out of this $600 note to make him equal with the others; that he should give a note to the administrators, when appointed (it being agreed that day that Jones and Williams should administer), for the difference between $500 and his note; that on the next day they did administer, and he gave them his note for $107 (being the difference between $500 and the $600 note and interest), and by consent of all parties his note of $600 was surrendered and destroyed. He further says that he "stands on his own rights in this case, as he did in the proceeding for partition," and says that it is an attempt "to set up an unjust claim, not creditable to the parties concerned, and in violation of the rights of this defendant." This paragraph of his answer, under the circumstances and facts of the case, we think, might have well been omitted. But a jury trial was waived, and the judge finds the facts as to the $600 note, the agreement of the parties, the appointment of the plaintiffs, Jones and Williams, administrators, and that defendant, after their appointment, gave them his note for $107, and they surrendered or destroyed the $600 note, and soon after the defendant paid the $107 note.

Upon these findings the court held that plaintiffs were entitled to recover $500 and interest thereon from the date of the $600 note, and that defendant must account for the excess in the value of his land.

There may be some natural justice in this ruling, but it is not the law. It was admitted on the argument by counsel for plaintiffs that it was erroneous as to the land, while it was contended that it was correct as to the collection of the $500 and interest.

This agreement and arrangement was made: That de- (446) fendant should only pay the excess over $500 on the $600 note by all the parties interested in the estate (there being no debts) the day before the administrators were appointed and qualified; and the administrators, after their appointment and qualification, in taking the $107 note and afterwards receiving payment of this note, were acting in accordance with this agreement. But this does not excuse them for any act they did in regard to the estate before they qualified. When an administrator is appointed and qualifies, his rights as such relate back to the death of the intestate. Schouler on Ex., sec. 238. An administrator, by relation, may ratify and make valid any act of his before qualification that he might have done in the course of his administration after he had qualified. Schouler, sec. 195. "One who assumes to act in behalf of the estate of a deceased person in compromising debts due to it before the appointment of an administrator will, if subsequently appointed administrator, be bound by his acts to the same extent as if he had received his appointment at the time of doing the same." *Alvord v. Marsh,* 12 Allen (Mass.), 603. To the same effect is *Taylor v. Phillips,* 30 Vt. (1 Shaw), 238.

In the case of *Alvord v. Marsh, supra,* it is held that where the plaintiff, before her appointment, settled with the defendant a claim due intestate's estate, in which she allowed claims not due by the intestate, but gave a receipt in full, and afterwards qualified as administratrix, she could not then collect what would have been due but for the settlement; that when she qualified her administration related back to the death of the intestate and validated this settlement.

These authorities go to show that the acts of parties before their appointment, if they are such acts as might have (447) been done in the course of administration, will be ratified if they are afterwards appointed. But from the findings of fact in this case we do not know that they necessarily involve the doctrine of ratification by relation back, as it appears that the $107 note was given and paid to the administrators after their appointment, and we suppose the $600 note was then surrendered or destroyed. But as this does not clearly appear, we discuss the doctrine of relation. And whether it was surrendered the day before they were appointed or not, it was clearly intended as a payment to Thomas as that much on his distributive share of his father's estate. It was in effect the same as if the defendant had paid off the $600 note and the administrators had paid him back $500 out of the same money. But it is claimed that this was done through mistake. And so we think. But a mistake of what? All the facts were known. Defendant's deed had been

registered for more than a year in Person County and defendant was living on the land. This was legal notice of that fact, and all the other facts were known to all the parties. This seems to be admitted by the parties in their argument. But plaintiffs contend that it was a mistake of law in not understanding the law of advancements. This seems to be true: that this payment (for we must treat it as such) was made under a mistake of law. And it seems to be settled in this State that a party cannot recover back money paid under a mistake of the law. *Newell v. March,* 30 N. C., 441; *Adams v. Reeves,* 68 N. C., 134; *Lyle v. Siler,* 103 N. C., 261; *Comrs. v. Comrs.,* 75 N. C., 240. The administrators, having failed to collect and, in
(448) effect, by this transaction, have wrongfully paid the defendant $500 on his distributive share of the intestate's estate through mistake of law, and, not being able to recover it back, have committed a *devastavit,* for which they are liable.

It is suggested by a member of the Court that it was a compromise of the $600 note, and plaintiff cannot recover on account of section 574 of The Code. This is true, if it was a compromise of the claim; but we see no element of compromise in the transaction. There was no talk of a compromise and there was nothing to compromise. The note was admitted to be due—every dollar of it—and there is no suggestion in the pleadings or otherwise that defendant was not solvent; but, as it was committed by and with the advice of all parties interested, except the two sets of minors, who could not participate or consent to this wrongful act of the administrator, none of them will be allowed to recover against the administrators except the infants. While in law the others might be allowed to recover their aliquot parts against the administrators, it would be unconscionable and inequitable for them to do so; and a court of equity would have enjoined them from so doing before the junction of jurisdictions, but now it will not aid them to recover. Therefore, in settling the estate of the intestate the administrators should be charged with this $500 and interest. But each one of the four adults who participated in this agreement and arrangement to give Thomas $500 out of the $600 note should be charged with his aliquot part—this being one-sixth each—as Thomas claims no part of the estate. This will be making them liable for one-third of the $500 and interest, whereas they have collected only $107. For the reasons assigned, there
(449) is error. Plaintiffs cannot sustain this action, and the judgment appealed from is

Reversed.

PLAINTIFF'S APPEAL.

FURCHES, J. This appeal has been disposed of by what is said in the opinion in defendant's appeal. Judgment for defendant.

CLARK, J., dissenting: The conclusion, it seems to me, is not a legitimate result from the reasoning of the opinion. Suppose there were creditors; the administrators as trustees for them could recover the whole amount of the destroyed note. There being certain distributees who did not concur in the surrender of the note, it would seem that the administrators as trustees for them could surely recover of the defendant the aliquot part of the note which is due said distributees, who cannot sue for it in their own names, but must bring the action through the medium of the administrators. If this were not true, when the administrators are insolvent the creditors and distributees would lose their debt. It is true that if the debtor has become insolvent, or loss has in anywise occurred by the *devastavit,* the administrators would become individually liable as executors *de son tort* to the parties, whether creditors of the estate or distributees not participating in the *devastavit;* but this does not destroy the right of the parties having an interest in the note to recover such interest through the medium of the administration. The debtor has not been discharged, as to the creditors or distributees not participating in the *devastavit,* from his primary liability. It is only when the wrongful action of the administrators has been such as to deprive their *cestuis que trust* of a remedy that an action lies against the administrators to make them secondarily responsible *de bonis propriis.* No action has yet been brought against the administrators, and the (450) sole question before us is whether the defendant, one of the parties sharing in the tort, is protected by his own wrongful act against responding to the action of the distributees, who were minors, for their share of the note, the action being brought, as it must be, by the administrators. I think there was no error in the action of the court below.

J. H. SHIELDS v. TOWN OF DURHAM

THE CODE, SEC. 757—LIABILITY OF MUNICIPAL CORPORATIONS FOR DEFECTIVE PRISONS—NOTICE.

1. Section 757 of The Code, requiring that claims against municipal corporations shall be presented to the proper authorities and demand for payment as prerequisites to an action to enforce such claims, applies only to demands arising *ex contractu* and not to those arising *ex delicto*.

2. A municipal corporation is held to notice of facts brought to the attention of individual members of its governing body when not in session.

3. Notice to the agent is notice to the principal, and this rule of law is applicable to municipal corporations; but notice to certain petty officials does not bring a case within the rules.

4. A town is responsible in damages for the gross neglect of its officials in the matter of providing suitable protection for the health of persons confined in the receptacle for prisoners.

ACTION for damages for unlawful detention in guardhouse of defendant, tried before *Starbuck, J.*, at October Term, 1895, of DURHAM.

The issues submitted were:

(451) "1. Was plaintiff injured by the negligence of the defendant?

"2. What damage is plaintiff entitled to recover?"

After the close of the evidence, and the jury had been addressed by two of the counsel for plaintiff and one for defendant, and during the address of another of the counsel for defendant, his Honor stated that, it being conceded by plaintiff that defendant had given general instruction to the chief of police to supply the prison with necessary fuel, etc., and that said authority had extended credit to the chief of police to do so, he would instruct the jury that plaintiff could not recover; and in deference thereto plaintiff submitted to a nonsuit and appealed, assigning as error this ruling of his Honor.

A summary of the evidence is set out in the opinion of *Associate Justice Furches.*

Manning & Foushee, J. W. Graham and Shepherd & Busbee for plaintiff.

F. A. Green and Boone, Merritt & Bryant for defendant.

FURCHES, J. This is an action to recover damages for injuries sustained by plaintiff on account of his imprisonment by defendant in a guardhouse, improperly constructed, filthy and uncomfortable, without sufficient bedclothing, with window glass out, on a cold freez-

ing winter night, from which he suffered great pain and his feet were frozen and his health greatly impaired. The court intimated the opinion, after the evidence was all in, that the plaintiff could not recover, and in deference thereto the plaintiff suffered a nonsuit and appealed.

Although this case has been tried twice below, and is here for the second time on appeal, the point is now made for the first time to dismiss the case for the reason that the complaint does not state a cause of action. To sustain this motion the defendant says (452) that this is an action against a municipal corporation and that it is necessary that the complaint should allege that the plaintiff's claim (if he has any) has been presented to defendant, and that defendant has refused to *audit* and pay the same, as provided in section 757 of The Code. This motion, though made at this late day, has received our careful attention and has given us some trouble. But after a thorough consideration of the matter we have come to the conclusion that section 757 does not apply to an action like this for unliquidated damages. It is true that the language of this statute is very broad: "No person shall sue any city * * * unless he shall have made a demand upon the proper municipal authorities." And the complaint shall be verified and show, first, "that the claimant presented his claim to the lawful municipal authorities to be *audited* and allowed, and that they had neglected to act upon it or had disallowed it." While we may have many cases in our Court where this section has been considered and sustained by dismissing actions brought without the claim having first been presented, these cases, so far as our examination has gone, have all been upon claims *ex contractu;* and we do not think any will be found where the demand is for damages on a claim *ex delicto,* nor have we been able to find any adjudicated cases in other States to aid us in our construction. But we find that all the law dictionaries which we have been able to consult define the word "audit" to apply only to claims *ex contractu.* Abbott, Bovier, Rapalje and Lawrence. And these authorities have aided us in coming to the conclusion that this section does not apply to an action for damages like this. Indeed, we do not see how such a claim as this could be audited. It might be compromised by the parties; but this is much more than auditing the same. It is the work of both parties—the agreement of minds, a contract and not an *ex parte* process of auditing. For the rea- (453) sons assigned, we refuse to dismiss on the motion of the defendant.

This action was here at Spring Term, 1895, reported in 116 N. C., 394. That appeal was by the defendant, and we then held that the court

erred in not submitting the evidence of the condition of this prison and its improper construction to the jury, probably for the reason that they were not sufficiently averred in the complaint. But this defect in the complaint has been removed by an amendment allowed by the court and made by the plaintiff. The evidence on this appeal and that on the appeal at Spring Term, 1895, is generally very much the same, and yet there is a marked difference in some respects which materially affects the case. There is another marked difference in this appeal and that: The appeal before the Court in 1895 was by the defendant, upon the refusal of the court to give certain instructions; and the court's refusing to give certain instructions was the matter then before the Court. But this is an appeal by the plaintiff from a judgment of nonsuit, upon an intimation of the court that the evidence did not make out a case entitling the plaintiff to recover. This being the state of this appeal, no evidence tending to exonerate the defendant or tending to sustain defendant's contentions can be considered. And, on the other hand, all the evidence tending to sustain plaintiff's action must be taken to be true and considered in the most favorable light for the plaintiff; for, while the jury might have discredited some part of it or, indeed, all of it, they might have believed all of it; and while the jury had the right to discredit such testimony, the court had no such right. Then, the plaintiff testified that he was put in the guardhouse on a charge of violating an ordinance of the town of Durham, in swearing on the streets, by
(454) one of the town policemen, on the evening of 7 January, 1893, upon which charge he was afterwards tried and convicted; that he remained in the guardhouse until 8 or 9 o'clock next morning, when a friend bailed him out; that it was a bitter-cold night —snow on the ground and had been for several days; the wind was blowing cold; the cell in which he was placed was an iron or steel cage six or seven feet square, with a tin or zinc floor, covered with ice; there was a bunk in the cage, with a mattress on it, and one—only one—blanket, which was wet and covered with excrement; there were window lights broken out, and the cold wind blowing in; there was a stove in the prison, but outside and two feet from the iron walls of the cage; that the policeman who put him in the cage built up a fire, but it went out; that he slept none all night, suffered intensely, and next morning his feet were badly frost-bitten and his legs swollen, and his health, which had before been uniformly good, had been bad ever since; that he weighed 190 pounds before and only 160 now, and still suffered pain from the injuries received by the imprisonment.

Barbee testified that he was in this guardhouse in December, 1892.

One or two panes of glass were out of the window then; the guardhouse was very filthy; no fire; very cold weather.

Rogers testified that he was in this guardhouse in the winter of 1892 and after Christmas. It was very cold—snow on the ground; was in the iron cell; blankets and mattress in the cell were not clean; no fire there; cell not clean.

Webb testified that he saw plaintiff in the cell about 7 o'clock in the morning, very cold and numb; teeth chattered. He complained of his hands, feet and body.

Guthrie testified that he visited the guardhouse about three years ago; it was cold weather; guardhouse in very bad condition, very filthy, cold and cheerless.

Woodall, a witness for the defendant, testified that he was (455) chief of police in 1893 and, with the exception of one year, ever since 1888, and on cross-examination said: that he complained to the commissioners, but not in meeting, of the guardhouse; told them it was too small and could not be properly cleaned; the commissioners started to build another guardhouse and hauled the brick, but for some reason did not build it. "From the time I was elected chief of police, in 1888, to the time Shields was in the guardhouse, neither the mayor nor any of the commissioners ever visited the guardhouse at all; did not examine to see if there was any fire or any fuel or any blankets in the guardhouse, or whether any window lights were broken out or whether the shutters were closed the night Shields was in it. The town had no guardhouse committee."

We have given a part of the testimony in the case; and it is to be seen, taking this as true and uncontradicted, whether a jury might have reasonably found a verdict for plaintiff. The greatest point of difference in the case, as presented before and as presented by the evidence now, is the condition the cell was in, the length of time it had been in this condition, the length of time it is shown that window glass had been broken out, and the actual or presumptive knowledge the city authorities had of its condition. And we must suppose that no one will contend that, if they had knowledge of the terrible condition in which this miserable concern was, and the plaintiff's health was impaired by being incarcerated in it on such a night as all the witnesses testify it to have been, the plaintiff should not recover. The general rule is that knowledge of the agent is knowledge of the principal. *Bank v. Burgwyn*, 110 N. C., 267; *Bank v. School Com., ante*, 383. The doctrine is held not to apply, in certain conditions, as to minor officers of municipalities. *Moffit v. Asheville*, 103 (456) N. C., 237. But this rule cannot protect them, where they have provided a place of imprisonment which is so badly constructed

that a prisoner cannot be reasonably comfortable. *Lewis v. Raleigh,* 77 N. C., 229. This they are bound to have knowledge of. And although there are certain duties devolved on ministerial or minor officers of a municipal corporation, for reasons of public policy, the corporation will not be held liable for, still it is their duty to give the affairs of the town their personal attention and inspection; and where a city prison has been for months in the terrible, filthy, wet and frozen condition, with window glass broken out as far back as December, 1892, they are presumed to know it and will be held responsible, whether they actually know it or not. Here it is in evidence that there is no committee in Durham charged with the duty of examining and looking after the town prison, and that the commissioners had not done so since 1888. The law will not tolerate such gross negligence as this, without holding them responsible. The chief of police says he told the commissioners about the bad condition of the prison, "but not in meeting." So we see that the commissioners had information of the bad condition of things. And the argument of the defendant is that when they were out on the streets of Durham they knew the prison was an unfit place to put a man in—filthy, wet and cold, with window glass broken out—but when they got "in meeting" they knew nothing about it. This will not do. The law does not tolerate such forgetfulness as this in town authorities. We have said at this term of the Court that information received by one member of a school board about the business of the board should have been given to the board, and that notice to him was notice to the board, and they
(457) were bound by it. We see no public policy or other reason why the same rule should not apply here. And this does not conflict with what is said in *Moffitt v. Asheville, supra,* nor with anything said by the Court when this case was here before. If the evidence offered by the plaintiff is true (and the Court in this appeal is bound to take it as true), there is sufficient evidence to warrant the jury in finding a verdict for the plaintiff. There was error in not submitting the case to the jury, and there must be a

New Trial.

Cited: Frisby v. Marshall, 119 N. C., 571; *Sheldon v. Asheville, ib.,* 610; *Nicholson v. Comrs.,* 121 N. C., 28; *Coley v. Statesville, ib.,* 317; *Neal v. Marion,* 126 N. C., 415; *Levin v. Burlington,* 129 N. C., 188; *Hughes v. Fayetteville,* 134 N. C., 754; *Sugg v. Greenville,* 169 N. C., 617.

J. W. HUTCHINS v. TOWN OF DURHAM

LAWS TAKEN TO BE INCORPORATED INTO CONTRACT—LICENSEES DISTINGUISHED FROM TENANTS—OCCUPANTS OF MARKET STALLS—IMPLIED POWERS OF CITIES AND TOWNS OVER MARKETS—RIGHTS AND DUTIES OF PASSENGERS, HOTEL GUESTS, THEATER GOERS, ETC., THEIR LIABILITY TO SUMMARY EVICTION AND THEIR REMEDIES.

1. Laws in existence at the date of a contract are deemed to constitute a part of the same, just as though incorporated in it.

2. A town ordinance providing that all licenses to occupy stalls in a market house may be revoked at will is in force until repealed, and may be summarily enforced at the discretion of the authorities of the town.

3. Persons occupying stalls in a town market house under license from the town are not tenants, but licensees merely. They do not acquire the rights of tenants from year to year by being permitted to hold over after the period covered by their license has expired, and may be summarily ejected at the discretion of the proper authorities.

4. Guests at a hotel, passengers on a car, holders of seats at a theatre, occupants, of stalls in a town market house and such like licenses cannot maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. Such persons' rights of occupancy are dependent upon proper behavior and decent conduct and obedience to reasonable rules and regulations of the proprietors, and for a breach of such implied conditions they may be summarily removed.

5. Markets being a public necessity, a town has the implied power to establish and regulate them.

ACTION brought by plaintiff to recover damages for being (458) violently evicted from a meat stall in the market house of defendant town of Durham by its officers, under the orders of its governing authorities. The case was tried before *Starbuck, J.*, at October Term, 1895, of DURHAM.

(467) Both parties appealed from the judgment rendered.

J. W. Graham and Boone, Merritt & Bryant for plaintiff.
F. A. Green and Fuller, Winston & Fuller for defendant.

AVERY, J. Upon offering the required testimony as to character and capacity, the defendant, at the regular time provided in the ordinances of the town for renting (during the last week in April, 1887), rented stall No. 2, in the defendant's market house, at a rental of $13 per month, and there being no further public rentings in pursuance of the ordinance until April, 1894, the plaintiff, though still retaining stall No. 2, added stall No. 3 by purchasing the business of one M. Openheimer, who at the first letting leased and occu-

(468) pied it. Since the plaintiff took possession under the license, in 1887, there has been continuously a provision in the town laws that "such license (as that granted him) *may be revoked" for any cause which the board may deem sufficient.*

Where parties contract in contemplation of a statute then in force, its provisions are deemed to constitute a part of the agreement, just as though they had been incorporated in it. *Koonce v. Russell,* 103 N. C., 179; Cooley Const. Lim., p. 285; *McCless v. Meekins,* 117 N. C., 34; *Strickland v. Pennsylvania,* 21 L. R. A., 16.

A licensed occupant of a stall in a market house has no such interest in the soil as he acquires by virtue of a contract of lease for a store or dwelling house. He cannot recover possession of it by an action in the nature of ejectment, if wrongfully evicted from it, but, as a mere licensee, can at most maintain an action for damages. *Strickland v. Pennsylvania, supra.* When the plaintiff entered, and while remaining as an occupant of the stall, the by-law made his license revocable, at the discretion of the authorities of the town, for any reason they deemed sufficient. That he paid his money for a license held by any such precarious tenure was his own fault, if fault it was. He was under no compulsion to submit to any such terms if he felt averse to doing so. He and all other persons were presumed to know the law and to conduct such business with an eye to its provisions. It is not material that the town had the power to repeal its ordinance, when it had never in fact annulled or altered it in the least particular. Where a legislative committee is authorized to enter into a contract for the public printing, the act empowering them to do so may either simply create them agents of the State to enter into an agreement, in which case they are left subject to any existing law relating to
(469) the manner of entering into such contract, or the lawmaking power may define their duties in the statute constituting the agency in such a way as by implication or directly to repeal pre-existing laws on the subject. This illustration is used because it is one familiar to those who have observed legislative proceedings. In the same way succeeding boards of commissioners are deemed to act, subject to the provisions of ordinances passed by their predecessors in authority, until they see fit to repeal them directly or to substitute others inconsistent with the older enactments.

It was insisted for the defendant on the argument that by holding over after the time fixed in the ordinance for an annual meeting the defendant became a tenant from year to year. It is true that when land is leased for a year, and the tenant is suffered to hold over without any new contract, the law implies a promise on the part of the lessee to pay the same rent, and on the part of the lessor to agree to

the same terms, and the tenancy becomes one from year to year. But no such implication can arise while a law stands upon the statute books of the town declaring in express terms that a meat stall is held under a license revocable at the pleasure and discretion of the licensor, not under a lease, if from the nature of this police power another relation could be created in its exercise in any case except by express contract. *Hatch v. Pendergrast,* 15 Md., 252. One who occupies a stall under a license granted in pursuance of the provisions of an ordinance defining the rights and duties of the town (such as that under which defendant entered) is not a lessee, but a mere licensee. He acquires no right in the soil, but is an occupant, at the absolute pleasure and discretion of the licensor, 27 Am. and Eng. Corp. Cases, p. 631; *Barry v. Kennedy,* 11 Abbott Pr. N. S. (N. Y.), 421; 14 Am. and Eng. Enc., 463; *Hatch v. Pendergrast, supra; Charleston v. Goldsmith,* 2 Spears (S. C.), 428; *Strickland v.* (470) *Pennsylvania, supra; Rose v. Mayor,* 31 Am. Rep., 308.

The fact that the town prescribes in its ordinances a day on which there shall be an annual renting of the stalls, confers no right on one who has voluntarily become an occupant of one of them upon the terms set forth in the ordinances. If he and all other occupants were subject to removal at discretion, the town could either advertise and offer all stalls in April or evict all the tenants at any other time and substitute others by a public or private letting in their places.

On 10 July, in pursuance of an order of 3 July, 1894, a notice that the stalls would be offered publicly for rent on 1 August, 1894, was posted at the market house and seen by the plaintiff, who was present also when his own stall was rented, and was notified on 9 August, to vacate on 10 August, 1894. He paid no attention to the notice and persisted in his refusal to remove his property or leave himself when the policeman appeared upon the scene at the appointed hour on that day. He suffered them to remove a heavy safe and to place his fresh beef, after removal, on marble slabs, without assistance and without a request in relation to the matter. He then placed himself upon his block, which it was necessary to move, and thereby forced the policemen to lift the block up, with him on top of it, and carry both out of the way. About the time they reached the place selected for depositing the block the plaintiff fell off and caught "upon his all fours." In no aspect of the evidence is this either an unlawful expulsion or a lawful expulsion, conducted in a manner so unnecessarily violent as to entitle the expelled party to damages, either compensatory or vindictive.

Where a guest in a hotel, a passenger on a railway train or a ticket holder at a theater creates a disturbance, though (471)

either has a right under his contract to remain so long as he acts with due regard to the rights of others, the proprietor, conductor or manager or their agents may use the amount of force necessary to expel. *S. v. Steele,* 106 N. C., 766. But markets are necessary to the life of the residents of a municipality, and for that reason it has been held that the right to establish and regulate them was implied in the very creation of such corporations. Having the right to regulate these places for the public good, they would be powerless to carry out that duty if, after the license of an occupant of a stall is revoked or expires, they do not have the same power through their lawful officers to expel him which an innkeeper or a conductor has to protect the guests or passengers, representing the public, who place themselves under his care.

The plaintiff had become a trespasser, not by holding over under any contract which gave him the least interest in the premises, but like one who enters a hotel under an implied license, but forfeits his right to remain by misconduct.

The testimony does not show that the officers used more force than was necessary to eject the plaintiff, and, therefore, even though they acted under the orders of the commissioners, the plaintiff can recover neither exemplary nor punitive damages. The plaintiff had no right to recover in any aspect of the evidence, and it follows that there was error in refusing the prayer of the defendant for instructions to that effect, while there was no error in refusing to tell the jury that the plaintiff could recover punitive or any other kind of damage. There was error in the ruling from which the defendant appealed,
(472) for which a new trial must be granted; and there was no error in that excepted to by the plaintiff.

Affirmed in plaintiff's appeal. New trial in defendant's appeal.

Cited: Caldwell v. Wilson, 121 N. C., 469.

J. H. SIMMONS ET AL. v. L. D. JONES ET AL.

SPECIAL PROCEEDINGS FOR PARTITION—AMENDMENTS—DISCRETION OF CLERK—CONDITIONAL JUDGMENTS—JUDGMENTS IN FORECLOSURE.

1. In special proceedings before the clerk of the Superior Court the allowance or rejection of amendments to the pleadings are matters of pure discretion with him.

2. A conditional judgment is one whose force depends upon the performance or nonperformance of certain acts to be done in the future by one of the parties.

3. A proviso in a judgment that the defendant shall have further time to perform the judgment, and if he does perform it within the specified time no execution shall issue or his lands shall not be sold under foreclosure, is not a condition, and judgments with such provisions are regular and proper.

4. A judgment which by its terms is to become void if the defendant shall pay so much money by a certain time is conditional and void.

5. A judgment for partition which directed the commissioners to charge the shares allotted to certain of the parties with certain sums (in accordance with the terms of a will under which all parties to the proceeding claimed), but not to make such charges if the sums so to be charged should be paid before the commissioners acted, is not conditional and void, but regular and proper.

PETITION for partition of land, heard (on appeal from (473) the clerk) at December (Special) Term, 1895, of JONES, before *Graham, J.*

The facts are stated in the opinion.

J. B. Batchelor and R. C. Strong for plaintiffs.
W. D. McIver for defendants.

MONTGOMERY, J. Amos L. Simmons, in his last will and testament, devised his real estate, one-fourth to his son George, one-fourth to his son Charles, one-fourth to his daughter Elizabeth, wife of Joseph Rhodes, and one-fourth to his grandchildren, Leah, John A., Mary F., Sophia D. and Robert D. Jones. The share of Charles was to be charged with the sum of $270, and the share of Elizabeth with the sum of $450, sums advanced to them, respectively, by their father in his lifetime, unless they should, respectively, pay these sums in the lifetime of the testator or afterwards and before the lands should be divided, or unless such amounts remaining unpaid on these advancements should not be paid with their shares of the personal estate.

A petition for partition of these lands was filed before the clerk of the Superior Court by George and Charles Simmons and Elizabeth Rhodes against the grandchildren above named, and the rights of the parties set out therein in accordance with the provisions of the will, the charges on the shares of Charles and Elizabeth being particularly mentioned. The petition contained no intimation that there was any personal property or money of the estate of the testator in the hands of the executor or any other person with which to pay off the charges on the shares of Charles and Elizabeth. The clerk made the order for partition and adjudged that the shares of Charles and Elizabeth be charged, respectively, with the sums imposed upon them under the will of their father. After the order for partition (474)

was made, the petitioners, Elizabeth and her husband, moved before the clerk to amend the petition so that it might allege that Mrs. Rhodes be declared "entitled to be accredited as a payment of the amount of money in the hands of the executor to which she might be entitled as legatee or distributee" under the will. The clerk refused to allow the amendment, and they excepted to his ruling.

If the amendment had been allowed it would not have amounted to an explicit declaration that there was a sum of money in the hands of the executor to which Mrs. Rhodes was entitled as legatee or devisee. As an allegation it was not positive, certain and unequivocal; it was not even an inferential statement of a fact. But, besides that objection to the proffered amendment, the allowance or rejection of it was a matter of pure discretion with the clerk. *Wiggins v. McKoy,* 87 N. C., 499; *Garrett v. Gibbs,* 107 N. C., 303. Rhodes and his wife filed also an exception to the judgment for partition, and insisted that it was conditional and therefore void. The judgment, after ordering the partition according to the will of the testator, instructed the commissioners to charge the shares of Charles and Mrs. Rhodes, respectively, with the sums expressly laid upon them in the will of their father, and simply added a proviso that if these sums were paid before the commissioners acted, then these shares should be relieved of the charges and the commissioners should not charge them on the shares in their report to the court. The substantial relief sought and the purpose of the proceeding was the partition of the land, the charge for equality only an incident. The judgment for partition remained in full force, whether the amounts charged on the shares of Charles and Mrs. Rhodes were paid, or not, before partition was
(475) actually made. Under the will of her father Mrs. Rhodes had the right to pay the sum charged against her share up to the time of actual partition, and it was proper that the judgment should give her the same right and that the commissioners should be instructed how to report in case she did or did not pay it before they acted. There is nothing like a condition expressed in the judgment. An unequivocal and positive order was made for the partition of the land which is the purpose of the action. The direction to the commissioners as to the charge on the appellants' share is in accordance with the provisions in the will—works no delay and creates no uncertainty. Nothing remained to be done upon which the judgment was dependent for its force and effect, and nothing was left open to defeat its provisions. A conditional judgment is one whose force depends upon the performance or nonperformance of certain acts to be done in the future by one of the parties, *e. g.,* a judgment in favor of A against B for $500, to be stricken out or to be void upon the pay-

ment of the amount within sixty days from its date if the defendant shall pay the amount within that time. Such a judgment would be perfectly good, however, if instead of the condition it contained a proviso that the defendant should be allowed sixty days within which to pay the money, and that in that event no execution should issue. And, again, if in case of foreclosure of mortgage on real estate for debt a clause should be inserted in the judgment to the effect that the judgment should be void or be stricken out if the defendant should pay the debt within ninety days, such a judgment would be conditional and therefore void; but a clause allowing the debtor ninety days within which to pay the debt, and, in default of his paying it within the time allowed, requiring the commissioners (476) to proceed to make the sale, would be unobjectionable and in accordance with the usual practice. There is no error in the rulings of the court below, and the judgment is

Affirmed.

SAMUEL BEAR, SR., v. W. H. HARRIS ET AL.

ACTION FOR DAMAGES—TRESPASS—EVIDENCE—DEFENSE.

1. Where defendant purchased the cargo of a schooner moored to a wharf, with privilege of removing the cargo within thirty days, and, during that time and without the permission of the owner of the schooner, removed the boat to a more convenient place for unloading, where it was damaged by a storm: *Held*, that the defendant was a trespasser *ab initio* and liable for the resulting damages.

2. In such case the fact that if the schooner had remained at the wharf it might have been undamaged by the storm as much as or more than it was at the place to which it was removed is no defense.

ACTION tried before *Hoke, J.*, and a jury, at January Term, 1895, of NEW HANOVER.

There was verdict for the plaintiff, and the defendants (480) appealed from the judgment.

George Rountree for plaintiff.
D. L. Russell and E. K. Bryan for defendants.

FAIRCLOTH, C. J. The cargo of the schooner in question was sold at public sale, and the terms were that the purchaser was to have thirty days to remove it, and there were no other terms. The schooner, then fast to the wharf in Wilmington, was sold to the plaintiff, subject to the terms of the sale of the cargo. The defendant, purchaser of the cargo, without plaintiff's permission, removed the schooner one

or two miles down the river for the purpose of unloading, and she was caught in a storm and damaged.

Defendant insists that by the terms of the sale he had the implied right to remove the boat to a more convenient place for unloading, and his Honor told the jury, if they believed that he removed the boat for such purpose without plaintiff's permission, he was liable for the damages. In this we see no error. The right to enter the boat at the wharf within thirty days and remove the cargo was not an implied license to remove the schooner to another place for convenience and unload. It was not a necessity, but was the abuse of a legal
(481) license, and made the defendant a trespasser *ab initio*. The argument was made that if the schooner had remained at the wharf the damage would have been as great or greater by reason of the storm. *Non constat* that such would have been the result, and there is no evidence that it *must* have happened. The defendant cannot qualify his wrong in that way and insist on the *possibility* of a loss if he had not exceeded his privilege. *Davis v. Garrett*, 6 Bing., 716; *Gardner v. Rowland*, 24 N. C., 247. In the latter case the defendant, under a license to enter the plaintiff's enclosed lands to remove some corn, instead of entering at the gate, as advised to do, for his own convenience entered at another place by pulling down the fence. This was held to be illegal, as it was unreasonable to presume a more extensive license than was essential to the enjoyment of what was expressly granted.

No Error.

MARY WILLIAMS ET AL. v. LEO HAID

ACTION TO CANCEL DEED FOR INCOMPETENCY OF GRANTOR—MENTAL CAPACITY—PRESUMPTION OF LAW.

1. The capacity or incapacity to make a deed or contract is a question of fact for the jury and not one of law.

2. No presumption of incompetency to make a deed or contract is raised by the law from advanced age or feeble health of the grantor.

3. In the trial of an issue as to whether a grantor, at the time of executing a deed, was of sound mind and disposing memory it was error to charge that, "If the jury believe that the grantor was sixty-four years of age, was suffering from physical disease which had developed four years previous thereto, which had grown in strength and virulence up to the time of the execution of the deed, and from the effect of which he died three months thereafter, and that his old age and physical infirmity had weakened his mind, then, the deed being a bounty and made without consideration, there arises the presumption of law that he was incompetent to execute the deed, and the burden is upon the defendant (grantee) to satisfy the jury that he was competent."

4. The fact that one portion of a charge to the jury correctly presents the law will not cure the erroneous portion.

ACTION tried before *Green, J.*, and a jury, at Fall Term, (482) 1895, of NEW HANOVER.

The plaintiffs alleged that one Lawrence Brown, late of the city of Wilmington, county and State aforesaid, died on 22 April, A. D. 1892, intestate, and that they were his only heirs at law; that prior to his death, to-wit, on 14 January, A. D. 1892, the said Lawrence Brown executed to the defendant a deed conveying certain real estate, therein described and fully set out in the complaint, and that on said day the said Lawrence Brown transferred and set over to the defendant all of his personal property without any consideration; that at the time of the execution of the said deed and transfer of the said personal property the said Lawrence Brown was mentally incompetent to make a deed or any other disposition of his property; and that the execution of said deed and the transfer of the said personal property was procured by undue influence exerted by the defendant and other persons named in the complaint over the mind and will of the said Lawrence Brown.

The defendant admitted the execution of the deed and (483) transfer of the personal property, and denied that the said Lawrence Brown was mentally incompetent to execute said deed or make a valid transfer of the personal property or that the same was procured by any undue influence.

The following issues were submitted to the jury:

1. "Are the plaintiffs the heirs at law of Lawrence Brown?

2. "Are the plaintiffs the only heirs at law of Lawrence Brown?

3. "At the time of the execution of the deed to the defendant, was Lawrence Brown of sound mind and disposing memory?

4. "Was the said deed obtained by undue influence exercised by the defendant Leo Haid, Daniel O'Connor, Rev. Father Dennen or any layman of the Catholic Church, or any of them?"

There was much testimony bearing upon the third issue.

Among the instructions prayed for by the plaintiff and tendered by the court on the third issue was the following: "That while old age itself or physical infirmity or mental weakness is not sufficient by itself to render a man incompetent to make a deed or execute a contract, yet old age, physical and mental weakness raise a strong presumption of incompetency; and if the jury believe that at the time this deed was executed Lawrence Brown was sixty-four years of age, was suffering from physical disease which had developed four years previous thereto, which had grown in strength and virulence up to the

time of the execution of this deed, and from the effect of which he died within three months thereafter, and that this old age and physical infirmity had weakened his mind, then, this deed and other disposition of his property being a *bounty* and made *without consideration,* there arises the presumption of law that he was incompetent to
(484) execute said deed or make said contract, and the burden of proof is upon the defendant to satisfy the jury that he was competent; and if the jury are not so satisfied, then the deed and contract is null and void, and the jury must find the third issue 'No.'" Defendant excepted.

The jury responded to the first issue, "Yes"; to the second issue, "Yes"; to the third issue, "No," and, under the direction of the court, made no response to the fourth issue.

The court refused defendant's motion for a new trial, and he appealed from the judgment rendered for plaintiff.

George Rountree and Thomas W. Strange for plaintiff.
H. G. Connor for defendant.

FAIRCLOTH, C. J. We dispose of this case by considering the instructions of the court upon the third issue. That issue was in these words, "Was the said Lawrence Brown, deceased, at the time of making the said deed, of sound mind and disposing memory?" which the jury answered "No." After numerous witnesses were examined on the question, the court charged the jury that the burden of this issue was upon the plaintiff "to satisfy them by a preponderance of proof that Lawrence Brown, at the time of executing the deed to the defendant, was not of such a state of mind as to comprehend the nature of his act, to understand what he was doing and to know the direct consequence of his act * * *; that if the jury believe from the whole of the evidence that at the time of executing the deed he had sufficient mind or mental capacity to understand what he was doing, what property he was conveying, to whom he was conveying it, and for what purpose the conveyance was made, they should answer the third issue 'Yes.'"

(485) In the latter part of the charge his Honor instructed the jury: "And if the jury believe that at the time this deed was executed Lawrence Brown was sixty-four years of age, was suffering from physical disease which had developed four years previous thereto, which had grown in strength and virulence up to the time of the execution of this deed, and from the effect of which he died within three months thereafter, and that this old age and physical infirmity had weakened his mind, then, this deed and other disposition of his

property being a bounty and made without consideration, there arises *the presumption* of law that he was incompetent to execute the deed or to make the contract, and the burden of proof is upon the defendant to satisfy the jury that he was competent; and if the jury are not so satisfied, then the deed and contract are null and void, and the jury must find the third issue 'No.' '' The defendant excepted.

In the latter part of the charge quoted there is error. The capacity or incapacity to make a deed or contract is a question of fact to be ascertained by the jury and not one of law. The law does not presume that a man sixty-four years of age is incompetent to contract, nor that one suffering from physical disease from which he dies in a few months, even if his mind had been weakened by suffering, is incapacitated to contract or convey his property. His actual condition under such and similar circumstances is the matter to be inquired of by the jury. The law cannot declare or presume in the matter until facts are found or admitted. At what age, for instance, will the law presume incompetency? Would it do so at fifty, sixty or seventy-five years? How much physical suffering and what degree of weakness of mind would the law require to exist before it would presume incompetency?

It does not help the case to say that, although a part of the charge is erroneous, there is another part of the charge on the same point which was correct, and that as a whole there is no error, (486) because the jury would be presumed to have obeyed the correct portion. *S. v. Fuller,* 114 N. C., 885. That is to assume that the jury understands the law and is able to detect and discard erroneous instruction, which would not be a safe assumption; besides, it is the duty of a jury to follow the instructions of the court upon the law and legal presumptions, whether they are right or not. With this conclusion it is unnecessary to pass upon the other questions, as they probably will not be presented at the next trial.

Venire de novo.

Cited: Edwards v. R. R., 129 N. C., 80; *s. c.,* 132 N. C., 101; *S. v. Barrett, ib.,* 1011; *S. v. Clark,* 134 N. C., 712; *Drum v. Miller,* 135 N. C., 218; *Westbrook v. Wilson, ib.,* 402; *S. v. Morgan,* 136 N. C., 632; *Bond v. Mfg. Co.,* 140 N. C., 384; *Liles v. Lumber Co.,* 142 N. C., 47; *Wilson v. R. R., ib.,* 341, 342; *Morrow v. R. R.,* 147 N. C., 629; *Jones v. Ins. Co.,* 151 N. C., 56; *McWhirter v. McWhirter,* 155 N. C., 147; *Hoaglin v. Tel. Co.,* 161 N. C., 399; *Horton v. R. R.,* 162 N. C., 456; *Raines v. R. R.,* 169 N. C., 192; *Champion v. Daniel,* 170 N. C., 333, 334.

FRANCIS WINSLOW v. GEORGE L. MORTON

CONSTITUTION OF U. S., ART. II, SEC. 2; STATE CONSTITUTION, ART. III, SEC. 8; ART. XII, SEC. 3—GOVERNOR'S POWERS AS COMMANDER IN CHIEF—REMOVAL OF OFFICERS OF STATE MILITIA—CONSTRUCTION OF STATUTES—REPEALING STATUTES BY IMPLICATION—STATUTES IN PARI MATERIA—THE CODE, SEC. 3268, LAWS 1893, CHS. 374, 399.

1. Under the Constitution of this State, Art. III, sec. 3, and Art. XII, sec. 3, the Governor is made commander in chief of the militia, except when it is called into the service of the Federal Government, and his control is supreme, in the absence of legislation "to provide for the organization," etc., of the militia, enacted pursuant to Article XII, section 3.

2. The Legislature can provide for the organization, arming, equipping and discipline of the militia, and when it passes laws of that character the powers of the Governor as commander in chief are limited *pro tanto,* and he is charged, as the head of the Executive Department with the duty of executing such laws.

3. As incidental to his office of commander in chief the Governor has the constitutional power, in the absence of legislation to the contrary, to remove an officer of the militia and dismiss him from the service.

4. The Code, sec. 3268, is in affirmance of the constitution and confers upon the Governor the power to dismiss and remove officers of the militia, and this power is not interfered with by chapters 374 and 399 of the Laws of 1893.

5. These rules of law for the construction of statutes are well established: (1) The law does not favor the repeal of an older statute by a later one by mere implication. (2) The implication which will work the repeal of a statute must be necessary, and if it arises out of repugnancy between the two acts the later act abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute. (3) Where a later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to merge into it the whole law on the subject, a repeal by necessary implication is effected.

6. The courts construe any statute in derogation of common law or of common right strictly, and upon the same principle prefer to interpret successive statutes as *in pari materia* and give effect to all, in so far as they are reconcilable one with another.

7. The naval force provided for by chapter 399, Laws 1893, is part of the State militia and subject to the same regulations.

8. The authority of the President of the United States as commander in chief of the army and navy of the United States and of the militia of the several States discussed.

(487) ACTION heard by *Starbuck, J.,* in March, 1896, at chambers, in Wilmington, NEW HANOVER County, upon a notice to show cause why a restraining order should not be granted.

The motion was heard upon the complaint and demurrer thereto.

The action was brought to enjoin the publication by the defendant, as lieutenant commander, of an order from the (488) Governor as commander in chief of the militia revoking a commission held by the plaintiff as commander of the naval battalion of the State Guard, the plaintiff denying the power of the Governor to issue such order without trial before a court-martial.

Defendant demurred to the complaint, for that it does not state facts sufficient to constitute a cause of action: (1) because the Governor had, in law, as commander in chief, the power to revoke plaintiff's commission; (2) because the action is not a proper one for injunction, for if the order was void the plaintiff is still in office, but if ousted he could try his title by an action in the nature of a *quo warranto.*

The demurrer was sustained, the motion for a restraining order denied, and plaintiff appealed.

Ricaud & Weill and George Rountree for plaintiff.
Attorney-General and Battle & Mordecai for defendant.

AVERY, J. The Constitution of the United States provides (Art. II, sec. 2) that "the President shall be commander in chief of the army and navy of the United States and of the militia of the several States when called into actual service of the United States." The Constitution of North Carolina (Art. III, sec. 8, and Art. XII, sec. 3) constitutes the Governor of the State commander in chief of the militia, except when they are called into the service of the Federal Government, and confers upon him the power to call them out "to execute the law, suppress riots or insurrection and to repel invasion." While the two provisions supplement each other so as to prevent collision when the Chief Executive of the United States calls (489) the militia of the State into actual service, the authority conferred as incident to the office of commander in chief, leaving other constitutional provisions out of view, is substantially the same when either is actually controlling land or naval forces within his own province.

The President, as the constituted head of the military establishment, has the implied power to regulate the disposition of armies and to direct the movements of the navy. So long as Congress refrains from the exercise of its authority to make rules for the government of the land and the naval forces, it has been conceded that the control of the President is supreme, within the sphere of his office, and limited only by the well-defined boundary fixed for the protection of individ-

ual liberty and security. Neither the President nor Congress nor the judiciary can disturb any of the safeguards of civil liberty. Ordronaux Con. Leg., p. 108. "But Congress may, under the Constitution, not only provide for raising, equipping and maintaining armies and navies, but may make rules for the government of the land and naval forces. When Congress asserts its authority to the extent that it acts within the purveiw of its powers the President is deprived of the supreme power of military head of the Government, and in lieu of his right to exercise it incurs the obligation as Chief Executive to see that the laws made by the legislative branch of the government are faithfully executed." Black's Const. Law, p. 96.

So, the Constitution of North Carolina (Art. XII, sec. 2) having authorized the Legislature "to provide for the organization, arming, equipping and discipline of the militia," where it passes an act in pursuance of this section, imposes *pro tanto* a limit upon the in-
(490) cidental authority of the Governor, as commander in chief and charges him, as the constituted head of the executive department (Article III, section 1), with the duty of seeing that the statute is carried into effect.

It appears, therefore, that by the terms of both the Federal and the State Constitutions the executive heads of the two governments are constituted commanders of the military forces by using substantially the same words, and that the grant of authority to the legislative departments is expressed in the two instruments in language almost identical. It follows that in time of peace the right of the President to remove officers of the regular army, in the absence of all statutory regulation by Congress, must be precisely the same as that of a Governor to dismiss officers of the militia when his powers and duties are not defined by any legislative act. It seems to have been settled by numerous authorities that the President may, in the absence of express prohibitory legislation by Congress, dismiss an officer from the service in order to promote the efficiency of the army or navy. *Blake v. U. S.*, 103 U. S., 227, 232; *Keyes v. U. S.*, 109 U. S., 336; *Black, supra*, p. 96, note; *McElrath v. U. S.*, 102 U. S., 426.

The statute (The Code, sec. 3268) was in affirmance of the Constitution in so far as it purported to clothe the Governor, as commander in chief, with the authority already vested in him to revoke any commission * * * whenever in his judgment it shall be necessary or expedient for the public good or for the good of the service. The power to dismiss being conferred by the constitutional provision and affirmed by statute, it is clear that the Governor may still lawfully exercise it, unless the Legislature, by virtue of its authority to organ-

ize and discipline the militia, has either expressly or by implication repealed the statute.

It is provided by section 24, chapter 374, Laws 1893, that "a commissioned officer may be honorably discharged upon (491) tender of resignation, upon disbandment of the organization to which he belongs, upon the report of the board of examination, or for failure to appear before such board when ordered." It was further provided in the same section that "he may be dismissed upon the sentence of a court-martial or conviction in a court of justice of an infamous offense." Another section of the same act (section 18) authorizes "the commander in chief to disband a company and grant honorable discharges to its officers and men where for ninety days it is found to contain less than the minimum number of enlisted men, or where upon inspection it is found to have fallen below a proper standard of efficiency."

The only remaining question is whether the older statute (The Code, sec. 3268) is by implication repealed by either chapter 374 or chapter 399, Laws 1893. The plaintiff does not contend that there is any express repealing clause in either. The courts have universally given their sanction to the rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. *S. v. Woodside,* 30 N. C., 104; *Simonton v. Lanier,* 71 N. C., 498. (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. *Wood v. U. S.,* 16 Peters, 363; *Chem Hiong v. U. S.,* 112 U. S., 549; *St. Louis v. Independent,* 17 Mo., 146. A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to the restrictions or modifications of its meaning, where such seems (492) to have been the legislative purpose. Southerland on Stat. Construct., sec. 158. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature as a substitute. *R. R. v. U. S.,* 127 U. S., 466; *S. v. Stolt,* 17 Wallace, 425; *Longlois v. Longlois,* 48 Mo., 60; *Casey v. Harned,* 5 Clarke (Iowa), 1; *S. v. Custer,* 65 N. C., 339; *The Code,* sec. 3766; *Brietung v. Lindoner,* 37 Mich., 217; *Trinity Church v. U. S.,* 457. (3) Where a later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to give expression in it to the whole law on

the subject, the latter is held to be repealed by necessary implication. *Matter of N. Y. Institution,* 121 N. Y., 234; *U. S. v. Lineu,* 11 Wallace, 88; *Jernigan v. Holden,* 34 Fla., 530.

The Legislature, by the act of 1876-'77 (The Code, sec. 3268), reaffirmed the Governor's right as commander in chief to revoke commissions and disband companies, in the exercise of a sound discretion, "for the public good or the good of the service." Are the Acts of 1893 repugnant to the provisions of The Code? If not, is there anything in either (chapter 374 or chapter 399, Laws 1893) that plaintiff manifests the purpose of the Legislature to substitute the new acts for the pre-existing statute? These are the questions upon which the controversy depends.

The section of The Code then in force clothed the Governor with power to disband companies or to revoke commissions where he deemed it best for the service or the public interest, but section 18, chapter 374, Laws 1893, clothed him with authority to act upon the report of an inspection made by the proper officer and order that a com-
(493) pany be disbanded and men and officers be honorably discharged, where they did not appear to have come up to a standard of efficiency set up by a staff officer or to have kept the number of enlisted men above the minimum prescribed. Clearly the right to exercise such a general discretion is not inconsistent with the legislative declaration that certain conditions may justify the exercise of the same power in special cases and under given circumstances, without regard to the views of the agent entrusted by the government with the authority. So the provision in section 24 of the same chapter, that a commissioned officer may be honorably discharged on tender of his resignation, upon the report of the board of examination, or for failure to appear before such board, is not irreconcilable with the prior statute, for the reason that the Governor might, before the passage of the later act, have refused to accept the resignation of an officer, or, upon an unfavorable report of the board or upon failure to appear before such board, might have declined to revoke his commission on the ground that he did not believe the public interest or the good of the service called for the exercise of his authority. The two statutes can stand and be construed together as vesting in the Governor the right to revoke commissions on special grounds, without regard to his opinion as to consequences or for any reason outside of the cases enumerated, where he may think it best for the service. Looking at all of the provisions of the two acts, which refer to each other and were intended to be enforced together, we see nothing to indicate a purpose to substitute the two chapters as a whole for the law previous-

ly in force. The courts construe any statute in derogation of the common law or of common right strictly, and upon the same principle prefer to interpret successive statutes as *in pari materia* and give effect to all, in so far as they are reconcilable one with the (494) other. It is manifest that the Legislature intended that the naval force which might be organized under chapter 399, Laws 1893, should constitute a part of the State militia and should be subject to the same regulations previously prescribed for the land forces. Neither the provision for the election of the battalion or company officers nor for the appointment of staff officers is inconsistent with the intent on the part of the Legislature to allow the chief officer of all the forces to exercise the power given him by the act of 1876-'77. On the contrary, the discipline of the naval forces, by the express terms of the last act, was required to "conform as closely to that of the land forces of this State as the difference in the two services will allow." If, therefore, under a proper construction of the act of 12 March (chapter 374), the Governor was not divested of the power to revoke commissions of officers in the land forces, there is no reason why he should not have conformed to the rules applicable to the land forces in dealing with the naval officers. It was not contended that the Governor revoked the commission of the plaintiff for reasons that affected his character as a man or his general efficiency as an officer. It is ordinarily essential to the success of efforts to train and discipline troops that there should be harmony and concerted action on the part of the higher officers entrusted with the duty. If, as we gather from the argument, the commander in chief and the commander of all the naval forces had disagreed as to methods or discipline, and such disagreements had made their relations unpleasant, it was natural that the chief officer should act upon the idea that the naval forces would prove more efficient if the command should be entrusted to one in touch both in thought and purpose, with his superior. For the reasons given the demurrer was properly sustained.

If the Governor could lawfully revoke the commission of (495) the plaintiff, the latter has no cause of action at all. It is therefore unnecessary to follow counsel in the discussion of the question whether, if the plaintiff had suffered an injury for which he would have been entitled to redress, his remedy would have been an action at law, pure and simple, or whether he might have invoked the equitable jurisdiction of the court by demanding an order enjoining the defendant, as lieutenant commander, from exercising the authority of commander. The judgment is

Affirmed.

Cited: *S. v. Atwater, post,* 1215; *S. v. Davis,* 129 N. C., 572; *Mial v. Ellington,* 134 N. C., 163; *S. v. Edwards, ib.,* 637, 640; *S. v. Parker,* 139 N. C., 587; *S. v. Perkins,* 141 N. C., 807; *S. v. R. R., ib.,* 853; *Kearney v. Vann,* 154 N. C., 317; *Bunch v. Comrs.,* 159 N. C., 339; *Hardwood Co. v. Waldo,* 161 N. C., 197.

J. E. SUTTON, ADMINISTRATOR, v. J. D. WALTERS ET AL.

THE CODE, SECS. 590, 957—ISSUES—DISCHARGE OF SURETY BY INDULGING PRINCIPAL—JUDGMENT NON OBSTANTE VEREDICTO—RECALLING WITNESS—OBJECTION THAT THERE IS NO EVIDENCE, OR INSUFFICIENT EVIDENCE—WHAT OBJECTIONS MAY BE MADE ORIGINALLY IN THE SUPREME COURT.

1. The interest in the result of the action which disqualifies a witness under section 590 of The Code must be a legal and not a mere sentimental interest.
2. Permitting a witness to be recalled rests within the discretion of the judge.
3. The objection that there is not sufficient evidence to warrant the submission of the case, or an issue in the case, to the jury must be made before verdict in order that the defect may be supplied, if possible, as the object of The Code practice is to have cases tried on their merits and to prevent the loss of rights through mere inadvertence.
4. A *venire de novo* will not be ordered because a material element is lacking in the issues submitted, if it appear that no objection was made to the issues in the lower court, and it also appears that the judge charged that the jury must be satisfied from the evidence that the matter omitted from the issues was established before they could answer the issue in the affirmative.
5. The proper issues to submit and instructions to be given the jury, where indulgence of the principal by the creditor is relied on as a defense by a surety, pointed out.
6. Judgment *non obstante veredicto* is only proper where the plea confesses a cause of action and sets up insufficient matter in avoidance. A motion for such judgment will not be considered by the Supreme Court if made for the first time in that Court.
7. No points can be taken for the first time in the Supreme Court, except (1) errors apparent upon the face of the record; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) want of jurisdiction of the subject-matter.
8. Upon the objection being taken that a judgment is erroneous upon the face of the record proper, the Court will construe the judgment with reference to the pleadings, evidence and charge, and not with regard to the issues alone.

(496) ACTION for debt by the plaintiff, administrator of Thomas Sutton, against John D. Walters, Alex. Sutton and Shade Wooten & Co., tried before *Graham, J.,* and a jury, at January (Special) Term, 1896, of LENOIR.

SUTTON *v.* WALTERS.

The plaintiff declared on a note, under seal, executed by the defendants John D. Walters and Alex. Sutton to the defendants Shade Wooten & Co. and endorsed, in blank, by Shade Wooten & Co. to plaintiff's intestate, Thomas Sutton. Said note is in the following words and figures:

"$500. LAGRANGE, N. C., 13 April, 1892. (497)

"Eight months after date, I promise to pay to the order of Shade Wooten & Co. $500, at 8 per cent interest from date at their office. Value received.

"JOHN D. WALTERS. [Seal.]
"ALEX. SUTTON. [Seal.]"

On the back of this note was endorsed, "Shade Wooten & Co.," without date. There were also on the note the following endorsed payments, admitted by the defendant John D. Walters to be in his own handwriting: "Paid on the within note $26.65, 13 December, 1892. Received on the within note $40 interest, up to 1 January, 1894." No date.

The defendant John D. Walters made no defense to the action.

The defendant Alex. Sutton, in his answer to plaintiff's complaint, alleged that defendant Walters executed said note as principal and he executed it as surety, and, on information and belief, at the time said note was endorsed by Shade Wooten & Co. to the plaintiff's intestate, Thomas Sutton, said Sutton had notice of such suretyship; and also, on information and belief, further alleged that plaintiff's intestate, Thomas Sutton, agreed with defendant John D. Walters, for a valuable consideration, to extend the time of the payment of said note beyond the date of its maturity, without the knowledge or consent of said Alex. Sutton.

The defendants Shade Wooten & Co., in their answer, after admitting their endorsement of said note to Thomas Sutton, the plaintiff's intestate, allege an agreement between John D. Walters and Thomas Sutton to extend the time of payment of said note, and that said defendant Walters paid said Thomas Sutton several sums of money for that purpose, and that said defendants, Shade (498) Wooten & Co., had given said Thomas Sutton notice to collect said note when it fell due.

The plaintiff offered said note in evidence and stopped.

The defendant Alex. Sutton put on as a witness the defendant John D. Walters, who said: "I am the principal to the note. Alex. Sutton is surety. Shade Wooten & Co. knew Alex. Sutton was surety."

The witness was then asked: "Did Thomas Sutton, deceased, know it?" Objected to by plaintiff. Objection overruled, and plaintiff excepted. Witness answered: "Yes; he knew it before he got the note. Mr. Sutton lived a year or two afterwards." Objection; overruled. Exception. "Did he extend the time of payment of note?" "Yes." Objection; overruled. Exception by plaintiff. "I put the credits on the note after its maturity. The last credit was not dated; was made after maturity and after the first endorsement." Objection; overruled. Exception by plaintiff. "What was your financial condition at the time of the maturity of the note?" "I was solvent and principal; was solvent at the time of the credit; am insolvent now." Question and answer objected to; overruled. Exception by plaintiff.

John D. Walters was recalled, and stated: "There was an agreement between me and Thomas Sutton, deceased, that he would extend the time when each payment was made. My recollection is the last payment was made a little in advance. The credit is not dated. There was no contract except the agreement to extend the payment. I owed him no other debt. I think the interest was paid in November." All the evidence of this witness was objected to at the proper time. Objection overruled, and plaintiff excepted.

(499) Here the defendants closed their case.

The plaintiff announced that he had no further evidence. The plaintiff then made the point that the whole of the defendants' evidence failed to show a valid contract, in that they had failed to show any time of forbearance on the part of the plaintiff.

His Honor then, under protest of the plaintiff, permitted the defendants to again recall the defendant John D. Walters, who said: "He (Sutton) agreed to extend the time till next fall." On cross-examination witness said: "He agreed to extend the time one year each time." Objection by the plaintiff; overruled. Plaintiff excepted.

The issues submitted appear in the opinion of the Court. There was a verdict and judgment in favor of the defendants Alexander Sutton and Shade Wooten & Co. Plaintiff appealed.

R. O. Burton for plaintiff.
George Rountree for defendants.

CLARK, J. The exceptions, based upon the incompetency of John D. Walters as a witness, under section 590 of The Code, are without merit. That section was analyzed and discussed in *Bunn v. Todd,* 107 N. C., 266, which has been since cited several times with approval. By reference to that decision and, indeed, to the very words of the statute,

it will be seen that, though the witness, John D. Walters, is a party to this action and is testifying as to personal transaction between himself and the intestate of the plaintiff, this disqualifies him only to testify "in behalf of himself or a person succeeding to his title or interest." In the present case he is not testifying in behalf of himself, for he does not contest the judgment against himself, and his interest cannot be affected in any way by this testimony, nor is his testimony "in behalf of anyone succeeding to his title or interest." (500) Whether his codefendant, who was merely his surety on the bond, had been discharged by an extension of time to himself as the principal debtor was a matter which in nowise affected the interest or liability of the witness. Judgment was admitted by him in favor of the plaintiff, and that liability could not be increased or affected should judgment also go against the surety, nor did the surety in any sense "succeed to his title or interest." Whether or not there was any sentimental consideration moving the principal debtor to wish to absolve his surety from liability was a matter for the jury, like all other questions of bias affecting the credit of a witness, but there was no legal cause rendering him an incompetent witness.

The permission of the court to recall a witness after the evidence closed was a matter of discretion in the judge. *Olive v. Olive,* 95 N. C., 485; *Pain v. Pain,* 80 N. C., 322; *S. v. King,* 84 N. C., 737. It is for this very reason that additional evidence should be called if obtainable—that an exception that there is not sufficient evidence to go to the jury must always be made before verdict in order that the defect can be supplied, if possible; since the object of the reformed procedure is that cases shall be tried on their merits and parties not lose their rights by a mere inadvertence. This has been repeatedly decided. *S. v. Kiger,* 115 N. C., 746, and numerous cases cited in Supplement to Clark's Code, p. 89.

His Honor submitted to the jury the following issues: 1. "Did Alexander Sutton sign the note to Thomas Sutton as surety?" Answer: "Yes." 2. "Did Thomas Sutton agree to extend the time of the payment of the note without the knowledge or consent of Alexander Sutton and Shade Wooten?" Answer: "Yes."

The issue should have embraced the further query, whether such suretyship was known to the plaintiff when he (501) gave the extension of time, but the defendant neither tendered such issue nor excepted to the failure to do so. Had the defendant done so, the court would have had an opportunity to correct what was doubtless an inadvertence with both parties, as well as the court, since from the evidence and the charge it is clear that all parties understood

that this question was embraced in the second issue; and, indeed, the fact that the suretyship was known to the plaintiff was alleged in the answer and was in evidence for defendant, and was not contradicted by any evidence for the plaintiff. Had the other issue been submitted upon the evidence, if believed, the jury must have found it for the defendant. The case has gone off upon the very issues of fact and questions of law in actual dispute between the two parties.

The judge's charge, which was as follows, drew the attention of the jury to this matter of the knowledge of the suretyship by the plaintiff, even if there had been any conflict of evidence as to the fact. His Honor, in charging the jury, among other things, said: "If you find that Thomas Sutton received interest on the note from John D. Walters before it was due, and that in consideration of the payment of interest in advance by Walters the said Sutton agreed to extend the time of payment without the knowledge or consent of Alexander Sutton and Shade Wooten & Co.; and if you find from the evidence that Thomas Sutton, knowing that Alexander Sutton was surety, agreed with Walters to forbear and extend the time of payment in consideration that Walters would pay the interest on the note before
(502) due and in advance, and if the interest was paid as agreed, and said agreement being made without the assent of Alexander Sutton and Shade Wooten & Co., then the said Sutton and Wooten & Co. would be exonerated from all liability, either as sureties or endorsers, by reason of such extension of time." The charge is correct. *Chemical Co. v. Pegram,* 112 N. C., 614; *Forbes v. Sheppard,* 98 N. C., 111; *Randolph v. Fleming,* 59 Ga., 776; Brandt on Suretyship, sec. 352. Nor can the motion for judgment *non obstante veredicto* be allowed here, for it was not made below and no exception, therefore, taken from its refusal. No points can be taken here (other than errors upon the face of the record proper) which do not appear by exception below, except that the complaint does not state a cause of action and that the court did not have jurisdiction of the subject-matter. Rule 27 and numerous cases cited in Clark's Code (2d Ed.), pp. 380, 382, 697, and in the Supplement to same, pp. 64 and 103. Besides, the motion for judgment *non obstante veredicto,* had it been made below, should not have been allowed, as it is only granted where the plea confesses a cause of action, and the matter relied on in avoidance is insufficient. *Walker v. Scott,* 106 N. C., 57. Here the answer is explicit and avers the knowledge of the suretyship on the part of the plaintiff when the forbearance was given. A defect in a judgment is, it is true, an error in the record proper, and may be taken advantage of upon inspection of the record, but such judgment must be con-

strued in reference to the pleadings, evidence and charge, and not with regard to the issues solely; and, so construed, there appears

No Error.

Cited: Lyon v. Pender, ante, 151; *S. v. Harris,* 120 N. C., 578; *S. v. Wilson,* 121 N. C., 657; *Reade v. Street,* 122 N. C., 302; *Jenkins v. Daniels,* 125 N. C., 168; *Fleming v. Barden,* 127 N. C., 217; *Bank v. Swink,* 129 N. C., 260; *Pharr v. R. R.,* 132 N. C., 422; *Revell v. Thrash, ib.,* 805; *Bennett v. Best,* 142 N. C., 171; *In re Abee,* 146 N. C., 274; *Henderson v. McLain, ib.,* 334; *Lloyd v. R. R.,* 151 N. C., 543; *Baxter v. Irvin,* 158 N. C., 280; *S. v. Fogleman,* 164 N. C., 460; *Helsabeck v. Doub,* 167 N. C., 205.

(503)

H. P. HINSON v. R. L. SMITH & CO.

CHATTEL MORTGAGE—POSSESSION OF MORTGAGED PROPERTY—ACTIONS FOR DAMAGES, CAUSA REMOTA AND CAUSA PROXIMA—RIGHTS AND REMEDIES OF MORTGAGOR AND MORTGAGEE INTER SESE.

1. In the absence of an express stipulation to the contrary, the mortgagee of personalty may take possession of it any time before or after condition broken.

2. A mortgagee who takes possession is held to a full and strict account for the rents and use of the property, for not only the profits actually received, but for the value of any reasonable and prudent use to which he might have put the property without detriment thereto.

3. A mere permission granted to a mortgagor to take the property to his home is not such a stipulation as will deprive the mortgagee of his legal right to take possession under his mortgage whenever he sees fit to do so.

4. The rule is that consequential damages in an action of tort must be the proximate consequence of the act and not the secondary result thereof.

5. Where a mortgagee took possession of a horse covered by the mortgage, in consequence of which the mortgagor had to walk home and suffered from the cold during his walk: *Held,* that such suffering of the mortgagor was too remote to be considered by the jury in an action for damages.

6. The relations existing between mortgagor and mortgagee, the legal status of each as to the other, their respective rights and remedies with respect to possession of the mortgaged property, whether real estate or personalty, explained by the Chief Justice.

ACTION tried before *Graham, J.,* at December (Special) Term, 1895, of GREENE.

There was a verdict and judgment in favor of the plaintiff. (504) Defendants appealed.

The facts appear in the opinion.

J. B. Batchelor for defendants.
No counsel contra.

FAIRCLOTH, C. J. Plaintiff and defendants exchanged horses on 23 October, 1894, and as "boot" money the plaintiff gave his note to defendants for $50 and secured the same by a mortgage on his mare, the defendants having warranted her to be sound, except in one eye. The plaintiff took the mare home and become dissatisfied with her qualities, and returned, and some unsuccessful attempts to exchange again were made. On 24 December, 1894, the plaintiff returned to Greenville and put the mare in a stable building where the defendants kept a livery business. Plaintiff asked the defendant if he would take the mare. He replied: "Are you going to pay the mortgage note that you owe us for the mare?" Plaintiff said "No," and defendant said, "I will take the mare if you don't pay it." Plaintiff said, "If you do, I will sue you." Defendant took the mare and plaintiff hired another horse to go home at night. Plaintiff sued for damages on the warranty and for the seizure of the mare.

Among other issues, the court submitted these: (8) "Did defendants unlawfully seize the mare described in the complaint on 24 December, 1894?" (9) "What damage, if any, has plaintiff sustained by the seizure?"

His Honor instructed the jury: "If the defendants took the mare from Hinson (the plaintiff) after they had given him permission to take her into his possession, they had no right to do so as mortgagees, and the jury will respond to the eighth issue 'Yes.' ". All the issues were found in favor of the plaintiff.

(505) We are not informed by the argument when the note became due and payable. It would probably be correct to presume that a debt is due at the time of its creation, without any other information; but, to give the plaintiff the full benefit of his contention, we will assume that the seizure was prior to the maturity of the note. This raises the question whether a mortgagee of personal property can take it into his possession before the secured debt becomes due, the property having remained in the mortgagor's possession until the seizure. This depends upon the nature of the mortgage and the respective rights of the parties. In some of the States a mortgage is held by statutory regulation or judicial construction to be simply a lien, leaving the legal estate in the mortgagor. In North Carolina and many other States the common law prevails, and the mortgage deed passes the legal title at once, defeasible by the subsequent performance of its condition. The title then draws the right of possession, and the mortgagee may enter into possession of the property at once or at any

time unless restrained by express provision or necessary implication, which does not appear in the case before us. 1 Jones Mortgages, sec. 58. "The mortgagee is entitled to immediate possession, in the absence of any agreement to the contrary. He may enter upon the estate under his deed even before condition broken, and may maintain an action against the mortgagor as a trespasser if he refuses to yield possession." 1 Jones, *supra* (5th Ed.), sec. 702. "The right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage, if there be no express or implied stipulation in it to the contrary, whether the mortgage debt be due and payable or not. * * * The right of possession follows the right of property." Jones Chattel Mortgages (4th Ed.), sec. (506) 426; *Brackett v. Bullard,* 12 Metc. (Mass.), 308; 15 Am. and Eng. Enc., 817, and note.

"Although the mortgagor is equitable owner, yet the mortgagee is more than a trustee for him, for a trustee is not allowed to deprive his *cestui que* trust of his possession; but a mortgagee may assume the possession whenever he pleases if there is no agreement to the contrary, and in point of possession the mortgagor is tenant at will, even in equity, for a court of equity never interferes to prevent the mortgagee from assuming the possession." Coote on Mortgages, 379 (324). "The mortgagee, as against the mortgagor and all persons claiming under him, is taken to be the owner of the fee; and as the right of possession follows the right of property, if there is no stipulation to restrain it, he is entitled to possession before condition broken, and is liable to be dispossessed only by performance of the condition at the time limited." *Erskine v. Townsend,* 2 Mass., 493, and numerous subsequent cases in that State.

"As soon as the estate is created the mortgagee may immediately enter on the lands, but is liable to be dispossessed upon the performance of the condition by the payment of the mortgage money at the day limited." 2 Bl. Com., 158. In consequence of this rule it became usual to stipulate or agree that the mortgagor shall hold possession till the day assigned for payment.

We are not referred to any decision of this Court in which the precise question has been presented and discussed, but in several cases the question is assumed to be settled in the affirmative. In *Morrison v. McLeod,* 37 N. C., 108, *Ruffin, C. J.,* says: "Whatever may be the rule when a mortgagee enters into possession by receipt of the rents of premises occupied by tenants, we conceive that when (507) he enters by taking the actual possession and occupies himself he makes himself tenant of the land and subjects himself to the highest

fair rent and becomes responsible for all such acts or omissions as would under the usual leases constitute claims on an ordinary tenant."

In *Williams v. Bennett,* 26 N. C., 122, *Ruffin, C. J.,* says: "The mortgagor was concluded by his deed, and after its execution his possession is by consent of the mortgagees and is in law their possession." In *Joyner v. Vincent,* 20 N. C., 652, the property mortgaged being a slave, *Ruffin, C. J.,* says: "We think that a mortgagee is not, under any circumstances, as between him and the mortgagor, obliged to take possession before a forfeiture and thereby subject himself unnecessarily to an account."

In *Hook v. Fentress,* 62 N. C., 235, *Pearson, C. J.,* says that "A vendor of land who has let the purchaser into possession and retains the legal title as a security for the payment of the purchase money occupies the relation of a mortgagee when the mortgagor is in possession, and has the right to take possession at any time and go into the pernancy of the profits, and may, on notice given, require the tenants to pay the rent to him, to be applied to keep down the interest, and any surplus to the discharge of principal."

In *Jackson v. Hall,* 84 N. C., 489, the property being a mule, *Smith, C. J.,* says: "While the defendant invaded no right of the mortgagor in taking and keeping possession until the day of default, whether the property was or was not in danger of being lost or injured, * * * and was bound to account, not only for profits actually received, but for the value of any reasonable and prudent use to which it could have been put without detriment to the property itself."

(508) In *Coor v. Smith,* 101 N. C., 261, *Merrimon, J.,* says: "The mortgagee, as such, was entitled to the land and, in the absence of agreement to the contrary, to all the crops that might be produced upon it from year to year. * * * The defendant mortgagor remained in possession of the land, not as of right, but by permission of the mortgagee."

The principle underlying the question is that the title to property carries the right of possession at any time, unless there is a stipulation to the contrary. This works no hardship, as the mortgagee is held to a full and strict account of the rents and use of the property, which may in some instances discharge the principal debt sooner than the mortgagor would do, when he would be entitled to possession with an unencumbered title. Allowing the plaintiff to take the mare to his home could not amount to a stipulation to defeat the right of possession in the mortgagee. There was no agreement as to the length of time the plaintiff should keep the property, whether until the day when the note should become due or otherwise. It was a simple per-

mission, which made the plaintiff a tenant at will or sufferance. His Honor's instruction on the eighth issue was therefore erroneous.

The court also instructed the jury, on the ninth issue, that if the plaintiff suffered from the cold in making his trip to his home that night they should award such damages on that account as they might conclude he was justly entitled to. There was error in that respect. The rule is that consequential damage in an action of tort must be the proximate consequence of the act and not the secondary result thereof. The latter was the result in this instance. *Sledge v. Reid,* 73 N. C., 440.

Error.

Cited: Moore v. Hurtt, 124 N. C., 28; *Satterthwaite v. Ellis,* 129 N. C., 70; *Hamilton v. Highlands,* 144 N. C., 287; *Green v. Rodman,* 150 N. C., 179; *Modlin v. Ins. Co.,* 151 N. C., 41; *Lumber Co. v. Hudson,* 153 N. C., 99.

(509)

ALBERT HALL v. E. A. LEWIS

PLEADING—DEALINGS BETWEEN ASSIGNEE OF MORTGAGE AND MORTGAGOR—FRAUD AND UNDUE INFLUENCE.

1. One who purchases and takes an assignment of a mortgage stands in the same relation to the mortgagor as did the original mortgagee, and his subsequent purchase of the equity of redemption from the mortgagor is presumed to be fraudulent and oppressive.

2. A complaint by a mortgagor to set aside a deed made by him to the mortgagee for the equity of redemption is not defective because it fails to allege that a clause of defeasance was omitted from the deed by fraud, inadvertence or mistake.

3. A mortgagor who conveys his equity of redemption to the mortgagee by absolute deed has a right to redeem, notwithstanding such deed, unless the mortgagee rebuts the presumption of fraud which such a transaction raises in equity by proving its *bona fides*—that is, that he had dealt fairly and openly with the mortgagor.

4. A mortgagee who purchases the equity of redemption from the mortgagor under circumstances which render the transaction one which will not be sustained in equity has no right to compensation for betterments put up on the property after it was conveyed to him. He is held to notice of the invalidity of such a purchase and title.

5. It seems that a defendant can make the point that the complaint does not set out a cause of action or entitle plaintiff to such relief as he demands by a motion for judgment *non obstante veredicto,* which will be treated as a demurrer.

6. The rule that there should be *allegata* as well as *probata* is one of practice, and it is a question "whether this rule will not give way to that great principle of equity that will enforce the specific performance of contracts where the contract is not denied."

7. A parol contract for the sale of land will be enforced if it is not denied. If it is denied it cannot be proved under the statute of frauds.

(510) ACTION tried before *Graham, J.*, at Fall Term, 1895, of SAMPSON.

The plaintiff owed a debt, secured by mortgage on land, to one W. A. Dunn, receiver, etc., and applied to the defendant to take up said mortgage debt. The defendant took up said debt and mortgage, paying W. A. Dunn the amount due thereon, which was $80.42; and soon thereafter the plaintiff, under the circumstances detailed in the evidence, executed to the defendant a deed, absolute in form, to the same land, reciting therein a consideration of $125, and thereupon the defendant delivered to the plaintiff the said note and mortgage.

The court submitted the following issues to the jury:

"Did the defendant agree with the plaintiff that the defendant would pay off the note and mortgage to the Clinton Loan Association and take a deed in fee simple for the land, and that it would be as good as a mortgage?" Answer: "Yes." (W. A. Dunn was receiver of the said association.)

The defendant excepted to this issue, upon the ground that it appeared on the face of the complaint that both plaintiff and defendant knew at the execution of the deed that the same was an absolute deed, and the fact that the plaintiff executed said deed under the persuasion of the defendant that it would be as good as a mortgage could make no difference. The court overruled this exception, submitted the issue, and the defendant excepted.

The plaintiff, Albert Hall, testified: "The defendant told me that a deed would be cheaper than a mortgage and would be just as good; that all he wanted was his money and interest, and that he did not want the land. Defendant paid Mr. Dunn the amount (511) due on the mortgage ($80.42), and Mr. Dunn assigned the mortgage to the defendant. I got Lewis to come with me, and paid him $1.50 for coming. He went back home with me and the $125 was put in it before I signed it. My wife was not at home at the time, but she came next morning, and I told her she must go to Autry, the justice of the peace before whom I signed the deed, and sign it; she did so. Lewis was to wait until November for me to pay him. He said he wanted nothing but his money and the interest. I tendered

the money to him in November, but he then claimed that I must pay him $280. Lewis never paid but $80.42 to take up the mortgage, and I did not owe anything else. The consideration of $125 in the deed was put there without my knowledge or consent. Lewis said he would take a deed and would not bother with a mortgage—that a deed would be the same thing."

The defendant here admitted that he had only paid $80.42 to take up the mortgage.

Mrs. Isabella Hall, the *feme* plaintiff, testified: "I was not at home when Mr. Lewis and my husband came back that night, but I came back next morning, and my husband told me he had got Mr. Lewis to take the land in hand. He gave me a paper and I took it to Mr. Autry, justice of the peace. I cannot read. He did not send it to me, nor did anyone else."

R. O. Autry, justice of the peace, testified: "I met Lewis and Hall about dark that night, on their way from Clinton, about two miles from Hall's house. Lewis got me to go with him to Hall's house. He said he had paid out $125 that day for Hall and he wanted the papers fixed while things were hot. Hall's wife was not at home. I put in the $125 at the request of Lewis. No one told Hall the consideration, that I know of. Hall was not present when (512) Lewis told me he had paid the $125. Next day Hall's wife came and signed the deed. It was not read. Upon leaving she asked me how much was still due on the land, and I told her Mr. Hall said about $80. Hall had told me what a time he had getting it fixed up, but that he had got it down to $80 and Mr. Lewis had paid that."

H. I. Hall testified: "I am no kin to plaintiff. In the spring of 1893 plaintiff told me that he had got his land safe; that Mr. Lewis had helped him; that Lewis would not take a mortgage; said that the deed would amount to the same thing and be cheaper for both. The place is worth about $300."

Hinton Faircloth testified: "In the fall of 1893 I heard Lewis say that he would let Hall have his land back when he paid him his money. Hall said that Lewis had taken up the mortgage and was going to give him a chance; that he had got it down to $80.42."

The defendant testified that plaintiff had come to him in April, 1893, and a few days before his land was to be sold by Dunn, and told him of it, and wanted defendant to let him have money to pay the debt and save the land from sale, and to hold the mortgage until the defendant should be repaid by plaintiff; that he told plaintiff he would not do that, but would buy the land at $125 and would pay off the mortgage, and that plaintiff could arrange the balance of the purchase money afterwards; that plaintiff must make him a deed; that he

would not take a mortgage; that plaintiff agreed to this, and they both went to Dunn, and defendant paid the debt and took the mortgage assigned to himself, to hold only until he could get the deed from the plaintiff; that they went home; plaintiff had the deed executed, and delivered same to defendant, and defendant at the same time
(513) delivered to the plaintiff the Dunn mortgage and note, all in accordance with the understanding of the parties; that after this was done the plaintiff wanted the defendant to give him a chance to buy the land back, and defendant told plaintiff that he could remain on the land until the first of next year and make his crop for the balance of the purchase money, about $40, after paying some expenses, and that if plaintiff would pay him for the land ($125) by the end of the year, he would sell the land back to him and make him a deed. The plaintiff agreed to this, remained in possession until the end of the year, made and gathered the crop, and voluntarily abandoned the possession and built upon and moved to another tract of land; that defendant then took possession of land and has made large and valuable improvements on the land, without any notice of any claim on the part of the plaintiff until the commencement of this action. The defendant then offered to prove the nature and value of the improvements made by him on the land before suit. The court, on objection by plaintiff, ruled out the testimony, remarking that a mortgagee was not entitled to anything for improvements he might put on the land. The defendant excepted and contended that in ruling out this evidence upon the ground indicated his Honor had anticipated the verdict of the jury upon the issue submitted, to-wit, "Was the deed in question intended to operate as a mortgage?" and while the question of the admissibility of this evidence was under discussion by his Honor and the defendant's counsel his Honor remarked that the plaintiff and his witnesses having testified, and the defendant having been examined in his own behalf and having testified that plaintiff came to him and asked him to take up the mortgage held by the Clinton Loan Association against plaintiff; that he told him that he would
(514) pay off the amount due, $80.42, but would take a straightout deed for the land; that he did pay off the $80.42, and the note and mortgage were signed to him, and that he then had a deed prepared from plaintiff and wife for the land, in which the consideration was expressed at $125, with the assent of the plaintiff; and that defendant, upon the execution of said deed, agreed with the plaintiff that he might redeem said land at $125, he should charge the jury that, if they believed the testimony of the defendant, construed and taken in connection with that offered by the plaintiff, then they should find the said deed, though absolute on the face, was intended as a

mortgage, and if they should find that said deed was intended by the parties to serve the place of the mortgage they should find this issue in favor of the plaintiff. The jury found this issue in favor of the plaintiff. The defendant contended that judgment ought to be entered for defendant, notwithstanding the verdict, for that it appeared in the pleadings and in the evidence that both parties knew at the execution of the deed that it was an absolute deed, and the fact that it was intended to operate as a mortgage would not entitle plaintiff to call on the court to declare it a mortgage.

His Honor refused the contention and gave judgment for the plaintiff. The defendant further excepted to said judgment, upon the ground that it appears in the case made by the plaintiff that the legal title to said land is in Dunn, the receiver.

Appeal by defendant.

J. D. Kerr for plaintiff.

J. L. Stewart for defendant.

FURCHES, J. The evidence in this case creates a strong impression upon the minds of the Court of palpable fraud on the part of defendant, from which a court of equity should give relief.

After the verdict of the jury the defendant moved for judg- (515) ment *non obstante veredicto,* for the reason that the complaint did not state a cause of action, in that it did not allege that the condition and clause of defeasance in his deed were "omitted by fraud, inadvertence or mistake," and cites *Norris v: McLam,* 104 N. C., 159, for this position. We do not admit that fraud is not alleged in the complaint, and therefore it does not become our duty to consider whether *Norris v. McLam, supra,* was put on the first principles of equity or not. It is true that the general rule is that there should be *allegata* as well as *probata;* but this is a rule of practice, and the question is whether this rule of practice would not give way to that great principle of equity that will enforce the specific performance of contracts where the contract is not denied. A parol contract for the sale of land will be enforced if it is not denied. *Bonham v. Craig,* 80 N. C., 226. If it is denied, it cannot be proved under the statute of frauds, and, of course, cannot be enforced. But this is because the contract is denied and cannot be proved.

Then, to take this complaint as upon demurrer, why should it not be enforced? A demurrer admits the facts, and defendant's motion must be put on the same ground. But if we take it in connection with the evidence of the plaintiff, that the defendant agreed to take up the mortgage of the Clinton Loan Association, on which there was only

$80.42 due, and to hold it until he could pay him; that defendant said to plaintiff that he would not take a mortgage from plaintiff to secure him, but would take a deed which would be the same thing in effect and it would be cheaper for both; that defendant procured the deed to be written and had the consideration stated to be $125, without the knowledge of defendant, as he alleges; that it was not read over to him and he could not read; that plaintiff's wife went the
(516) next day and signed it without its ever being read to her, and she cannot read, and the justice who took her acknowledgment testified that he did not read it to her, and that after she had signed and acknowledged the same she asked how much was still due on the land and he told her that her husband had told him "about $80," and that plaintiff continued to live on the land and make a crop.

And now we are asked to say that all this does not amount to an allegation of fraud!

There are some expressions used by the court on the trial that might be subject to criticism but for the *admitted facts* on the part of defendant; for instance, when the defendant offered evidence for the purpose of showing that he had put valuable improvements on the land, and the court in ruling out this evidence remarked "that a mortgagee was not entitled to anything for improvements he put on the land," and when he said that he should charge the jury "that if they believed the testimony of the defendant, construed and taken in connection with that offered by the plaintiff, then they should find the said deed, though absolute on its face, was intended as a mortgage." There was no error in the court's excluding the evidence offered to show improvements. The error, if any, was in the judge's expressing an opinion as to a fact upon which the jury had to pass, and in the court's grouping together the evidence of the plaintiff, "taken in connection with that of the defendant," when defendant contends that the defendant's evidence was contradictory of that of the plaintiff, and the jury should have been so instructed.

But when we consider that the defendant admitted that he, at the request of plaintiff, paid the Clinton Loan Association $80.42 and had the mortgage and debt assigned to him, the law at once created the fiduciary relation of mortgagor and mortgagee between
(517) the plaintiff and the defendant; and this being so, the deed from plaintiff could only be a purchase of plaintiff's reversionary interest in the land, which the law presumed to be fraudulent, and the burden was upon the mortgagee (the defendant) to show the *bona fides* of the transaction. *McLeod v. Bullard,* 84 N. C., 515. And it was not only the right, but the duty of the court to have instructed the jury to that effect; and we find nothing in what the judge said

that goes to the extent of the rule laid down by the Court in *McLeod v. Bullard, supra.* So, if there was error in what the judge said, as pointed out by defendant, it was harmless, as it was the duty of the judge to tell the jury that the law presumed the transaction to be fraudulent on the part of defendant, and it devolved on him to rebut this presumption by proving the *bona fides* of the transaction—that is, that he had dealt fairly and openly with plaintiff; that he had explained why it was that he caused $125 to be stated as the consideration, when he only paid $80.42; that it was a *bona fide* purchase for $125—why it was that he charged the plaintiff $1.50 for his time and trouble in going with plaintiff to take up the old mortgage; that he had given a reasonably fair price for the land (shown to be worth $300 by uncontradicted evidence), and that he had paid the plaintiff at least the difference between $80.42 and $125. And as defendant had offered no evidence as to the $1.50 paid him for his time, and no evidence to show or tending to show that the land for which he paid only $80.42 is not worth $300, it was the duty of the court to charge the jury that defendant had not rebutted the presumption of fraud the law put upon him, and it was their duty to return a verdict for plaintiff, even to say nothing of the other evidences of fraud in the case, upon which defendant's evidence hardly amounted (518) to a *scintilla,* a shadow, a pretense.

In our opinion this is not a case in which defendant is entitled to pay for improvements. He was bound in law to know his title was not good, and there was no error in refusing to hear evidence as to improvements. The judgment must be

Affirmed.

Cited: Atkins v. Crumpler, 120 N. C., 310, 311; *Southerland v. Merritt, ib.,* 319; *Monroe v. Fuchtler,* 121 N. C., 104; *Weil v. Flowers, ib.,* 135; *Jenkins v. Daniels,* 125 N. C., 171; *Jennings v. Hinton,* 128 N. C., 217; *Winders v. Hill,* 144 N. C., 617; *Henry v. Hilliard,* 155 N. C., 378.

A. M. LEE ET AL. V. L. A. MCKOY, EXECUTRIX, THOMAS H. MCKOY ET AL.

THE CODE, SECS. 153 (2), 162, 1436, 1474—STATUTE OF LIMITATIONS—LIABILITY OF HEIR FOR ANCESTOR'S DEBTS—REMEDIES OF CREDITORS AGAINST ESTATES OF DECEASED PERSONS—SYME V. BADGER OVERRULED.

1. The statute of limitations is suspended by The Code, sec. 162, in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remain continuously absent for a year or occasionally visits the State; (2) when such person retains his residence, but is absent from the State continuously for one year or more.

2. If a party is a nonresident of the State where the cause of action accrues, the "return to the State," specified in section 162, as necessary to put the statute of limitations in motion, is a return, *animo manenda*—not a casual appearance in the State, passing through it, or even making a visit here.

3. A judgment against the personal representative on a debt of his intestate is an estoppel upon the real representative, and in the absence of fraud or collusion is not open to a plea of the statute of limitations on the part of the real representatives.

4. If an action is brought by a creditor against the personal representative of his deceased debtor within seven years, etc., but by delays in the courts judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt.

5. Upon the death of a debtor the creditor's remedies are primarily against the personal representative; he cannot maintain an action against the real representative until the personal estate has been exhausted or, if that has been wasted, until the bond of the personal representative has been exhausted, but he may sue both the personal and real representative in one action in order to avoid circumlocution.

6. It is the duty of the personal representative to take appropriate steps to subject the real estate of decedent to the payment of debts. If he is derelict in this matter the creditor has a remedy to enforce a sale of the real estate under sections 1436, 1474 of The Code.

7. The decision in *Syme v. Badger,* 96 N. C., 197, as to the seven-year statute of limitations seems to have been founded upon a mistaken line of reasoning and, having been several times doubted in former decisions, is now positively overruled, as is also the case of *Andres v. Powell,* 97 N. C., 155. The ruling in *Syme v. Badger* would bar a cause of action before the right to sue on it had accrued.

(519) ACTION tried before *Graham, J.*, and a jury, at Fall Term, 1895, of SAMPSON.

A. A. McKoy died 11 November, 1885, seized of real and personal property. On 13 November, 1885, L. A. McKoy qualified as executrix under his last will and testament, and on the 19th made advertisement for creditors.

On 11 February, 1892, plaintiff A. M. Lee recovered judgment before a justice of the peace against defendant executrix on a note, under seal, due 1 January, 1883, for $74.49, and on an account due at his death $106.53, which were docketed in the Superior Court on 11 February, 1892.

On 22 April, 1892, an action was instituted against de- (520) fendant executrix by A. M. Lee, for himself and all other creditors, to enforce said judgments.

Under an order of court F. R. Cooper was appointed referee to take and state an account. At the hearing the accounts of the other plaintiffs were passed upon, as set forth in the report of the referee. It appeared from said report that such assets as had gone into the hands of the executrix were wasted and that she was insolvent. Whereupon an order was issued making Thomas H. McKoy and A. McK. Griggs, heirs at law and devisees of A. A. McKoy, and L. A. McKoy, guardian *ad litem* of A. McK. Griggs, parties defendant, and that summons issue.

On 28 January, 1895, Thomas H. McKoy was brought into court, and 25 September, 1895, defendant A. McKoy Griggs and his guardian were likewise brought into court. Their answers were filed on the above respective dates, and they plead that under The Code, sec. 153, subsec. 3, their lands could not be charged with their ancestor's debts.

Plaintiffs reply that at the time of the death of his father, A. A. McKoy, and for many years thereafter, Thomas H. McKoy was a nonresident of the State and the statute does not apply to him. Thomas H. McKoy denies that he was a nonresident, and alleges that he never gave up his residence in Sampson County and that at no time was he ever absent from the State as much as twelve months continuously.

The following issue was submitted to the jury, to which they responded in the affirmative: "Did plaintiffs' cause of action against defendants accrue more than seven years prior to service of summons on T. H. McKoy?"

Several witnesses were examined as to the residence of Thomas H. McKoy, how frequently he visited the State, the (521) duration of his absences from and stays in the State.

Upon the close of the evidence the court charged the jury that, if they believed the evidence introduced by the plaintiffs, then Thomas H. McKoy was not continuously absent from this State for more than one year since the cause of action accrued, and therefore the time that he was absent from the State should not be deducted from the date at which the various causes of action accrued, and if that was not done, then the said causes of action were barred by the statute of limitations, and they should answer the issue "Yes."

Plaintiffs objected to the charge, and excepted. There was a verdict and judgment for the defendants. Plaintiffs appealed.

As the decision of the court is based upon a construction of the statutes, and does not turn upon the statements as made by the witnesses, it is deemed unnecessary to set out the testimony here.

The referee's report shows other debts outstanding against the estate of A. A. McKoy. The facts as to these debts sufficiently appear in the opinion of the Court.

T. M. Lee, R. O. Burton and J. D. Kerr for plaintiffs.
H. E. Faison and Allen & Dortch for defendants.

CLARK, J. *The Code,* sec. 162, provides that if, after a cause of action accrues against any person, he shall depart from and reside out of the State *or* remain continuously absent from the State for the space of one year or more, the time of his absence shall not be counted as any part of the time limited for the commencement of the
(522) action. When a person becomes a nonresident of the State it is not necessary that he should remain continuously out of the State one year to stop the running of the statute, nor would occasional visits to the State put the statute in motion. *Armfield v. Moore,* 97 N. C., 34. While he is a nonresident, and from the time he becomes such, the statute is *ipso facto* suspended. When a person, though still retaining his residence in the State, is continuously absent from it for one year, the statute is suspended during such continued absence. *Armfield v. Moore, supra.* His Honor erred in putting only the latter theory to the jury. There being evidence tending to show that Thomas H. McKoy was a nonresident of the State, it was error to instruct the jury that if he had not been continuously absent from the State for more than one year the statute had not been suspended. If the party is a nonresident of the State when the cause of action accrues, the "return to the State," specified by section 162 as necessary to put the statute in motion, is a return with a view to residence —not a casual appearance in the State, passing through it, or even making a visit here. *Armfield v. Moore, supra.*

The instruction was also erroneous in charging that if Thomas H. McKoy had not been continuously absent from the State for one year the causes of action were barred, for the further reason that, judgment having been obtained against the administratrix on two of the claims within seven years next after her qualification, and there being no exception to the finding of fact by the referee that there was no personal estate to pay said debts, and it being admitted that the executrix had no funds in hand and was insolvent, it was not open to

the heirs at law to plead the statute of limitations against such judgments, there being no allegation of collusion. *Brittain v. Dickson,* 104 N. C., 547; *Woodlief v. Bragg,* 108 N. C., 571, citing *Speer v. James,* 94 N. C., 417; *Long v. Oxford,* 108 N. C., 280. The (523) latter case cites, also, *Proctor v. Proctor,* 105 N. C., 222; *Smith v. Brown,* 101 N. C., 347.

There remains for consideration only the inquiry whether the heirs at law are protected by the statute of limitations as to the other debts, as to which action was brought against the administratrix within the statutory period but on which judgment was not obtained till after it had expired. In *Proctor v. Proctor, supra,* it was pointed out that in *Bevers v. Park,* 88 N. C., 456, it had been held that the heir could plead the statute against a debt not reduced to judgment against the administrator, and as to which the latter might plead the statute in a special proceeding by him for permission to sell real estate for assets, but that in *Speer v. James, supra,* this had been restricted by holding that the heir could not plead the statute of limitations against a judgment obtained against the personal representative unless fraud or collusion in obtaining such judgment is shown.

The question presented, therefore, is so much of the ruling in *Syme v. Badger,* 96 N. C., 197, as holds that the realty is protected from liability for the debts of the deceased if the statutory period of seven years has expired, even though the creditor had begun proceedings within the seven years against the personal representative to enforce his claim, but by delays in the court had failed to obtain judgment till after that period. This decision has been much questioned and has been repeatedly shaken, among other cases, in *Woodlief v. Bragg, supra,* and *Smith v. Brown,* 101 N. C., 347, bottom of p. 352. It may be noted that its supporting case, *Andres v. Powell,* 97 N. C., 155, which protected the heir at law by the lapse of seven years from the qualification of the personal representatives, even as to causes of action accruing subsequently to the death of the decedent, was overruled in *Miller v. Shoaf,* 110 N. C., 319, thereby estab- (524) lishing the dissenting opinion of *Merrimon, J.,* in *Andres v. Powell* as the correct statement of the law. And we now deem it our duty to overrule the decision in *Syme v. Badger,* which, after the long and repeated consideration given it, seems to have been founded upon a mistaken line of reasoning. In *Smith v. Brown, supra,* pp. 352, 353, *Smith, C. J.,* seems himself to question the reasoning in *Syme v. Badger.* Since the obtaining a judgment against the personal representatives prevents the bar of the statute as to the real representatives, there can be no reason why the latter are not equally prohibited from

pleading the statute when the action was begun against the personal representatives within seven years, but by delays in the courts judgment was not had against them after the lapse of seven years.

At the death of the debtor the creditor had simply a cause of action against the personal representative to establish his debt. He could not sue the heir, because the liability of the land held by the heir was secondary, conditioned upon the failure of the personal estate. If the creditor had ignored the personal representative and sued the heir, he would have been nonsuited, because he had no personal claim against the heir. If he had established his debt against the personal representative, and, there being sufficient personal assets, he had then sued the heir to subject the land, he would have been nonsuited. *Latham v. Bell,* 69 N. C., 135, which has been repeatedly cited and approved. Womack's Digest, No. 4885. He must in all cases work out his right to subject the land through the personal representative, because the existence of assets or, if they had been wasted, the solvency of the bond of the administrator is a sufficient answer to the claim to sell
(525) the land. If the creditor establishes his debt, it then becomes the duty of the personal representative to subject the land. If he fails to do so, the law gives the creditor a remedy to enforce the sale. The Code, secs. 1436, 1474. The creditor is not even a necessary party to the action brought by the personal representative. *Pelletier v. Saunders,* 67 N. C., 261; *Smith v. Brown,* 101 N. C., 347, 352.

The liability is that of the land, and not of the heir as such (*Speer v. James,* 94 N. C., 417), and is secondary. The creditor, therefore, has done what is required of him when he presents his claim and has it acknowledged by the personal representative or establishes it by judgment. He has no cause of action against the heir, and the ruling in *Syme v. Badger* would bar the cause of action before the right to sue arose.

The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. If the statute was intended to have the broad effect attributed to it in *Syme v. Badger,* the personal representative would have been named. It would be anomalous to bar the creditor in seven years and the personal representative in ten years. The Code, sec. 158.

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, *e. g.,* the right to enforce specific performance or some lien or trust not covered by other provisions of The Code. *Smith v. Brown, supra,* p. 352. This is the only way to avoid the absurdity of barring a cause of action before it arises. When the creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be

barred as against the land which that representative is to subject. In the present case proceedings against the administra- (526) trix were instituted within the seven years after her qualification and making advertisement; and, though the heirs at law were not made parties to the proceedings till after the lapse of seven years, the proceedings, not being barred as to the personal representative, cannot be barred as to the heirs at law by The Code, sec. 153 (2), the ground assigned by the court below. It may be that some of the debts are barred on other grounds. *Redmond v. Pippen,* 113 N. C., 90. But that point is not now before us. That in order to save circumlocution the heirs at law may be made parties to the proceeding against the personal representative is settled by the case of *Lilly v. Wooley,* 94 N. C., 412, which was cited with approval in *Syme v. Badger, supra,* and which has been approved since in *Brittain v. Dickson,* 104 N. C., 547.

Error.

Cited: Woodlief v. Wester, 136 N. C., 165; *Best v. Best,* 161 N. C., 516; *Lee v. Giles, ib.,* 543; *Barnes v. Fort,* 169 N. C., 435.

CASWELL ASKEW ET AL., EXECUTORS OF J. H. C. BRYAN, v. F. D. KOONCE

PRACTICE—REPLY—VERIFICATION—COUNTERCLAIM.

1. Inasmuch as every allegation of new matter in an answer not relating to a counterclaim is deemed to be controverted by the adverse party as upon a direct denial or avoidance (section 268 of The Code), no replication is necessary, and a failure to verify a replication, if filed, is immaterial.

2. To constitute a counterclaim, the demand must be one on which a separate action would lie.

ACTION heard before *Graham, J.,* at Fall Term, 1895, of JONES, on the pleadings and exceptions to the report of a referee.

A replication to the answer was filed, but was not verified. His Honor overruled the exceptions to the report of referee (527) and gave judgment for the plaintiff, and defendant appealed.

J. B. Batchelor for defendants. (531)
W. D. McIver for plaintiff.

FAIRCLOTH, C. J. This action is instituted to recover from the defendant money collected by him as an attorney for plaintiff. The matter was referred by consent, and to the report several exceptions are filed, all pointing to the findings of fact, which this Court cannot

review. The account covers a period of several years. Only one exception is relied upon before this Court, and, looking at the
(532) report, we can see no error in that. The answer is verified but the replication is not. We can see no need for the replication in this case, as every allegation of new matter in the answer not relating to a counterclaim is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require. The Code, sec. 268. It was suggested here that a part of defendant's answer was a counterclaim, and, not being denied by a verified replication, the defendant was entitled to a credit in that respect. It is beyond our ability to see how a counterclaim could lie to recover money already in the defendant's hands, sought to be collected by the plaintiff.

Unless a defendant has some matter existing in his favor and against the plaintiff on which he could maintain an independent action, such claim would not be a counterclaim. We see no error in the trial below.

Affirmed.

Cited: McLamb v. McPhail, 126 N. C., 221; *Oldham v. Rieger,* 145 N. C., 260.

F. T. ATKINS v. J. M. CRUMPLER ET AL.

MORTGAGE—POWER OF SALE—COMPLIANCE WITH POWER—TRIAL.

1. The attempted sale of land under a mortgage by the heir of the mortgagee is without authority and conveys no estate, though it seems that the purchaser at such sale, if acting in good faith, may be subrogated to the rights of the mortgagee.

2. The sale of land under a power contained in a mortgage, in order to be valid, must be made in strict compliance with the terms of the power and must be openly and fairly conducted.

3. Plaintiff claimed to have bought the land at a sale under a power contained in a mortgage executed by seven of ten tenants in common to L., whose son and heir assumed to exercise the power of sale. Subsequently two of the said seven, together with the other three tenants in common who did not join in the mortgage to L., executed a mortgage to J., cashier of a banking association (unincorporated), to secure a note to said association. F. subsequently became cashier of the association, and he sold the land under the said mortgage to F., and plaintiff became the purchaser. Thereupon five of the tenants in common (four of whom signed the note and mortgage to J.) executed a bond to plaintiff, by which they agreed to surrender possession of the land in default of the payment of a specified sum within a certain time. In an action to foreclose the last-named instrument the defendants alleged fraud, that plaintiff had received the benefit of the

proceeds of the note executed to J., and that they were not and had never been indebted to plaintiff, except on a prior note, which was usurious and had been fully paid: *Held*, that the court erred in refusing to admit evidence tending to sustain such defense.

ACTION tried at October Term, 1895, of SAMPSON, before (533) *Graham, J.*, and a jury.

Defendant excepted to the issue submitted to the jury, (536) and appealed from the judgment rendered upon the verdict.

Allen & Dortch and H. E. Faison for plaintiff.
J. D. Kerr for defendants.

FURCHES, J. Defendants are the heirs of Irvin Owens, who died some time before 1873, and the lands in controversy descended to them as his heirs at law. After the death of their father, Irvin Owens, and in May, 1873, a part of the defendants executed their note and a mortgage on the land to one T. M. Lee to secure a debt the said Owens owed to said Lee before Owens' death. After this T. M. Lee died, and the debt and mortgage by some means got into the hands (537) of T. J. Lee, and sometime afterwards, and, as it appears, about the last of January, 1882, the plaintiff, as he alleges, became the purchaser of the land at a sale made by T. J. Lee under a power contained in the deed to his father, and, as defendants allege, the plaintiff purchased the note and mortgage from T. J. Lee which defendants had given his father; and on the same day the plaintiff bargained and sold the land to a part of the defendants for $640.67, taking their note for that amount, with interest at the rate of 12½ per cent, and executed his bond, obligating himself to make a good deed in fee simple, with warranty, upon the payment of the note. Defendants made several payments upon this note before February, 1889, which, they say, paid the note in full. This the plaintiff denies. But however this may be, it seems that on 16 February, 1887, seven of the defendants executed a note, under seal, to A. F. Johnson, as cashier of the Clinton Loan Association, for $1,100, which, it is said, the plaintiff endorsed (though this does not appear on the copy of the note in the record), and defendants executed a mortgage to Johnson, as cashier, upon this land to secure this note. It is said that plaintiff paid this note, and afterwards Johnson resigned his position as cashier and one W. L. Faison was elected in his stead. Johnson executed a general deed to Faison, in which he undertook to convey and assign to him all the assets and effects of said association, consisting of notes and mortgages, etc. Some time after this assignment (the date not given nor copy of deed furnished) Faison, under the authority contained in the

mortgage from defendant to Johnson, sold the land in dispute, and the plaintiff became the purchaser. The Clinton Loan Asso-
(538) ciation was a partnership and not a corporation, and the plaintiff was a member of the partnership. The $1,100 note given by defendants to Johnson, cashier, has endorsed on it the following payments: "Received interest for ninety days from 18 May, 1887. Received $40 from Thomas Owens on within, 10 March, 1888. F. T. Atkins."

Defendants, in their answer, allege usury and fraud on the part of the plaintiff, and that the $1,100 for which the note and mortgage were given to the Clinton Loan Association was for the benefit of plaintiff and not for their benefit, and they never received a dollar of the money. And defendants say if they owe the plaintiff anything (which they deny) it is only what may be still due on the $640.67 without interest, or, if with interest, then only lawful interest, six per cent, should be allowed; and they deny that plaintiff has a good title to the land and that he would be able to make them a good title if they pay the balance of the $640.67 note, if anything remains due thereon.

It will be noted that only a part of the heirs of Irvin Owens signed the note or joined in the mortgage to T. M. Lee, and that they did not all join in the note and mortgage to Johnson, cashier.

The plaintiff does not have and never has had a good and indefeasible title to this land. If the mortgage to T. M. Lee had been properly foreclosed under the power of sale, it could only have conveyed seven-tenths of the land, as only seven of the ten heirs of Irvin Owens executed the mortgage.

If plaintiff only purchased this debt and mortgage, as defendants say he did, he would then be the equitable owner and occupy a position similar to that of a mortgagee without the power of sale. If T. J. Lee undertook to sell and foreclose under the power in the mortgage to his father, such sale was without authority and did not convey the estate. *Dameron v. Eskridge,* 104 N. C., 621;
(539) *Strauss v. B. and L. A., post,* 556. If plaintiff purchased in good faith at such sale, and his money has been applied *bona fide* to the payment of the debt of those who executed the note and mortgage, it may be that he may be subrogated to the rights of the mortgagee; but as the makers of this mortgage were the owners of seven-tenths of this land, upon a satisfaction of the mortgage they again became both the legal and equitable owners, without any reconveyance from plaintiff or anyone else.

Having considered the mortgage to Lee, we will now consider the mortgage to Johnson, cashier. And defendants had the right to exe-

cute a mortgage to Johnson in 1889 for this land, which would be a second mortgage as to those who had executed the Lee mortgage; but of it was made for the plaintiff's benefit and he got the money, as is alleged by defendant, no court exercising equitable jurisdiction will allow him to have the land sold, buy it in, then dispossess the defendants and take their land.

But, leaving out of view for the present the question of fraud and usury, we find the same difficulty in the regularity of the sale made by Faison which we found in the sale made by T. J. Lee, if he sold, as plaintiff alleges. "Courts watch with jealousy the foreclosure of mortgages under powers of sale contained in them." *Dameron v. Eskridge, supra.* We do not say, nor mean to say, that a mortgage cannot be foreclosed by the mortgagee under a power of sale contained in the mortgage; but we say it must be done openly, fairly and in compliance with the terms of the power.

The original debt of plaintiff was only $640.67, evidenced by a note with usurious interest at the rate of 12½ per cent. There had been a number of payments made on this note, and no other transaction or cause of indebtedness is shown between plain- (540) tiff and defendants since the execution of that note, and defendants say there are no others. And we find in the transcript of record a bond for $1,213.85 to plaintiff, signed by J. M. Crumpler, O. W. Owens, J. R. Owens, T. J. Owens (who signs with his mark) and W. R. Owens, dated 1 February, 1889, in which said defendants promise to surrender possession to plaintiffs on 1 January, 1890, "unless the sum of $640 is paid to the plaintiff before 1 January, 1890." It seems significant to us that the bond should be for $1,213.85, but $640 *must be paid* by 1 January, 1890, or defendants must surrender possession.

But, as we have seen, the defendants allege fraud and usury—that they owe plaintiff nothing unless it be on the $640 note, and that the note and mortgage to the Clinton Loan Association was for the benefit of the plaintiff, and that he got the money, and not defendants. And as evidence to show the amount of the indebtedness and usury, the defendants offered in evidence the note they gave the plaintiff on 1 January, 1882, for $640.67, with interest at 12½ per cent. This was objected to by plaintiff, excluded by the court, and defendants excepted. In this there was error.

Defendants introduced O. W. Owens as a witness, he being one of the parties who executed the note and mortgage to the Clinton Loan Association, and proposed to prove by him that the note and mortgage were made for the benefit of plaintiff, and that he got the money,

and not the defendants. This evidence was objected to by plaintiff, excluded by the court, and defendants excepted. In this ruling there was error. There were other exceptions which have not been considered, as they will likely not arise on another trial. But the errors stated above entitle the defendants to a new trial.

Upon the new trial the court will frame and submit such
(541) issues as may be necessary to determine whether defendants owe plaintiff anything, or for any other consideration except the $640.67 note, dated 31 January, 1882, and whether the plaintiff got the benefit of the $1,100 note made payable to the Clinton Loan Association. If he did, although he may have afterwards paid the money back to the association, he will be entitled to no benefit from that transaction. And this brings us back to the first proposition—do the defendants owe plaintiff for anything outside of the $640.67 note, and if so, for what? In determining the defendants' indebtedness the $640.67 note will be taken as the basis of that indebtedness, to be credited with all payments they have made thereon. As plaintiff has charged defendants usurious interest (12½ per cent), we do not allow him any interest on the $640.67 note. *Moore v. Beaman,* 112 N. C., 558. There is error, and a new trial is ordered.

Error.

AVERY, J. I concur in the conclusion that a new trial should be granted to the defendants, but not in all of the reasoning of the Court by which that conclusion is reached.

Cited: S. c., 120 N. C., 309; *Hussey v. Hill, ib.,* 316; *Monroe v. Fuchtler,* 121 N. C., 104; *Churchill v. Turnage,* 122 N. C., 433; *Brett v. Davenport,* 151 N. C., 9; *Owens v. Wright,* 161 N. C., 142.

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(542)

A. E. DENTON, ADMINISTRATOR OF F. J. RANDOLPH, DECEASED, v. AARON TYSON ET AL.

ADMINISTRATION—WIDOW'S ALLOWANCE—PRIORITY OF WIDOW'S CLAIM—SALE OF LAND FOR ASSETS—PAYMENT OF DEBTS BY ADMINISTRATOR—SUBROGATION TO RIGHTS OF CREDITORS—SURPLUS OF PROCEEDS OF SALE OF LAND TO PAY DEBTS REMAINS REAL ESTATE.

1. A widow's claim to her year's allowance has priority over all other claims against a decedent's estate except such as are secured by specific liens on property, even over funeral expenses and costs of administration.

2. Where, in the absence of personal assets of a decedent's estate, the administrator pays debts out of his own pocket, he is entitled to be subrogated to the rights of creditors and to have the land sold for his reimbursement.

3. In case of sale of land for assets to pay debts of a decedent, the surplus, after paying the debts and costs, remains real estate and cannot be applied to the payment of a judgment against the administrator in favor of the widow for the balance of her year's allowance.

PETITION for the sale of land for assets pending in the Superior Court of GREENE, transferred to term for trial, and heard before *Brown, J.*, at May (Special) Term, 1894.

From a judgment of his Honor remanding the case to the clerk and directing its dismissal and plaintiff appealed.

The facts are stated by *Associate Justice Furches.*

J. B. Batchelor and Swift Galloway for plaintiff.
Shepherd & Busbee for defendants.

FURCHES, J. This is an application by an administrator to sell land for assets, and is resisted by the heirs upon the ground that there was sufficient personal property to pay the debts (543) and costs of administration, if the same had been properly applied. And it appeared on the trial that the year's support of the widow had been laid off and assigned to her, which included all the personal estate of her husband, except the sum of $89.06 cash on hand at the death of the husband. Besides the specified articles of personal property allowed the widow, she was also allowed the sum of $182 in cash, to be paid her out of the personal estate by the administrator, who is the plaintiff. Upon this money allowance he paid the widow the $89.06 cash on hand at the death of the husband and took her receipt for the same. The plaintiff then proceeded to pay out of his own money, on funeral expenses, costs, attorney fees, etc., $104, and asks to be subrogated to the rights of the parties to whom he paid this money and for an order of sale. Some of the claims paid by plaintiff are contested as being improperly paid. But, if he had the right to pay the $89.06, then it is admitted that the estate would be due the plaintiff $43.77 on claims paid by him, which are not disputed by the defendants.

This being an application to sell land for assets, it is not necessary that we should pass upon the correctness of the claims paid by plaintiff further than is necessary to see that there are debts unpaid and that there are no personal assets to pay them.

This brings us to the question presented in this appeal: Did the plaintiff have the right to pay the widow the $89.06 on her year's allowance in preference to paying the funeral expenses, cost and charges of administration? We think he had. It is the duty of the

administrator to assign or cause to be assigned to the widow her year's support. The Code, sec. 2120. If there is not a sufficiency of specific articles on hand to make up the allowance, the balance
(544) shall be assessed and paid in money. The Code, sec. 2116. And this shall have preference over general creditors and judgment liens. The Code, sec. 2116; *Williams v. Jones,* 95 N. C., 504. It does not appear that any of these debts were secured by specific liens; but if that were so, it could make no difference to the defendants, as the question with them is *debt or no debt,* and not as to how it is secured. The question of lien could only arise as to creditors.

There is no allegation of fraud or want of good faith on the part of the plaintiff in making these payments; and this being so, he has the right to be subrogated to the rights of the creditors and to be repaid out of the proceeds arising *from the sale of land. Turner v. Shuffler,* 108 N. C., 642; *Clark v. Williams,* 70 N. C., 679. But the widow will not be entitled to any further payment on her year's support out of money arising from the sale of land. And if the land sold should bring more than is sufficient to pay the proper expenditures of the plaintiff in the course of his administration, the residue will remain real estate.

Error.

(545)

JOSIAH EXUM v. JASPER BAKER ET AL.

COMMISSIONER'S DEED—EXECUTION OF POWERS.

1. Where the donee of a power of sale has an individual interest in the subject-matter, independent of the power, a deed by him which makes no reference to the power passes only his private interest. If he have no individual interest, such a deed will be construed an execution of the power.

2. A deed made by a commissioner of the court which recites a sale under the judgment by the commissioner, but does not have the word "commissioner" after the signature of the grantor, is valid. (*Vide McLean v. Patterson,* 84 N. C., 427).

ACTION to recover possession of land, tried before *Graham, J.,* at December (Special) Term, 1895, of GREENE.

The defendant admitted possession, but denied title in the plaintiff. The plaintiff offered the following deed in support of his title:

"Whereas, at Spring Term, 1889, of the Superior Court of Greene County, Josiah Exum and W. D. Wallace, assignees of W. H. Dail & Bro., obtained a judgment of foreclosure against Bryant Baker and wife, Mittye Baker, on a certain mortgage set out in the pleadings in said action; that Theo. Edwards was appointed a commissioner to sell

said land; that said land was by said commissioner duly advertised according to law and sold at the courthouse in Snow Hill on the first Monday in January, 1890, at which sale Josiah Exum, assignee of W. H. Dail & Bro., became the purchaser; that at Spring Term, 1890, of said court said sale was duly confirmed:

"Now, therefore, this deed, made by Theo. Edwards, commissioner aforesaid of Greene County and State of North Carolina, of the first part, and Josiah Exum, assignee of W. H. Dail & (546) Bro., of Greene County and said State, of the second part, witnesseth: Therefor and in consideration of the premises above, and the further consideration of $400, the purchase price, the party of the first part has bargained, sold and conveyed and by these presents doth bargain, sell and convey to the party of the second part, his heirs and assigns, all that tract or parcel of land in Greene County on which the said Bryant Baker resides, being the tract of land purchased of J. T. Freeman on Rice Pocosin, adjoining the lands formerly owned by Henry Cannady, Ollin Moore and others, containing eighty acres, more or less: To have and to hold the same, and all the hereditaments and appurtenances thereunto or in anywise appertaining, to the said party of the second part, his heirs and assigns, in fee simple, forever. And the party of the first part, as commissioner aforesaid, covenants to and with the party of the second part, his heirs and assigns, that he will warrant and defend said title to the same and against the lawful claims of all persons.

"In testimony whereof, I have hereto set my hand and seal, this 16 April, 1890.

"THEO. EDWARDS. [Seal.]"

Duly proved and recorded.

Defendant objected, upon the ground that plaintiff claimed the land through Theo. Edwards, commissioner of the Superior Court, whereas said deed was signed by Theo. Edwards in his individual capacity, and the attesting clause does not refer to him as the commissioner of the court.

The court held the deed was invalid, except as against Theo. Edwards individually. Plaintiff excepted.

Plaintiff submitted to a nonsuit and appealed. (547)

Shepherd & Busbee for plaintiff.
J. B. Batchelor for defendants.

FAIRCLOTH, C. J., after stating the facts: The sole question presented is the validity of the deed offered in evidence to pass title.

In the argument against it the only reason assigned is that the grantor failed to add to his signature the word "commissioner." It sometimes happens that when a deed is defective in form it is necessary to find the intention of the act.

In this case the intention, from the recitals in the deed, is so manifest that the court cannot fail to see it. The regularity of the proceedings recited in the case is admitted, and also of the sale under which the plaintiff claims.

When the donee of a power to sell has an interest of his own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction is that he intends to convey only what he might rightfully convey without the power. *Towles v. Fisher,* 77 N. C., 437, and the authorities cited by counsel in that case. 4 Kent, 334, 335. When, however, the donee has no interest in the subject of the conveynace, but only a naked power, as in the case before us, then the intent apparent upon the face of the instrument to sell would be deemed a sufficient reference to the power to make the instrument an execution of it, as the words of the instrument could not be otherwise satisfied. *Siler v. Ward,* 4 N. C., 161.

The case of *Bryson v. Lewis,* 84 N. C., 680, relied upon by the defendant, was a question of agency and personal liability upon a promise to pay money, and does not hit the mark in the present case.

Error.

Cited: Herring v. Williams, 158 N. C., 912.

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(548)

ARMOUR PACKING COMPANY v. J. DAVIS, RECEIVER

CUSTOM OF BANKS—DEALINGS BETWEEN BANK AND DEPOSITOR—TITLE TO NEGOTIABLE INSTRUMENTS—RESTRICTED ENDORSEMENTS—PRESUMPTION AND PROOF OF BAILMENT.

1. A negotiable instrument deposited in a bank, endorsed "for collection," remains the property of the depositor, and the same rule holds when the written endorsement appears unrestricted, but as a matter of fact (evidenced by express collateral agreement or a tacit understanding to be reasonably inferred from the course of dealing between the bank and its depositor) the instrument is taken by the bank, not as a purchase, but for collection simply.

2. The fact that a bank has given a depositor credit for the amount of a negotiable instrument, regularly endorsed, is not conclusive evidence that the bank had purchased the paper and was not a mere bailee thereof.

3. When a bank habitually credits a depositor's account with negotiable instruments endorsed to it by such depositor, giving permission to the depositor to draw against such credits, but charges up to the depositor all such papers as are not paid on presentation, or deducts such items from the next deposit, such a course of dealing stamps the transaction, with reference to the title to instruments so endorsed, as being unmistakably a bailment for collection simply, and no greater title is vested in the bank.

ACTION tried before *Starbuck, J.*, at January Term, 1896, of NEW HANOVER.

The Armour Packing Company, by a motion in the cause, in the case of *Tate v. Bank,* pending in the Superior Court of New Hanover, sought to recover possession of a certain check by it deposited in the said Bank of New Hanover before insolvency, which was unpaid and is now held by the defendant receiver and by him (549) claimed to be the property of the bank. The check in controversy was deposited by petitioner in the bank on 16 June, 1893, three days before the appointment of a receiver, and is as follows:

"No. 189. BALTIMORE, 13 June, '93.

"DROVERS AND MECHANICS NATIONAL BANK,

"Pay to the order of J. W. G. Cobb, $312.31.

"E. STENBERGER,

"H. STENBERGER,

Attorney."

The check at the time of its deposit was endorsed as follows:

"Pay to the order of C. S. McColl. J. W. G. Cobb."

"Pay to Armour Packing Company or order. C. S. McColl."

"Armour Packing Co., by H. J. Bierman, Cas."

The Bank of New Hanover thereupon transmitted the check to the Importers and Traders National Bank of New York, endorsed as follows:

"Pay to Importers and Traders National Bank, or order, for collection for Bank of New Hanover, Wilmington, N. C.

"W. L. SMITH, *Cashier.*"

The Importers and Traders National Bank transmitted the check to the National Exchange Bank, at Baltimore, endorsed as follows:

"Pay to National Exchange Bank, Baltimore, or order, for collection for account of Importers and Traders National Bank, New York."

The check was presented for payment upon the drawees named therein, at Baltimore, on 21 June, 1893, when payment was refused for want of funds in drawees' hands belonging to the (550) drawer to meet the same, and thereupon the check was pro-

tested for nonpayment and returned to the defendant, Junius Davis, receiver, as aforesaid, on or about 26 June, 1893.

The further facts are contained in the judgment of his Honor, which is in these words:

This cause came on for trial before *Starbuck, J.*, at the January Term, 1896, of New Hanover. By consent of counsel for both parties, a jury trial was waived and it was agreed that the court should find the facts. The court, upon the testimony and exhibits, finds the following facts:

At the time of the transaction, hereinafter stated, the petitioner had its principal place of business at Kansas City, Mo. It had a branch business at Wilmington, N. C., under the charge of a local manager. The defendant Bank of New Hanover filed a deed of assignment for the benefit of creditors on 19 June, 1893, and the defendant Junius Davis was appointed receiver.

Previous to and at the time of the insolvency of the said bank petitioner kept a deposit account with the said bank. Deposits of money, checks and drafts were made in the said bank from time to time by the manager of petitioner's local business at Wilmington in the name of the plaintiff company. The petitioner, through its home office at Kansas City, drew checks against the deposits so made, its checks usually being for an amount corresponding to the amount of a previous deposit. The manager of the petitioner's said business in Wilmington had no authority to check against the deposits made by him to the credit of the plaintiff company, but the same were subject only to petitioner's check drawn at its home office at Kansas City, and this fact was assented to by the defendant bank.

(551) The course of business between the petitioners and said bank was such that from time to time the petitioners would make deposits of money, checks, drafts and other negotiable paper by simple endorsement, and deposit the same in bank, the deposit slip, containing the items of cash, drafts or checks, being prepared by the petitioner's local manager. The said bank would at the time credit the whole deposit, money, drafts and checks in the pass book of the plaintiffs kept with said bank as one item, one amount; and the deposit so made, including the checks and drafts, would at once be credited by the bank to the account of the petitioners on the books of the bank as cash. There was no express agreement between the petitoners and the bank with reference to the passing of title to the paper deposited. The check sued on was deposited with the other paper and money, amounting in all to $3,485, on 16 June, 1893. The whole deposit of $3,485 was credited on the pass book of the peti-

tioners as one item and was at once credited by the bank to the account of the petitioners *as cash* on the books of the bank. The said check was endorsed in blank by the petitioners. The petitioner at no time overdrew its account.

The last check of the plaintiff paid by the bank was on 17 June, for $2,392. This check was against a deposit of a week before of like amount. On 16 June the petitioner had to its credit a balance of $6,250. The check in controversy was never drawn against by the petitioners. It was the custom of the said bank, where paper deposited with it was returned unpaid, to charge the same back to the depositor, if such depositor was an out-of-town customer; if such depositor to whom it had been credited was a customer in town, he would give the bank a check for it, if he had money to his credit, or take it off his deposit ticket when making his next deposit. The bank regarded the petitioner as an in-town customer, and so treated (552) it in their dealings. If paper deposited by petitioner and passed to its credit by the bank was returned unpaid the bank would immediately notify petitioner, who was the last endorser, and when petitoner's local manager would make his next deposit (he deposited daily) the amount of such unpaid paper would be deducted from the aggregate of the deposit slip of that day and the said paper delivered to the local manager. It was also a custom of the bank to mark all paper belonging to it and payable out of town, at sight or on demand, upon the day of deposit, and before sending it in the mail, with the letters "C. I.," indicating cash item. The paper so marked was treated as cash. This is not a general custom of banks, but was a custom of the Bank of New Hanover and done for the purpose of distinguishing paper deposited with them for credit and paper simply left with them for collection. It so stamped paper received by it from petitioners on deposit, and the draft sued on was so stamped. The bank was in the custom of receiving items for collection, as well as items deposited as cash. This stamp of "C. I." was used by the bank for its own guidance. Where paper was left with the bank for collection, such paper was not treated by the bank as cash until actually collected, nor put to the credit of the depositor until actually collected. There were several occasions on which deposits were made by plaintiff of paper for collection. In these cases the paper was time paper and not due; the petitioner deposited them with the bank before maturity, and at maturity, when collected, the proceeds were credited to the petitioner. They were not credited to the petitioner when the deposit was made. The bank, when paper which had been credited was returned unpaid did not notify all endorsers on such paper, but notified only the depositor to whom it had

been credited, who was the last endorser. It was generally
(553) understood between the depositors of the bank and the bank that if paper so deposited was not paid the depositor would repay it on its return. The bank looked more to the credit of the depositor than anything else in taking paper for deposit and crediting it as cash. The general customs at the bank were applicable to its dealings with the petitioner.

The draft sued on was presented for payment upon the drawees named therein at Baltimore, on 21 June, 1893, after the insolvency of the defendant bank, when payment was refused, and therefore was protested for nonpayment and returned to defendant Junius Davis, receiver.

And upon the foregoing facts, it is adjudged by the court that the said check or draft mentioned in the petition herein is not property of the petitioner, the Armour Packing Company, but is the property of said Junius Davis, as receiver of the Bank of New Hanover.

The costs of this petition, to be taxed by the clerk, must be paid by said Armour Packing Company.

Petitioner appealed, and assigned as error that his Honor erred in his conclusion of law upon the facts found, that the said check is not the property of the petitioner, but is the property of the defendant Davis, as receiver of the Bank of New Hanover.

Iredell Meares for plaintiff.
George Rountree and P. B. Manning for defendant.

CLARK, J. Had the paper, when deposited by the plaintiff in the bank, been endorsed "for collection," there can be no question that it would have remained the property of the depositor, for the title would not have passed. *Boykin v. Bank, post,* 556. Had the
(554) paper been collected and the proceeds mingled with the general funds of the bank, even if the paper had been endorsed "for collection," the plaintiff would have been a simple contract creditor, with no preference over other creditors. *Bank v. Bank,* 115 N. C., 226; *Bank v. Davis,* 114 N. C., 343. The point here presented is different from either of the above, and has elicited some conflict of decision, but it seems now settled by the weight of authority, especially the more recent cases, and it is in accordance with the "reason of the thing," that while an endorsement "for collection" of a draft or check does not transfer title to the endorsee, but merely constitutes him the agent of the endorser, a different result does not follow an unrestricted endorsement, where, though the endorser is credited and the endorsee charged with the amount of such paper, it appears as a fact that the en-

dorsee does not become unconditionally responsible for such amount until the check or draft is actually paid. *Bank v. Hubbell,* 117 N. Y., 384 (15 Am. St., 515). In a very recent case (*In re Bank,* 45 Am. St., 454; 56 Minor, 119) the Court says: "There can be no doubt that, if a draft or other paper is delivered to a bank for collection, the mere fact that the endorsement of the owner is unrestricted will not, as between him and the bank, make the latter the owner of the property. Neither is it conclusive upon the question of the ownership of the paper that before collection the amount of it is credited to the customer's account, against which he has the privilege of drawing by check. Such privilege is merely gratuitous, if the bank may cancel the credit or charge back the paper to the customer's account when it is not paid by the maker or drawee. *Gites v. Perkins,* 9 East, 12; *Levi v. Bank,* 5 Dill., 104; *Balback v. Frelinghuisen,* 15 Fed., 675."
And in a late case in the United States Circuit Court of Ap- (555) peals (*Beal v. Somerville,* 50 Fed., 647) the same principle is affirmed, the Court pointing out that, though the amount of the paper may be at once placed to the credit of the depositor, with permission to him to draw against it, yet if the tacit understanding from the course of dealings between the parties is that if the paper is not paid the amount thereof is to be charged back to the depositor's account, this is really a bailment for collection, and, as between the depositor and the bank, the title never passed, it having passed *sub modo* only as between the bank and the payee. As between the depositor and the bank, the question whether title passes or not depends upon whether as a matter of fact the paper was taken for collection, though not so restricted by an endorsement to that effect, or whether it was taken absolutely as a purchase or discount. To the same purport are *Balbach v. Frelinghuisen, supra; Scott v. Bank,* 23 N. Y., 289, and 2 Morse Banks, sec. 583c. In the present case it is found that the tacit agreement between the parties, from their course of dealings, was that, though the amount was credited to the depositor and he could draw against it, yet if the paper so deposited was not paid on presentation the amount thereof was to be charged up to the depositor's account or taken off his next deposit ticket. This stamps the transaction as being unmistakably a bailment for collection. As nothing had passed, the fact that the bank had simply given the depositor credit on its books would not make the bank a purchaser for value. *Bank v. Davis,* 114 N. C., 335, citing *Mann v. Bank,* 30 Kan., 412; *Bank v. Valentine,* 18 Hun., 416; *Bank v. Newell,* 71 Miss., 308.

It was further said in *In re Bank, supra:* "Of course, in all such

cases the banker, like a factor, has a lien for advances made on
(556) the faith of the paper, and consequently the claim of the customer may be modified by the state of his account." No such question, however, arises in this case, the balance of the plaintiff's account, independent of this check, being in its favor at the time of the failure of the bank. Upon the facts found, the check is the property of the plaintiff.

Reversed.

Cited: Cotton Mills v. Weil, 129 N. C., 456; *Davis v. Lumber Co.,* 130 N. C., 176; *Mfg. Co. v. Tierney,* 133 N. C., 637; *Bank v. Oil Mills,* 150 N. C., 721; *Bank v. Exum,* 163 N. C., 202; *Bank v. Roberts,* 168 N. C., 476; *Worth Co. v. Feed Co.,* 172 N. C., 342.

W. H. STRAUSS, ON BEHALF OF HIMSELF AND OTHERS, v. CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION

BUILDING AND LOAN ASSOCIATIONS—RECEIVER'S DUTIES AS TO APPEALS—POWERS OF SALE IN MORTGAGES—ORDER OF DISTRIBUTION.

1. The rules for the adjustment of the affairs of insolvent building and loan associations laid down in this case on the former appeal (117 N. C., 308) affirmed.

2. A receiver appointed by the court cannot exercise the powers of sale contained in a mortgage to the corporation of which he is the receiver, nor can the court confer such a power upon him until the mortgagor is properly before the court.

3. Orders for the distribution of a fund among creditors should not be made until the fund is in court. Such orders may be made at any time as to funds then in court.

4. It is the duty of a receiver to appeal when he thinks the party or corporation he represents has not had justice; but it is not his duty to appeal in the interests of one creditor or stockholder as against another, as they can look after their own interests.

PETITION in the cause, in a creditor's bill, entitled
(557) "Strauss," on behalf of himself and all other creditors, etc., against Carolina Interstate Building and Loan Association, heard by *Graham, J.,* at chambers, in October, 1895.

The order made, and from which the receivers and nonborrowing members of the association appealed, is as follows:

This action coming on to be heard before his Honor, A. W. Graham, Judge, presiding in the Sixth Judicial District, at chambers, at Clinton, N. C., on 11 October, 1895, by consent of all parties thereto, upon the petition of Iredell Meares and P. B. Manning, 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 (558) 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, 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 discharged by said receivers according to law. 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 said 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 the 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
(559) 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 canceled 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; 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.

Iredell Meares and P. B. Manning, the receivers of the defendant corporation and the nonborrowing shareholders of said corporation, make the following assignment of errors to the order of the Hon. A. W. Graham, Judge, made on 17 October, 1895, in the above-entitled action, to-wit:

2. That the court erred in advising and directing the receivers of the said defendant corporation to wind up, adjust and settle the affairs of said corporation 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
(560) 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 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, 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."

3. That the court erred in holding that, "upon the ascertainment in the manner aforesaid of the balance due by the borrowing members to the association, and the payment thereof, such borrowing members 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 the association, but his stock shall be deemed canceled and surrendered."

4. That the court erred in holding that "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 the costs, charges and expenses of executing the trust of said receivership; secondly, (561) 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 24 July, 1895."

Ricaud & Weill and E. S. Martin for receivers.
Allen & Dortch for borrowers.

FURCHES, J. At the last term, upon the application of the receivers, we undertook to give them such directions as we thought necessary to enable them to proceed with their work in collecting the assets of this insolvent association, to the end that the rights and interests of all parties might be finally adjusted and settled; and the case coming on for further directions upon the opinion of this Court, his Honor, at January Term, 1896, entered up another judgment, from which the *receivers* and the nonborrowing members again appealed; and in this appeal we are asked to review and modify the opinion heretofore given; and if we cannot, or do not do that, then we are asked to review the judgment of the court as made. We do not admit that it would be consistent with the practice of this Court for us to review the opinion at the last term in this way. It is not the mode pointed out by the published rules of practice of the Court; but as it was in

the nature of instructions to the receivers who act under authority from the Court, we have re-examined what we then said and find no reason to change or modify the opinion. The object the Court had in view was a fair and equitable adjustment between all parties mutually interested in the concern; and upon a re-examination of the
(562) matter we are satisfied that the instructions then given are sustained by reason and authority, and if followed will result in substantially effecting the purpose we intended. The modification mostly insisted on was that part where it is said: "We know of no law authorizing the receivers to foreclose the mortgages under the powers contained in the mortgages." And upon a reconsideration of this we do not wish to change what we then said. The receivers have no legal estate in the mortgaged property, and instead of the case of *Dameron v. Eskridge,* 104 N. C., 621, sustaining the right of the receivers to foreclose under the powers, it seems to us to sustain the other view. It may be possible, if this point was presented in a case before the Court, a foreclosure by the receivers under the powers contained in the mortgages might be sustained; but if we were to so hold in this matter—where the mortgagors are not before the Court—it would be but obiter and they would not be bound by it. So, without discussing the matter further, we think there is sufficient reason why we should make no change in what was said when the case was here at the last term.

We have no doubt that his Honor intended to observe the ruling of this Court in his judgment; but we do not think he did so. We expressly decline to give any direction as to the distribution of the fund. We said this should not be done until the fund is in court. And his Honor's judgment directs the receivers "to collect and distribute the assets thereof among the respective members or shareholders of said corporation, upon the principles and in the manner following." This was in violation of the opinion of this Court. A distribution was not intended to be made and should not be made until funds are in court to be distributed. Of course, the receivers should be authorized to use such funds in their hands as may
(563) become necessary to defray expenses of collection, but they should not pay out or distribute any other money, except under the order of the court, after it has been collected and reported to the court. Such order may be made at any time upon the fund then in court.

This following paragraph of his Honor's judgment is objected to by appellants, to wit: "And upon the payment of said balance so ascertained, with all interest thereon, the mortgage given as aforesaid shall be released and discharged by the receivers according to law."

This paragraph is not provided for in the opinion at last term, nor does it conflict with anything then said, unless it tends to disturb the equitable adjustment therein provided for. We are not sufficiently advised as to what result it would have upon the final settlement to say whether or not it is in violation of the rules we have laid down for final settlement. If it would disturb this rule of equitable adjustment, then it should be left out, but if it does not do this we see no objection to it. It should be settled upon a consideration of the principle of equitable adjustment, as we have stated, and which his Honor will fully investigate. But the receivers will not act upon this paragraph until it is considered and passed upon by the court below upon the filing of this question.

We call attention to the fact that the receivers are appellants now and at the last term, when it does not appear that any question is presented in which the corporation is interested. There are cases in which it is the duty of receivers to appeal, where they think the party or corporation they represent has not had justice, but it is not considered to be their duty to appeal in the interest of one portion of the corporators—stockholders—against the other; and as to their duties it is expected they will observe the directions of (564) the court from whom they received their appointments. If any of the parties interested as corporators think the judge's instructions are erroneous and injurious to them, they may appeal. Let this opinion be certified.

Error.

Cited: Atkins v. Crumpler, ante, 539; *Thompson v. Loan Assn.,* 120 N. C., 424; *Howell v. B. & L. Asso., ib.,* 287; *Meares v. Davis,* 121 N. C., 129; *Meares v. Duncan,* 123 N. C., 205; *Williams v. Maxwell, ib.,* 594; *Lumber Co. v. Lumber,* 152 N. C., 271; *B. & L. Asso. v. Blalock,* 160 N. C., 492.

J. W. CRAVEN, ADMINISTRATOR OF ISABELLA CRAVEN, v. W. S. RUSSELL

ACTION FOR RECOVERY OF PERSONAL PROPERTY—PLEADING—AMENDMENT—PRINCIPAL AND AGENT—DECLARATIONS OF AGENT.

1. Where, in the course of the trial of an action for the recovery of specific personal property, it developed that at the commencement of the action the defendant was not in possession of the property, having sold it immediately after plaintiff's demand, it was proper to permit plaintiff to amend his complaint so as to charge a conversion of the property; for in such case, the scope of the action not being changed and there being no inconsistency between the action as amended and as originally begun, the defendant could not be hurt by the amendment.

2. The declarations of an agent in regard to a transaction after the termination of the agency do not affect the aforetime principal and are not admissible as testimony against the latter.

ACTION tried before *Greene, J.*, and a jury, at January Term, 1896, of MOORE.

(565) From a judgment for the defendant the plaintiff appealed.

The facts are sufficiently set out in the opinion of *Associate Justice Montgomery.*

Douglass & Spence for plaintiff.

W. E. Murchison and N. A. Sinclair contra.

MONTGOMERY, J. This action was originally commenced for the recovery of certain personal property which the plaintiff alleged the defendant unlawfully withheld from him. In the course of the trial it was developed that the defendant was not in the possession of the property when the action was commenced, he having, after demand upon him and before the action was brought, sold the same and converted the proceeds to his own use. Upon this condition of things the court allowed the plaintiff's motion to amend his complaint so as to charge a conversion of the property by the defendant. The defendant excepted. There is no force in the exception. The proof requisite to make out the case after the amendment was exactly the proof required to make out the case under the original complaint, except as to that concerning the sale of the personal property, and that is no material variance. The scope of the action was not changed, and there is no inconsistency between the action as amended and the action as originally constituted. The defendant could not have been prejudiced by the amendment. *Carpenter v. Huffsteller,* 87 N. C., 273; *Ely v. Early,* 94 N. C., 1.

The defendant, Russell, a witness for himself, was allowed to testify, against the objection of the plaintiff, that the aforetime agent of the plaintiff's intestate, long after his agency had ceased, had told

the witness that a part of the alleged debt due to the plaintiff's intestate by Glosson for advances to make the crop of 1891 was not for such consideration, but for the purchase of a mule by (566) Glosson in 1890. This testimony was clearly incompetent and ought not to have been received. "What an agent says in the course of doing an act in the scope of his agency, characterizing or qualifying the act, is admissible as a part of the *res gestae,* but if his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principle." *Smith v. R. R.,* 68 N. C., 107. This has been approved in *Branch v. R. R.,* 88 N. C., 573, and in *Southerland v. R. R.,* 106 N. C., 100.

There is error in the proceedings of the court below, as pointed out, and the plaintiff is entitled to a new trial.

New Trial.

Cited: Mfg. Co. v. Blythe, 127 N. C., 327; *McEntyre v. Cotton Mills,* 132 N. C., 600; *Lassiter v. R. R.,* 136 N. C., 95; *Hardware Co. v. Banking Co.,* 169 N. C., 747.

BOYKIN, SEDDON & CO. v. BANK OF FAYETTEVILLE

BANKS—COLLECTIONS—DRAFTS ENDORSED "FOR COLLECTION."

Where plaintiff sent a draft to N. H. bank for collection, and the bank sent it, with like endorsement to its correspondent, the Bank of F., which collected the draft and credited the proceeds to the account of the N. H. Bank: *Held,* that the restrictive endorsement, "for collection," was notice to the Bank of F. that the plaintiff was the owner of the draft and that the N. H. bank was only an agent, and the fact that the proceeds were placed to the credit of the latter bank (but not actually paid over) is no defense to an action by the plaintiff.

APPEAL from a judgment of a justice of the peace, heard by *Hoke, J.,* at November Term, 1895, of CUMBERLAND.

The action was brought to recover the amount of a draft (567) sent by the plaintiff to the Bank of New Hanover, at Wilmington, endorsed "for collection and remittance," and by the latter bank sent to the defendant.

On the trial John C. Haigh testified as follows: "Received draft from Bank of New Hanover. Draft accepted and paid by A. E. Rankin & Co. Gave bank credit for it. Didn't send them any money. Paid 17 June, 1893, by Rankin & Co. Didn't send any money; did not account for it, except notified them it was paid and put to their credit on night of 17 June (Saturday). On morning 19th (Monday) heard

of failure of bank. Mailed notice of payment on 17th; think it was late in afternoon when notice was mailed—after banking hours. Distance from Fayetteville, 75 miles. Couldn't have reached Wilmington before Monday."

Cross-examination: "Draft reached us in ordinary course of business, for collection, from Bank of New Hanover. Kept running and reciprocal account with Bank of New Hanover. Entered credits and let run up to $4,000 or $5,000, and then settlement had and balance remitted. This was the method of dealing between banks and the usual, universal custom between banks. Money, $82.50, on 17 June, put to credit of Bank of New Hanover and entered on books of defendant bank to its credit. We had no information endorsement on draft when we got it."

The court held that the entries on the back of the draft were notice to defendant bank that the draft was held for collection only, and that on the evidence, if believed, defendant was responsible, and so instructed jury.

Defendant excepted to the ruling of the court, contending that when defendant bank collected money and entered same to the credit of the Bank of New Hanover, and mailed notice, the obliga-
(568) tion of defendant bank to the plaintiffs ceased, and the plaintiffs were thereafter only creditors to the Bank of New Hanover.

Defendant appealed from judgment for plaintiff.

H. L. Cook for plaintiff.
R. P. Buxton for defendant.

CLARK, J. The endorsement on the paper, "for collection," was notice to the defendant that the plaintiff was the owner of the same, and that the Wilmington bank was merely an agent. Morse on Banks, sec. 217; 2 *ib.*, sec. 593. If the defendant had actually paid the money collected to the agent before any notice from the principal, it would have been a discharge of liability; but here there has been no actual payment—simply an entry of the amount on its books to the credit of the Wilmington bank, which was authority for that bank to draw, but this could be corrected by a counter-entry and a notice to the Wilmington bank that the money had been paid to the principal. As the latter bank has become insolvent and has gone into liquidation, it was entirely proper that the principal should intervene and not permit the fund to go into the hands of his insolvent agent. *Stevenson v. Bank,* 113 N. C., 485; 2 Morse Banks, sec. 591; *Bank v. Johnson,* 9 Gill and J., 297. Had the defendant bank refused to pay over the

money to the Wilmington bank, it is settled that the latter could not maintain an action to recover from the defendant, but the plaintiff alone could maintain the action, being the real party in interest. *Abrams v. Cureton,* 74 N. C., 523, which has been often cited with approval. See Womack's Digest, No. 8. It must be noted that here there was shown no interest coupled with a trust, nor any authority devolved upon the Wilmington bank to apply the funds to any special purpose which would have entitled that bank to (569) have brought an action for this fund as "trustee of an express trust," which was the case in *Wynne v. Heck,* 92 N. C., 414.

No Error.

Cited: Packing Co. v. Davis, ante, 553; *Bank v. Bank,* 119 N. C., 308; *Bank v. Wilson,* 124 N. C., 568; *Cotton Mills v. Weil,* 129 N. C., 456; *Davis v. Lumber Co.,* 130 N. C., 176; *Mfg. Co. v. Tierney,* 133 N. C., 639; *Chapman v. McLawhorn,* 150 N. C., 167; *Bank v. Oil Mills, ib.,* 721; *Martin v. Mask,* 158 N. C., 442; *Bank v. Exum,* 163 N. C., 203.

WILLIAM McQUEEN, ADMINISTRATOR OF NEILL McQUEEN, v. JOHN R. SMITH

ACTION TO FORECLOSE CONTRACT FOR SALE OF LAND—RIGHT OF ACTION—CONDITION PRECEDENT—VENDOR AND VENDEE.

1. When defendant in an action to enforce a contract for the purchase and sale of land denies the right of plaintiff to maintain the action on other grounds, the failure to give the notice required by the contract is immaterial.
2. Where a contract for the sale of land empowered the vendor to sell the land on default in the payment at maturity of any one of the notes given for the deferred payments of the purchase price, his administrator may bring an action to foreclose without waiting for the maturity of the last note.
3. It is irregular practice to provide in a decree of foreclosure for the compensation of the commissioner appointed to sell in advance of his services, and also to direct him how to apply the proceeds. This should be done by the court after the report and confirmation of the sale.

ACTION heard before *Hoke, J.,* at November Term, 1895, of CUMBERLAND.

The defendant appealed from the judgment in favor of the plaintiff.

The facts are stated by *Associate Justice Furches.*

N. A. Sinclair and W. E. Murchison for plaintiff. (570)

R. P. Buxton for defendant.

FURCHES, J. The intestate of the plaintiff William McQueen, bargained and sold lands mentioned in the complaint to the defendant, John R. Smith, at the price of $3,600—$600 to be paid in cash and the balance ($3,000) to be paid in equal annual instalments of $428.58 each. On 11 January, 1888, they closed this contract by defendant's paying to plaintiff's intestate the $600, and by executing seven notes, under seal, for the residue of the price, as agreed upon. At the same time the plaintiff's intestate and his wife and the defendant entered into a written contract to convey the land to the defendant upon the payment of the balance of the purchase money. The contract, signed by the defendant and the intestate and his wife, contained conditions and a power of sale. The conditions were that, if the defendant should make default in the payment of any one of the notes at maturity, the intestate upon thirty days' notice, might take the land back, free from any claim on the part of the defendant, or he might at his option sell the same, after forty days' notice, at public sale, for cash or on a credit, and apply the proceeds to the payment of said indebtedness, and the residue, if any, he should pay to the defendant. The defendant paid the two first notes when they fell due, and a part of the third, leaving the four last notes and the larger part of the third note unpaid. All the notes unpaid were due at the commencement of this action, except the last, which according to its terms, did not fall due until 11 January, 1895.

On 12 January, 1894, the plaintiff administrator commenced this action, in which the heirs at law of the intestate, Neill Mc-
(571) Queen, join as plaintiffs, and ask for a foreclosure and sale and the application of the proceeds to the payment of the debt, as provided in the contract.

The defendant answered and denied the plaintiff's right to foreclose and sell until the last note falls due, on 11 January, 1895, and also for the reason that the plaintiff did not give him thirty days' notice before bringing suit, as provided in the contract, before the intestate could have sold under the power contained in the contract if he were living. But the court held that the plaintiff was entitled to a judgment of foreclosure and order of sale, and so adjudged; and to this the defendant excepted and assigned two grounds of error, as follows:

1. "Because an issue as to demand of possession before suit ought to have been submitted to the jury, as asked for by defendant."

2. "No sale for foreclosure should be asked for by suit or granted by the court until the actual maturity of the last note securing the purchase money."

Neither of these exceptions can be sustained. The object of notice is to save the trouble and expense of litigation. And where it appears from defendant's answer that, had plaintiff given the thirty days' notice which defendant contends he was entitled to, it would not have prevented the litigation; or, in other words, where the defendant denies plaintiff's right of action, had the notice been given, this does away with the want of notice. *Vincent v. Carbin,* 85 N. C., 108; *Head v. Head,* 52 N. C., 620. In this case defendant denies plaintiff's right to bring and maintain this action before 1 January, 1895, and therefore does away with the objection as to notice, if it ever existed.

This leaves the other exception to be considered. And we see that if the intestate Neill McQueen were living he would (572) have the right to sell under the power contained in the contract, all the notes being due, except one, and the condition being that he might sell if "any one" of them was not paid at maturity. If the forfeiture had occurred, and the intestate might have sold at the time this action was commenced, we can see no reason why plaintiff's cause of action had not arisen and why he may not maintain this action. It is true that one of the notes was not due at the commencement of this action; and if plaintiff's right of action depended on this note we would hold with the defendant and dismiss the suit. But plaintiff had a cause of action without this note, which has now been due more than a year, and we see no reason why we should disturb the judgment of the court on account of that note not being due at the commencement of the action.

But the judgment of the court was irregular, in that it provided for the compensation of the commissioner in advance of his services; and it also provides how he should apply the proceeds of the sale, which should not have been done until the sale was made and reported to the court. The judgment should have been for a foreclosure, order of sale and order to report the sale to court for further directions. The judgment, thus modified, will be affirmed.

Modified and Affirmed.

Cited: Shields v. McNeill, post, 593; *Moore v. Hurtt,* 124 N. C., 29; *Hendon v. R. R.,* 127 N. C., 113.

(573)

IN RE J. W. SELLARS, ADMINISTRATOR OF M. FAULK

ADMINISTRATOR—BOND—RENEWAL—MORTGAGE ON LAND BELONGING TO ESTATE AS SECURITY.

1. Where an administrator who had given bond for $4,000, was ordered to renew, "strengthen and increase" the same to $6,000, and within a year from the death of decedent executed and offered a mortgage for $2,000 upon land of his intestate, whose heir he was: *Held*, that the tender of the mortgage was not a compliance with the order, since it neither increased the penalty of the bond nor afforded any additional security, the property covered by the mortgage being already liable for the debts.

2. The reason or necessity for requiring an administrator to increase his bond is a matter for the clerk of the Superior Court before whom the proceeding for such purpose is pending.

SPECIAL PROCEEDINGS by W. C. McDuffie and others, judgment creditors of the estate of M. Faulk, deceased, pending before the clerk of the Superior Court of CUMBERLAND.

J. W. Sellars, administrator, had qualified and given his bond in the sum of $4,000. On motion of creditors, he was notified to give a better bond, and it was ordered by the clerk that he "increase his bond to $6,000." On appeal, *Judge Hoke* ordered that he "renew, strengthen and increase his bond as directed by the clerk." No appeal was taken from this order, and in obedience thereto J. W. Sellars tendered a mortgage in the sum of $2,000 on the lands of his intestate, he being one of the only two heirs of said intestate, in lieu of bond required by The Code, sec. 118. The clerk adjudged that the said mortgage was a "compliance with the judgment of the judge
(574) in the prior appeal." On appeal, his Honor confirmed the judgment of the clerk in all respects. All the property included in said mortgage was inherited by the mortgagors from said M. Faulk, and is worth the amount of said bond. Not one year had elapsed since the death of the intestate. The mortgage was in due form. The creditors appealed to the Supreme Court.

J. C. and S. H. MacRae for plaintiffs.
N. A. Sinclair and W. E. Murchison for defendant.

FAIRCLOTH, C. J. The mortgage in question is not in the record before us, and it is not clear whether it was executed by the administrator, as such, as required by The Code, sec. 118, or whether it was by him as an heir of his intestate. It conveyed property already liable for the debts; and if it be taken that the mortgage increased the *security*, we infer that it does not increase the penalty of the bond,

as required by the order. The time when all the debts for which the mortgaged property is liable has not yet expired. The mortgage is to secure $2,000, but it is not for the amount of the bond required by said section of The Code and the order of the court. The reason or necessity for increasing the bond to $6,000 is a matter for the clerk and not for this Court. We have concluded that the original order has not been complied with. Of course, the administrator may still comply if he elects to do so.

Error.

(575)

R. K. BLAKE ET AL. v. ANNIE L. BLAKE ET AL.

PARTITION—DEVISE IN TRUST.

Where property was left in trust, to be divided when the youngest child of the testator should arrive at age, the trustee to use the income for the support of the minor children, partition cannot be ordered during the minority of the youngest child.

ACTION brought for the partition of land, heard before *Greene, J.*, at January Term, 1896, of ROBESON.

A sale for partition was ordered, made and confirmed, and defendants appealed.

The property sought to be partitioned was devised to the parties by the will of Susan O. R. Blake, as follows:

"I give, devise and bequeath all my real property and estate, of whatsoever description, consisting of town lots, houses, etc., in the town of Lumberton, N. C., and the land in Britt's Township, in said county, known as the Britts land, to my husband, W. B. Blake, in trust for all my children, to be equally divided between them when the youngest child shall arrive at the age of twenty-one years. I also empower him to use the rents and profits in the support, maintenance and education of such of my children as are infants until they attain their majority. I also hereby invest my husband and trustee, W. B. Blake, with full power to sell and invest in other property or estate such of my property and real estate as is herein devised, or any part thereof, should it be to the interest of my children so to do, and this devise is subject to the right and power so to do."

McNeill & McLean for plaintiffs.
A. Nash for defendants.

CLARK, J. Under the devise in the will, which is appended to the complaint, the property was left in trust to be (576) "divided when the youngest child should arrive at age." That con-

tingency not yet having happened, a division cannot be ordered. *Green v. Green,* 86 N. C., 546. The complaint fails to state a cause of action.

Action Dismissed.

PATAPSCO GUANO COMPANY v. BRYAN & CO.

CONTRACT, CONSTRUCTION OF—TRUST RELATION—TRUST FUND—CONVERSION—PLEADING—JUDGMENT NON OBSTANTE VEREDICTO.

1. Where a contract between plaintiff and defendant was that the former should sell to the latter certain goods, to be paid for by the notes of defendant, who was to deliver to plaintiff all notes taken from purchasers of the goods as collateral security for the payment of defendant's notes, with the further provision that all of said goods, together with the proceeds of sale thereof, should be held in trust for the plaintiff: *Held,* that the contract not only created the relation of debtor and creditor, but also made the defendant trustee for the plaintiff of all the notes and cash derived from the sale of the goods, and therefore liable in damages for the conversion thereof.

2. Where, in an action on such contract, the defendant admitted the execution of the contract and the collection of enough from the sales of the goods to pay his notes, but denied the embezzlement and conversion which the complaint charged against him, and the jury responded negatively to an issue as to the wrongful conversion by the defendant of the proceeds of the sales of the goods: *Held,* that a judgment *non obstante veredicto* ought to have been rendered for the plaintiff.

(577) ACTION for conversion of trust funds, tried before *Greene, J.,* and a jury, at January Term, 1896, of MOORE.

There was a verdict for the defendant, and from judgment thereon and the refusal of a motion for judgment *non obstante veredicto* the plaintiff appealed.

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

The contract referred to in the opinion was as follows:

"*To Messrs. Bryan & Co., Jonesboro, N. C.:*

"We have this day sold you for delivery during the ensuing season, to be shipped or ordered by you in not less than car-load lots, with the privilege of as much more as may be mutually satisfactory, the following fertilizers: ten tons Patapsco guano, $23 per ton—2,000 pounds, in bags; (— tons acid phosphate, $—), the above to be delivered f. o. b. at Jonesboro, N. C., and is to be settled for by your note or notes, payable to our order, to be given at any time we may call for same after shipment of goods, and made payable at banking

office of S. H. Buchanan, Jonesboro, N. C., and to mature as follows: 1 and 15 November and 15 December, 1891.

"On 1 May next, or sooner, if possible, you agree to deliver to us, or our order, notes of planters or other purchasers to whom you may have sold these goods, for the gross amount of the sales of the same, to be held by us as collateral security for the payment of your obligations as above stated, and all of said goods, as also all proceeds therefrom, are to be held in trust by you for the payment of your notes to us.

"And, further, all proceeds of said goods, as collected, must be first applied to the payment of your notes, whether the same shall have matured or not.

"It is hereby mutually agreed and understood that the above contract is made subject to suspension in case of fire or (578) other unavoidable accident to sellers' works.

"In sending collaterals to the company, please place a nominal value of $25 on each package and express same to our office at Baltimore. The same will be returned to you in ample time for collection.

"This contract subject to the approval of the company.

"The collateral notes provided for in this contract must in all cases be deposited.

"No deviation from this contract will be recognized unless authorized by the company in writing. Goods not to be shipped out till ordered by Messrs. Bryan & Co.

"C. R. CARRINGTON,
"For Patapsco Guano Co."

"GENTLEMEN:—Your offer is hereby accepted upon terms and conditions stated in this contract. BRYAN & Co.

"JONESBORO, N. C., 17 February, 1891."

Douglass & Spence for plaintiff.
W. E. Murchison for defendants.

MONTGOMERY, J. Upon an examination of the complaint and answer in this action it appears that the defendant confesses that the plaintiff has stated a cause of action against him. He admits the execution of the notes and contract set out in the complaint, and admits by his failure to deny the first section in allegation seven of plaintiff's amended complaint that he had collected enough, in cash and upon the notes executed to him by the purchasers of the guano sold to him by the plaintiff, to pay his notes due to the plaintiff. His denial of embezzlement and conversion charged against him in the com-

plaint plainly appears in his answer to be made, not because he has not misappropriated the trust funds which were derived from a
(579) sale of the guano, but because of the legal construction which he puts upon the contract between himself and the plaintiff. The defendant relies upon matter which he pleads in avoidance to defeat the action. The plea in avoidance which he sets up is that the contract between himself and the plaintiff for the sale of the guano constitutes him simply the debtor of the plaintiff for the value of the guano, and does not make him a trustee, as well as a debtor, of the notes and cash received by him for the guano. If, therefore, the contract, as a matter of law, establishes a relation of trust between the parties, the matter pleaded in avoidance is insufficient.

There can be no doubt that the contract makes the defendant a trustee for the plaintiff's benefit of the guano sold to him by the plaintiff, of the notes taken by the defendant from the purchasers of the guano, and of the cash money derived from the sales and of that collected on the notes. A contract of this nature, to this effect, has been construed by the Court in the case of *Chemical Co. v. Johnson,* 98 N. C., 123. Issues, among which was the following, "Did the defendant wrongfully convert the guano, notes or other evidences of indebtedness or the proceeds thereof to his own use?" were submitted to the jury, and the response to the one above written out was in favor of the defendant. The plaintiff moved for a judgment *non obstante veredicto.* The motion was denied and judgment was rendered for the defendant. There was error in the ruling of the court refusing the motion of the plaintiff. He was entitled, upon the pleadings, to his judgment as prayed for. The judgment is reversed, and judgment must be entered in the court below for the plaintiff, according to the prayer of his complaint.

Reversed.

Cited: Fertilizer Co. v. Little, post, 817, 820; *Grocery Co. v. Davis,* 132 N. C., 98; *Chemical Co. v. McNair,* 139 N. C., 335; *Chemical Co. v. Floyd,* 158 N. C., 460.

(580)

D. A. BLUE ET AL. v. J. F. RITTER ET AL.

ACTION TO RECOVER LAND—WILLS—PRESUMPTION—TRIAL—BURDEN OF PROOF—FAILURE OF PROOF—APPEAL.

1. The law presumes that one who undertakes to make a will does not intend to die intestate as to any part of his property: *Hence,*

2. Where, in an action to recover land, the plaintiff dies and his heirs and executors are made parties plaintiff in his stead, and on the trial offer evidence that their ancestor is dead, and that he left a will which has been probated, the presumption is that he devised all his property, and the heirs must, by the will or otherwise, show that they are his devisees.

3. In such case it was proper for the trial judge to direct a verdict for defendant on the ground of a failure of proof of plaintiff's title.

4. Where the point as to the insufficiency of evidence was made and argued, and replied to by plaintiff, on the trial below, and a judgment based on such insufficiency was rendered below, this Court will not order the missing evidence to be supplied.

ACTION for the recovery of land, tried at May Term, 1895, of CUMBERLAND, before *Norwood, J.,* and a jury.

There was a verdict for the defendants, and plaintiffs appealed.

The facts necessary to an understanding of the decision of the Court are stated in the opinion of *Associate Justice Furches.*

T. H. Sutton and Shepherd & Busbee for plaintiffs.
N. W. Ray for defendants.

FURCHES, J. This is an action for the possession of land. It therefore became the duty of plaintiffs to make out their title—that is, to show by the evidence that they are the owners (581) —and if they fail to do this they must fail in this action. *Cowen v. Withrow,* 116 N. C., 771. The action was commenced by N. R. Blue, who has since died, and the plaintiffs offered evidence showing that he was dead, leaving a last will and testament, an order of court at a former term to make his heirs at law and executors parties plaintiff, and that they had been so made. But they did not offer in evidence the will of the testator. And upon the argument, as is stated in the case on appeal, defendants contended that plaintiffs had failed to make out their case—failed to show that they were the owners of the land in dispute, even admitting that they had shown that Blue at the time of his death was the owner—for the reason that they had shown that Blue had made a will; and nothing further appearing, the law presumed that he devised this land, and that the devisees, and not

the executors nor heirs at law, were the owners. This position of defendants was disputed by plaintiffs on the trial below, as it was on the argument in this Court. Whereupon, his Honor then said, as has been admitted by counsel on both sides: "The case depended on questions of law; that plaintiffs had not made out a case which would entitle them to recover; that because of failure of proof and defects in the title of plaintiffs the jury would be instructed to answer 'No' to the first issue, and they were so instructed." To this plaintiffs excepted, and the jury answered "No," as they were instructed to do. Judgment for defendants and appeal by plaintiffs.

It appears upon an examination of authorities that defendants' contention must be sustained. Upon its appearing that Blue left a last will and testament, which had been admitted to probate, and the executors had qualified, the presumption is that he had willed
(582) this land, if it was his at the time of his death. 2 Redfield Wills, 116; Schouler on Wills, sec. 490; Pritchard on Wills, sec. 1. "The law presumes that a man who undertakes to make a will does not intend to die intestate as to any part of his property." Pritchard, *supra*, sec. 386. The same doctrine is held in *Speight v. Gatling*, 17 N. C., 5; *Jones v. Perry*, 38 N. C., 200. This presumption should have been rebutted by plaintiffs to entitle them to recover.

On the argument here it was contended for plaintiffs that this ground of defense was technical, and the Court was asked to send for the will, if it found trouble on this point. It is true it is technical and so is much of the law that courts are called upon every day to administer. And how it would have been if the will had been introduced we do not know.

We are not inadvertent to the fact that this Court has of its own motion sent down for papers found during the investigation to be necessary for its information, as in *Foster v. Hackett*, 112 N. C., 546. But those cases were very different from this. In those cases it was to explain and to show the effect of evidence in the case, and not for the purpose of adding new evidence to make out a case for the plaintiff, when he had failed to make out the case on the trial below. But in this case it seems to us we should not do so, as this was a point made and argued by defendants and replied to by plaintiffs in the trial below. It would be making a new case in this Court from the one tried below. The judge said "that, because of the failure of proof," he charged the jury to answer the first issue for defendants. It was most probable that this is the very defect he charged upon, as it had been discussed by both sides. And it would not be fair to appellee if we should allow plaintiffs to make a new case before us, and then overrule the court below on the new case.

We find no error in the judgment appealed from, as the (583) case is constituted for us, and it must be affirmed.

There were a number of other points made and discussed before us, but the consideration we have given this one disposes of the case, and we have not considered the other questions.

Affirmed.

Cited: Cox v. Lumber Co., 124 N. C., 83; *Peebles v. Graham,* 128 N. C., 225; *Hooker v. Greenville,* 130 N. C., 474; *Steadman v. Steadman,* 143 N. C., 351; *Harper v. Harper,* 148 N. C., 457; *Austin v. Austin,* 160 N. C., 368.

J. & O. E. EVANS v. CUMBERLAND MILLS

JUDGMENT—RES JUDICATA—TRIAL.

1. Where, in the trial of an action for damages for shortage in goods sold and delivered to plaintiffs, it appeared that the defendant, after delivering a part of the goods sold, had divided the balance due on the price into several amounts and brought action thereon in a justice's court, and the vendee had set up a counterclaim for shortage, but the vendor recovered judgments from which the vendee did not appeal: *Held,* that the vendee (defendants in said actions) are estopped from claiming damages for shortage, except as to the goods which had not been delivered at the time of said judgments.

2. The justice's judgments are conclusive, in a subsequent action to recover an overpayment, as to any payments alleged to have been made before such judgments were taken.

ACTION tried before *Norwood, J.,* and a jury, at May Term, 1895, of CUMBERLAND.

Verdict and judgment in favor of plaintiffs, and the de- (587) fendant appealed.

N. W. Ray for plaintiffs.
R. P. Buxton and T. H. Sutton for defendants.

MONTGOMERY, J. In October, 1889, the defendants in this action contracted to manufacture and deliver to the plaintiffs a large lot of cotton bagging. All of the goods were delivered to the plaintiffs within about thirty days after the contract was entered into, with the exception of 106 rolls thereof, and the plaintiffs had paid within that time a considerable amount on the contract price. On 15 November following, and before the 106 rolls had been delivered (though delivery had been tendered), the defendants divided the (588)

amount which they claimed to be still due to them by the plaintiffs into several sums, each under $200, and brought suit upon them in a court of a justice of the peace. The defendants in that action (the plaintiffs in this) set up counter claims, alleging injury and damage, in that the weights and measures of the bagging were short. Judgments were, however, recovered by the defendants in this action (the plaintiffs in those), and there were no appeals therefrom.

The present action is brought by the plaintiffs to recover damages for the alleged shortage in weights and measures of the whole lot of bagging. His Honor was right in holding that the plaintiffs were estopped by the justice's judgments to claim such damages, except for the 106 rolls, which were not delivered until after the justice's judgments, and as to the latter he properly allowed them to introduce testimony as to the shortage in weights and measures. After an examination, however, of the testimony in this case, we are of opinion that the same was not sufficient to have been submitted to the jury. It did not tend to prove any damage to the plaintiffs. It was not sufficiently definite to enable the jury to form any idea of pecuniary damage. The testimony of James Evans, one of the plaintiffs, is the only testimony on that point, and is as follows: "I never saw more than twenty-five rolls of it weighed, and we computed weight of the balance from that; that was the way Robbins said to do it. There were eighty-one rolls that we did not weigh. I do not know whether or not the eighty-one rolls would have weighed enough to make up for the deficiency in the twenty-five rolls. There was a difference of several ounces between the weights of some of the rolls." In their complaint in this action the plaintiffs allege "that they were required to pay, and did pay, to the defendants $100 more than the goods
(589) delivered would amount to, even at measurement and weight which defendants claim for amount delivered." The defendants denied this in their answer. The only proof offered by the plaintiffs to make good the allegation was the testimony of James Evans, one of the plaintiffs, and is as follows: "We paid them about $100 more than the bill would have been if the goods had been according to contract." If this allegation of the plaintiffs is founded on an overpayment by mistake, made before the judgments were had, it should have been pleaded and proved at the trials before the justice. The justice's judgments are conclusive against any payments alleged to have been made before the judgments were had. If the allegation is based on a payment by mistake, made to the sheriff on the executions in his hands, the payment ought to have been set out in the complaint with particularity and certainty, and proved. The presump-

tion is that the executions in the sheriff's hands were correct and that he collected only what was due on them. We are of opinion that the allegation and the testimony introduced to support it were both too indefinite and insufficient to justify either verdict or judgment. There is error.

New trial.

(590)

H. B. SHIELDS v. A. H. MCNEILL

PRACTICE—APPEAL—INTERLOCUTORY JUDGMENT—REFEREE'S REPORT, EXCEPTIONS TO.

1. An interlocutory judgment, as to which no assignment of errors excepted to on the trial is set out or appears on the record of the appeal from the final judgment, will not be considered.

2. Where exceptions to a referee's report are not filed within the prescribed time, it is within the discretion of the judge below to refuse to consider them.

ACTION tried before *Greene, J.*, at January Term, 1896, of MOORE, upon exceptions to referee's report, certain of the issues arising upon pleadings having been tried before *Whitaker, J.*, and a jury, at March Term, 1893.

It appeared that the referee appointed by *Judge Whitaker* had made report to December Term, 1894, and that upon hearing exceptions to said report the cause was re-referred to the referee. Without hearing further evidence, the referee made report to the same term of court, towit, August Term, 1895. The defendants were allowed thirty days to file exceptions. By mistake of time allowed—the defendant's counsel believing sixty days had been allowed instead of thirty—on 19 October, 1895, he filed exceptions. Upon suggestion that the defendant's exceptions to said report had not been filed within the thirty days allowed, the Court declined to hear said exceptions, to which the defendant excepted. The defendant, McNeill, then demanded that his exceptions upon the first report, in so far as they applied to the second report, should be heard by the (591) court, which demand, upon objection by plaintiff, was refused. To this the defendant excepted.

It appears from the evidence taken before the referee that the defendant, McNeill, was the owner of an interest in the $230 mortgage, amounting to $140, principal and interest thereon, which fact was admitted by the plaintiff.

Judgment was rendered by the court for the plaintiff, to the form of which judgment the defendant, McNeill, excepted, for that said

judgment directed a foreclosure of the $230 mortgage, in which said McNeill had a $140 interest, and out of the proceeds of said sale the $90 interest of the plaintiff and the $100 mortgage should be paid, leaving the McNeill interest unprovided for.

The defendant further objected to said judgment for error in the court in declining to hear exceptions to report of referee.

The defendant appealed.

Black & Adams for plaintiff.
Douglass & Spence and W. E. Murchison for defendant.

FURCHES, J. The trial and judgment before *Whitaker, J.*, at March Term, 1893, settled two questions: That S. C. Barrett and wife executed the Monger and Worthy mortgage, and that said Barrett and wife were the owners of the land conveyed by said mortgage at the time of its execution. But it was contended on the argument for the defendant that the judgment of *Whitaker, J.*, was interlocutory and erroneous and that exceptions were noted, and in this appeal we are asked to review the trial before *Whitaker, J.* This we cannot do, whether the judgment was interlocutory or not. If it is what is termed a final judgment, it should have been appealed from at that
(592) time; and if it is what is termed an interlocutory judgment, where the exceptions might be noted and reserved till final judgment, it is not necessary for us to determine; for if it be considered interlocutory we cannot review it, unless there was some error assigned or apparent on the record; and in this case there is no assignment of error as to the trial and judgment before *Whitaker, J.*, and none appears in the record.

The consideration we have given the Whitaker judgment disposes of all the exceptions as to the irregularity of the sheriff's sale, including the dates of issuing the execution and date of sale, as this evidence was all introduced for the purpose of determining whether Barrett and wife were the owners of the land at the date of the mortgages, when this question had been settled by the Whitaker trial and judgment at March Term, 1893.

And the other question to be considered is defendant's exceptions to the referee's report. These exceptions were not filed within the thirty days allowed, in which they were to be filed; and the court on this account refused to hear or consider them, and confirmed the report. As the exceptions were not filed within the time allowed, it was discretionary with the judge whether he would hear and consider them or not, and we cannot review this discretion.

Upon the argument it was contended by defendant's counsel that the judgment provided for the payment of plaintiff's debt out of a sale of the mortgaged property, and had not provided for the payment of defendant's debt; but upon examination we find this is not the case, and the judgment seems to be a proper one.

It appears from the case that defendant, McNeill, has become the purchaser of Barrett's reversionary interest in the land, and is therefore the fee simple owner, subject to plaintiff's en- (593) cumbrance. This being so, if he pays plaintiff's recovery the land is his. It is not necessary for him to pay his own debt; this would be foolishness that the law does not provide for. But the judgment is that if plaintiff's debt is not paid the land is to be sold and reported to court for further orders, and then the application will be made according to the priority of the mortgages (*McQueen v. Smith, ante,* 569), first, to the satisfaction of the A. R. McDonald mortgage, and then to the A. H. McNeill mortgage. We find no error, and the judgment is

Affirmed.

J. C. CURRIE v. COLIN M. HAWKINS*

DEFICIENCY IN QUANTITY—EXCEPTIONS IN DEEDS—RECITALS IN DEEDS—ORAL COLLATERAL AGREEMENTS—DATE OF SUMMONS.

1. An oral agreement to make good any shortage in quantity, entered into contemporaneously with the delivery of a deed for land, is valid.

2. A deed stating the area of the land conveyed to be so many acres, "more or less," after deducting certain excepted tracts, the number of acres in the excepted tracts being definitely and positively set out, is *prima facie* evidence against the grantor as to the number of acres contained in such excepted tracts.

3. A summons is presumed to bear the true date of its issue, but it is competent to show that it was not in fact then issued.

ACTION for the recovery of compensation for an alleged (594) deficiency in the area of a tract of land sold by defendant to plaintiff, and tried at Fall Term, 1895, of MONTGOMERY, before *Norwood, J.*

The plaintiff appealed.

The facts bearing upon the points determined by the Court are set out in the opinion of *Associate Justice Montgomery.*

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

Douglass & Spence and Black & Adams for plaintiff.
R. O. Burton for defendant.

MONTGOMERY, J. The plaintiff's complaint sets out two causes of action. In the first it is alleged that by the terms of a deed executed to the plaintiff by the defendant it is stipulated that if it should turn out that the timber on any part of the land conveyed should prove to have been "boxed" or worked for turpentine before the execution of the deed, then such lands should be estimated at fifty cents per acre, whereas $3.68 was the amount paid per acre for the land.

The plaintiffs allege further as to the first cause of action that subsequently to the execution of the deed and the payment of the purchase money it was ascertained that the timber on 119 acres of land had been boxed or worked for turpentine, and the plaintiff demands of the defendant the difference between the amount paid for the land upon which the timber was so boxed and the fifty cents estimated value, according to the terms of the deed. The answer denied the cause of action.

The court settled the issues, and there appears in the record no exception to them by the plaintiff. No issue was submitted
(595) as to the cause of action, and none asked for by the plaintiff. The rulings of his Honor, therefore, in refusing to allow testimony on this matter were correct.

The second cause of action is for the reimbursement to the plaintiff by the defendant of an amount which the plaintiff alleges that the defendant agreed to pay him in case there should be a shortage in the number of acres in the land conveyed in the deed. The purchase money named in the deed is $6,500, and the number of acres 1,768.

The plaintiff was allowed to testify, without objection, and said: "I started to read the deed, and Mr. Hawkins, the defendant, took it and read it to me. I asked him the meaning of 'more or less' in the deed, and he said that it was an expression usually put in deeds. He said that if the deficiency was small it would go for nothing, but he agreed that if there was twenty acres more than 1,768 acres I must pay him for the excess, and that if it lacked twenty acres he would pay me the deficiency. He had told me the tract contained 1,767 acres; this was some days before the execution of the deed." As we have said, the defendant made no objection to the testimony when offered. But as the ruling of his Honor, to which we shall presently refer, may possibly have been based partly upon the effect of this testimony, we will observe that it was perfectly competent for the purpose for which it was offered. *McGee v. Craven,* 106 N. C., 351; *Sherrill v. Hagan,* 92 N. C., 345.

There was a consent order entered up in the cause, by which it was provided that N. M. Thayer should make a survey of the lands conveyed by the defendant to the plaintiff, and on the trial the plaintiff introduced Mr. Thayer to prove the alleged deficiency in the number of acres in the land conveyed. Without objection, he testified as follows: "I know the corners (596) and boundaries—that is, I surveyed and found them. I found within the boundary 3,470 acres. I had the defendant's deed to plaintiff at the time I made the survey and surveyed by it. I have made a calculation of the lands excepted, and summed them up. I found that the amount of the acres excepted, taking what the deed said as to the acres in the excepted tracts, amounted to 1,948 6-10 acres. I did not survey the excepted tracts. This, taken from 3,470 acres, leaves 1,521 4-10 acres. This amount makes a shortage of 246 6-10 acres in the deed. I am now the county surveyor; have been so about twenty years, but not regularly for that time. I took the angles of the courses and distances on my field book. I have not my field notes with me. I can't say that the acreage in the exceptions is correct." The date of the deed from defendant to plaintiffs is 1 December, 1885, and the summons in this action is dated 28 November, 1888—three days before it is admitted that the statute of limitations would have barred the action. The sheriff's return upon the summons, signed by him, is as follows: "Received 11 February, 1889. Served 11 February, 1889, by reading the above summons to C. M. Hawkins."

The following issues were submitted to the jury:

1. "Did the defendant agree with the plaintiff, at the time the deed was executed and delivered and the money paid, and before the deed was delivered and the money paid, that he would repay to the plaintiff the price per acre for any number of acres that the deed might contain less than 1,768 acres?

2. "Did the boundaries in the deed, exclusive of the lands excepted, convey less than 1,768 acres, and if so, how many acres less?

3. "Did the plaintiff's alleged cause of action accrue with- (597) in three years next before the beginning of this action?"

4. "How much is the plaintiff entitled to recover?"

After the testimony was in, his Honor intimated that he would instruct the jury "that the testimony was not sufficient to establish plaintiff's claim of deficiency in acreage, and that if they believed the testimony they should answer the third issue "No."

The plaintiffs submitted to a nonsuit and appealed from the judgment.

The testimony of the plaintiff as to the alleged agreement by the defendant to pay him the deficiency in acreage was certainly sufficient to have been submitted to the jury to go to show that agreement, and his Honor most probably had in his mind the manner in which the plaintiff had offered to prove the shortage, through the testimony of Mr. Thayer, when he said that "the testimony was not sufficient to establish plaintiff's claim of deficiency in acreage."

In the argument here the counsel for defendant contended that the only method by which any shortage in acreage, if any existed, could be ascertained was to run around the whole tract by survey, then to survey each of the tracts which were excepted in the deed from the defendant to the plaintiff, and then to subtract the acreage of the excepted tracts, so ascertained, from the whole. Perchance, he argued, if a survey of the excepted tracts had been made, it would have been ascertained that there was in reality a less number of acres within the metes and bounds recited in the deeds to the excepted tracts than they were said to contain; and as the plaintiff under his
(598) deed got all of the land except the actual number of acres embraced within the metes and bounds of the excepted tracts, he might in this way have gotten the whole of his 1,768 acres. He cited as bearing on this question *Gudger v. Hensley,* 82 N. C., 481; *Brown v. Rickard,* 107 N. C., 639, and *Davis v. Stroud,* 104 N. C., 484.

In the first case cited (*Gudger v. Hensley*) the plaintiff there claimed title through a grant from the State to Blount, and successive conveyances through intermediate parties to himself. In the grant to Blount was the following exception: "Within which boundary there are 13,735 acres of land, entered by persons, whose names are hereunto annexed, since the date of said Blount's entries and by his permission, but as they are not yet surveyed their situation cannot be delineated." The defendant there contended that the grant to Blount was inoperative to convey the land in dispute, by reason of the exception following the description of the boundaries of the tract and the plaintiff's failure to show that the portion he now seeks to recover is embraced in the exception. The grant was introduced in evidence, and there was no list of names annexed to it and no proof offered that any such list was ever annexed. The court held in that case that the grant to Blount was good, but that the exception was void for uncertainty, which was not cured by proper proof on the trial, and that the *onus* would have been on the defendant, if he had claimed under the exception in the grant, by proper proofs, to bring himself within the terms of the exception, and not that the plaintiff should assume the burden.

In the second case cited (*Brown v. Rickard*) the only question there raised was as to the value and nature of the estate conveyed in the deed—whether an admittedly valid exception in a grant passed to the purchaser under a deed conveying "two-third shares of all the land remaining unsold and contained within the boundary of the 30,080-acre tract of land granted by the State of North (599) Carolina in the year 1795 to James Greenlee (and others) and situated in Burke County. Said tract of land is more particularly and fully described in the original State grant." It is true that in that case the Court held that the boundary made by the grant "did not consist necessarily and merely of the external metes and bounds of the grant; it embraced as well its internal metes and bounds and limits, and hence it embraced also the location, the metes and bounds of the land excepted from the grant; it had such internal boundary. The grant referred to the excepted land, the entry thereof, its metes and bounds, and these became a part of its own boundary, as much as if the same had been specifically set forth in the grant itself. Hence all the land remaining unsold and contained within the boundary of the 30,080-acre grant implies the boundary, including that that excludes the exception."

In the last case cited (*Davis v. Stroud*) it was decided by the Court that where there had been a conveyance of a residue of a tract of land, in an action brought by the grantee for possession against an alleged trespasser, the residue must be distinctly located by competent proof of the quantity which had been sold off before the sale of the residue, and that the deeds themselves to such portions were the best evidence for that purpose.

These cited cases do not help the defendant. The questions of law which they decide are not like the one for decision in this case. The plaintiff here is not suing a trespasser for the recovery of any portion of the land which the defendant conveyed to him. If that was the case it may be that he would have to follow the course marked out in *Davis v. Stroud, supra*—prove title to the land and then show that the trespasser was in possession of a part thereof not embraced in the deeds to the excepted tracts—and the best proof of this (600) would be the deeds themselves. Neither has the plaintiff any trouble with any of the purchasers of the excepted tracts, nor any dispute with them concerning the boundaries of their lands, for uncertainty of description or any other cause. The defendant in his deed to the plaintiff excepted from its operation several tracts of land which had theretofore been conveyed to others, and the exact number of acres in each tract so conveyed is set forth in the deed—not so many

acres, "more or less," or "about," or "as near as can be estimated," or such like phrases, but the exact number. The defendant, therefore, cannot be heard to say, in this action at least, that the plaintiff must prove that the deed from the defendant to him is untrue, and that the plaintiff must prove that within the metes and bounds of the deeds to the excepted tracts there are fewer acres than the deeds set forth. The plaintiff has the right to take the defendant according to the language of the deed, and to assume that the number of acres is properly and truly set out in the deeds to the excepted tracts. We think, therefore, that his Honor erred in holding that "the testimony was not sufficient to be submitted to the jury to establish plaintiff's claim of deficiency in acreage."

There remains to be disposed of the plea of the statute of limitations. The date of the issue of a summons, when the matter is in dispute, depends upon the facts connected therewith. The presumption is in favor of its having been issued at the time it bears date, but the defendant may show to the contrary. *Webster v. Sharpe,* 116 N. C., 466. The defendant has introduced no testimony in this case tending to show that the issuing of the summons was, in fact, after the date mentioned therein, and he relied simply upon the fact that the sheriff's return showed that it was received two months
(601) and a half after its date to prove that it was not issued on the day of its date. This fact alone does not rebut the presumption that the summons was issued at the time of its date. It appears from the record that the plaintiff and his attorney were together in the clerk's office on the day of the date of the summons; that on that day the prosecution bond was given and filed, and that the summons was made out and signed by the clerk and delivered to the plaintiff's attorney. It was received and served by the sheriff in ample time for the term of the court next ensuing the date of its issue. We are of opinion, therefore, that the summons in this case was issued on the day it bears date, and, that being so, that the action was not barred at the time it was commenced. There was error in the rulings and judgment of court below.

New Trial.

Cited: Houston v. Thornton, 122 N. C., 375; *McClure v. Fellows,* 131 N. C., 512; *Smith v. Lumber Co.,* 142 N. C., 31; *Brown v. Hobbs,* 147 N. C., 77; *Stern v. Benbow,* 151 N. C., 462; *Buie v. Kennedy,* 164 N. C., 299.

Z. W. WHITEHEAD v. E. J. HALE

PRACTICE IN APPLICATION FOR RECEIVER—FINDINGS OF FACTS—LEGAL DISCRETION —INSOLVENCY OF MORTGAGOR—CLAIM AND DELIVERY.

1. In applications for a receiver the judge below is presumed to have found the facts in accordance with the contention of the party in whose favor he decided. He need not find the facts specifically unless the losing party requests him to do so.

2. A receiver will not be appointed, in an action to foreclose a mortgage on a newspaper, when the defendant denies owing anything on the mortgage debt, and it is apparent that, owing to the peculiar nature of the property, the appointment of a receiver would practically destroy its value.

3. The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy.

4. Insolvency of the mortgagor is not of itself a sufficient ground for the appointment of a receiver to take charge of mortgaged chattels.

5. Actions of claim and delivery for mortgaged personalty rests on a different footing from applications for a receiver, as the mortgagor is protected by the bond required in claim and delivery.

ACTION brought to obtain judgment on the notes of the (602) defendant and for the foreclosure of a mortgage alleged to have been given to secure said notes, heard before *Norwood, J.*, at May Term, 1895, of CUMBERLAND, on a motion by the plaintiff for a receiver, said motion being based on the complaint, answer, reply and the affidavit of the plaintiff and defendant, respectively.

The motion for the appointment of a receiver was refused, and the plaintiff excepted and appealed to the Supreme Court.

The material facts appear in the opinion of *Associate Justice Clark.*

N. A. Sinclair and W. E. Murchison for plaintiff.
N. W. Ray for defendant.

CLARK, J. This action is brought for the foreclosure of a mortgage upon a newspaper, together with its press, type, subscription list, etc., including its good will. The defendant, while admitting that the mortgage had been executed, denies that there is any balance due on the same, and alleges on the contrary that the plaintiff is indebted to him, and asks for an account and a cancellation of the mortgage. Under these circumstances the court not only would not (603)

decree a foreclosure till the balance due, if any, was ascertained, but would enjoin any attempt to sell under a power of sale in the mortgage until the account had been stated. *Purnell v. Vaughan,* 77 N. C., 268; *Pritchard v. Sanderson,* 84 N. C., 299; *Pender v. Pittman, ib.,* 372. But the plaintiff goes further and asks that the property be taken out of the control of the defendant, pending the litigation, by placing it in the hands of a receiver. Inasmuch as the answer of the defendant, if true, negatives any lien or interest of the plaintiff as to the property, this would be a strong measure to grant the plaintiff, as he offers no indemnity, as he would have done had he proceeded by claim and delivery, for the damages which might be done the defendant if the plaintiff's claim should prove unfounded. To grant such motion without due caution might put it in the power of an irresponsible or reckless mortgagee to ruin a mortgagor's business, though no balance is due on the mortgage. Whether a receiver shall be appointed in any case is left, therefore, largely to the sound judgment of the presiding judge, who will take into consideration all the circumstances, including the nature of the property and its likelihood to be destroyed or spirited away during the litigation, and the probability on the other hand of its value being seriously impaired by its being placed in the hands of a receiver, as would be particularly the case with a newspaper whose value so largely depends upon its good will and the personal characteristics of the editor and the policy he pursues, as is well pointed out by *Avery, J.,* in *Cowan v. Fairbrother, ante,* 406. The appointment of or refusal to appoint a receiver is, like every judgment below, presumed to be correct, and the burden is on the appellant to show error. The judge in this class of cases is presumed to have found the facts in accordance with
(604) the contention of the party in whose favor he decided the motion, and need not find the facts specifically unless the losing party requests him to do so. *Milhiser v. Balsley,* 106 N. C., 433; *Holden v. Purefoy,* 108 N. C., 163; *Parker v. McPhail,* 112 N. C., 502; *Delafield v. Construction Co.,* 115 N. C., 21. The rule is thus clearly stated by *Shepherd, J.,* in *Holden v. Purefoy, supra:* "No findings of fact accompany the several affidavits, nor does it appear that the appellant requested that such findings should be made. If he had desired the ruling of this Court upon any particular view of the facts, he should have asked for a finding of the same, but as he failed to do so, we must assume, in the absence of any specific exception, that his objection is based on the ground that, taking as true that view of the testimony most favorable to the appellee, the latter, as a matter of law, would not be entitled to relief." This is a reasonable rule, and has been so held by repeated decisions, several of which are above cited.

This ruling does not apply to injunction proceedings, which stand on a different footing.

In the present case there was no request by the appellant that the judge should find the facts, and we must take them to be as set out in the affidavits filed by the appellee. On turning to the affidavits we find it testified by the defendant, and not denied by the plaintiff, that to appoint a receiver "would be positively to destroy absolutely its value and render the property in controversy in this action worthless as a newspaper." Owing to the peculiar nature of this species of property, and the important part of its good will and the capacity and policy of the editor, especially if a man of talent and popularity and of strong individuality, have in giving it value, it can be readily seen that appointing a receiver to take charge of the paper, with power to change the editor or control its policy, might and (605) in many case would destroy all its value, beyond the slight value attached to the possibly well-worn type and press. To appoint a receiver, even of realty, or of a railroad, or the like, is to be done with caution (*Lumber Co. v. Wallace,* 93 N. C., 22), though in such cases the value does not (as is the case with a newspaper) depend upon the popularity of the owner or manager and the good will, which is so largely personal to him. The allegation that to appoint a receiver would be to destroy the property absolutely as a newspaper, *i. e.,* all the property beyond the slight value of the worn type and press, etc., not being denied, must be taken as true. Why, then, appoint a receiver, when to do so could not benefit the plaintiff, even if his contention is right, and would be an irreparable wrong to the defendant if his contention that the plaintiff is in fact indebted to him be true? As a ground for relief, the plaintiff, who makes his affidvait in Washington City, alleges on information that the property is depreciating in the hands of the defendant. This, if true, would not be as hurtful as the utter destruction of the newspaper property by the appointment of a receiver, which the plaintiff does not deny. The defendant, however, in his affidavit, denies that the property has depreciated, but on the contrary avers that it has doubled in value and is steadily appreciating in his hands. This, we take it, means not only additions to the subscription list, advertising patronage and good will, but, from the nature of a newspaper office, the constant substitution of new type for the old, which from time to time becomes worn out and useless. The judge below might have considered that the plaintiff, a nonresident, was swearing upon hearsay "information and belief," as he states, and that the defendant was testifying to facts within his daily and direct knowledge. But however that (606) may have been, we must conclude, upon the authorities above

cited, that the court below, in the absence of a request to find the facts found this and all other controverted points in favor of the appellee, and we are bound by such finding.

It is true that the plaintiff alleged that the defendant was insolvent, and this the defendant admitted, but there is no allegation that the defendant intends to run off with or conceal or destroy the property, and the only possible bearing which the allegation of insolvency could have is in connection with the other allegation (which is found against the plaintiff), that the property is depreciating, and thus the security is being impaired. The allegation of the defendant's insolvency and poverty, taken alone, is not sufficient ground to take the property out of his hands, which he avers is his own, free from any legal claim of the plaintiff, especially when the effect of the judge's ruling is, as we have seen, that the security is not being impaired, but in truth has doubled in value and is steadily increasing in worth, and that, in fact, to appoint the receiver would be really to destroy the chief value of the property. 20 Am. and Eng. Encyc., 39, and notes 1 and 2. Upon a proper state of facts a receiver can be appointed of a newspaper, as well as of other property, but upon the peculiar state of facts found in this case to appoint a receiver would be a great injury to the defendant and no benefit to the plaintiff, and the judge below properly left the property in the hands of the defendant until a jury could pass upon the controverted issue of fact, whether the plaintiff has any sum due him for which he can ask a decree of foreclosure.

No error.

Cited: Shoaf v. Frost, 127 N. C., 307; *S. v. Council*, 129 N. C., 517; *Parker v. Ins. Co.*, 143 N. C., 342.

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(607)

A. F. HOUCK v. JOHN D. SOMERS*

TRUSTEE—RESULTING TRUST—SET-OFF.

1. Where money loaned is furnished by the wife, and the note and mortgage therefor are made to the husband, the latter becomes trustee for his wife, who is the equitable owner thereof, without any express assignment to her.
2. In such case the borrower cannot set-off against his liability on the note an indebtedness due from the husband to him.

ACTION tried before *Norwood, J.*, at November Term, 1895, of IREDELL.

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

The action was commenced for possession, under claim and delivery, of certain personal property, a pair of mules, etc., conveyed by John D. Somers by chattel mortgage to H. L. Ayers, on 8 September, 1893, and assigned by H. L. Ayers to C. J. Ayers, 24 October, 1893, and assigned by C. J. Ayers to the plaintiff, 12 December, 1893. The note, to secure which said mortgage was given, was due and payable 15 October, 1893.

The plaintiff alleged in his complaint that the money for which the note and mortgage was given was the separate estate of C. J. Ayers, wife of H. L. Ayers, and that this fact was made known to the defendant, Somers, at and before the execution of the note and mortgage in question. This was denied by defendant, and an unsettled copartnership between defendant, Somers, and H. L. Ayers was set up by defendant.

The first evidence introduced by the plaintiff was a chattel mortgage executed to H. L. Ayers, 8 September, 1893, by J. D. Somers, and the note secured thereby for $100, due and pay- (608) able 13 October, 1893. It was admitted that the property in dispute was the same property conveyed in the mortgage. On the back of said mortgage are the following endorsements, to-wit: "In consideration of Mrs. C. J. Ayers having furnished the within amount, I hereby transfer and assign all my title and interest in the within note and mortgage to her. This 24 October, 1893. (Signed) H. L. Ayers." Also, "For value received of Dr. A. F. Houck, I assign the within mortgage and note, with all the powers and privileges therein, to him. This 12 December, 1893. (Signed) C. J. Ayers."

R. B. McLaughlin, Esq., witness for plaintiff, testified: "The assignment from Ayers to his wife is in my handwriting, and he (H. L. Ayers) signed it. The assignment from C. J. Ayers is in the handwriting of F. D. Hackett. Both the mortgage and the partnership agreement were drawn by me. My recollection is that it was well understood at the time that the money advanced, for which the mortgage was given, was the money of Mrs. C. J. Ayers. This was stated by H. L. Ayers to J. D. Somers in my presence before the note and mortgage were executed. Ayers said unless the mortgage was executed he could not get the money from his wife. He said, as far as he was concerned, he would not require a mortgage. I don't think that any money was paid then, but I think Ayers agreed to put the money in the bank, but I am not certain as to this."

H. L. Ayers, witness for plaintiff, testified, in substance, that "The money advanced to Somers at the time the mortgage was given belonged to my wife, C. J. Ayers. I told Somers it was my wife's money, and she would not advance it unless he would sign the mort-

(609) gage. My wife got the money from her father's estate. On settlement of the partnership between Somers and myself there was $108 due from Somers to me—$8 over and above the mortgage."

A. F. Houck testified: "He gave $100 for the mortgage, and that no part has been paid; that he had no notice of any unsettled partnership between Somers and Ayers at the time he bought the mortgage."

John D. Somers, defendant, testified: "Ayers never gave me any money; did not put anything in bank for me, nor for the partnership, that I knew of. Partnership only ran twenty-seven days. It was not profitable to me. Ayers did bring grain there (to a distillery); I don't know how much. According to a statement made by Ayers himself, he owed me $50." (The above evidence objected to by plaintiff; overruled; exception.)

H. L. Ayers, recalled by plaintiff: "I got the $100 from my wife and bought corn with it for the distillery, with the knowledge and consent of Somers. I didn't promise to put the $100 in the bank."

The court submitted the following issues:

1. "Is the plaintiff the owner of the property described in the complaint?

2. "What is the value of the property?

3. "Has any part of the mortgage debt been paid, and if so, what amount has been paid?"

The plaintiff asked the court to charge the jury:

1. "If the money loaned the defendant was the separate property of C. J. Ayers, wife of H. L. Ayers, even though the mortgage was given to H. L. Ayers, there was a resulting trust in favor of C. J. Ayers, and equity would hold H. L. Ayers as trustee for the benefit of his wife and would treat the mortgage as her property." Refused by the court, and plaintiff excepted.

2. "If the jury find as a fact from the evidence that the (610) fact was communicated to Somers at the time he borrowed the money that it was the money of Mrs. C. J. Ayers, and he accepted it and signed the mortgage to H. L. Ayers, he had notice in law of C. J. Ayers' equitable rights, took subject to them, and is estopped by his said act of accepting said money from denying her title thereto or the title of her assignee, the plaintiff in this action." Refused by the court, and plaintiff excepted.

3. "If Somers knew or was informed at the time that the money he got was Mrs. Ayers' money, then he had notice of her equitable title thereto, and took the same subject thereto." Refused by the court, and plaintiff excepted.

His Honor charged the jury, among other things:

1. "That as the note in question was assigned, after its maturity, to C. J. Ayers, and that she took the same subject to any defense Somers might have against H. L. Ayers, and that the plaintiff, her assignee, took it subject to the same rule that I have laid down to you, the burden is on the defendant to make out his equitable defense.

2. "If the jury finds from the evidence that H. L. Ayers and Somers were equal partners in the distillery, and that H. L. Ayers owes the copartnership $50, they should answer the third issue 'Nothing due.'

3. "His Honor further said, in charging the jury, that if they found the copartnership owed Somers $50, then the plaintiff would not be entitled to recover, and if they found that the partnership owed Ayers $8 over and above this debt sued on, as testified to by Ayers, that it would not do to consider Ayers, because Ayers had put nothing in as a partner."

His Honor declined to submit the question to the jury whether the money loaned was the money of C. J. Ayers, as contended by the plaintiff.

To the charge as given above in the first, second and third (611) paragraphs plaintiff excepted.

The jury answered the first issue "No," the second "$150," and the third "Nothing due."

Plaintiff moved for a new trial upon the exceptions to the evidence as above set forth, for refusal to give prayers for instructions numbers 1, 2 and 3, and for the charge given in sections 1, 2 and 3, as above set forth.

Motion overruled. Exception by the plaintiff. Judgment for defendant. Appeal.

Armfield & Turner for plaintiff.
No counsel contra.

FAIRCLOTH, C. J. If A purchases property from B, taking the title in himself, and the consideration is furnished by C, by operation of law A becomes a trustee for the benefit of C, and the statute at once executes the trust, and C becomes in equity the absolute owner. Such a trust need not be in writing, and it may be shown by parol proof. The authorities in our own reports are numerous. Application: If the wife, C. J. Ayers, furnished the consideration in money or property for the note and mortgage executed to her husband, H. L. Ayers, then he immediately became her trustee, and it can make no difference whether he assigned the note to her before or after its maturity, as it

was her property from the day of its execution and became her separate estate.

The defense that there was a balance due the defendant on partnership account between him and the husband cannot be allowed, as that would contravene the Constitution, Art. X, sec. 6, which declares that the separate estate of the wife "shall not be liable for any debts, obligations or engagements of her husband." The plaintiff alleged
(612) that the consideration for the note and mortgage was the money of the wife, and that was denied in the answer. That is a material fact in the case, and can be ascertained by a distinct issue submitted, or it may be made available by appropriate instructions to the jury upon the issues already submitted. His Honor fell into the error of treating the case as one exclusively between the husband and the defendant, regardless of the wife's equities, in which event, as far as now appears, he would have held correctly. The plaintiff's prayers for instructions were, in substance, proper to be heard by the jury. Adams' Equity, 33; *Lyon v. Akin*, 78 N. C., 258; *Clement v. Clement*, 54 N. C., 184.

Judgment Reversed.

D. M. MILLER v. LIFE INSURANCE COMPANY OF VIRGINIA

CONTRACT—USURY—INTENT OF LENDER—INDIRECT PROFIT IN EXCESS OF LEGAL RATE OF INTEREST.

1. If it is the intent or purpose of the lender of money to get more than the legal rate of interest for the loan, and if there be a provision, a condition or a contingency in or connected with the contract by which he may do so, the transaction is usurious.

2. If the usurious character of a transaction is not manifest upon its face, but depends on facts and circumstances connected with the transaction as a part of *res gestae*, it is a question of fact, as well as law, and should be submitted to the jury.

3. Where a life insurance company lent to a borrower a sum of money at the full legal rate of interest, payable monthly, its repayment being amply secured by mortgage on real estate, but required the borrower, in addition and as a condition of the lease, to take from and reassign to it an endowment policy for a sum equal to the amount of the loan, upon which the premiums should be paid monthly for seven years (or until his death), the payment of the premiums being also secured by the mortgage: *Held*, that the transaction was usurious.

FAIRCLOTH, C. J., and AVERY, J., dissent.

(613) ACTION for an accounting, and to enjoin and restrain defendant from selling the lands of plaintiff under deed of trust.

Temporary restraining order and order to show cause was granted by *Timberlake, J.,* and made returnable before *Hoke, J.,* at Salisbury, on 17 February, 1896, being Monday of the regular term of ROWAN.

The following facts were agreed:

1. Plaintiff is a resident of this State, and defendant company is a Virginia corporation, doing business in this State, and the contract was made in this State.

2. That on 30 September, 1895, in said county and State, plaintiff made application to defendant company for a loan of $1,200, said application being in writing, a copy of which is hereto attached as a part of this case agreed.

3. That on 1 October, 1895, in pursuance of said application, said loan was made to plaintiff, and to secure repayment of the same plaintiff executed to defendant a mortgage or trust deed conveying certain lands to defendant, with power of sale upon default, a copy of which trust deed is hereto attached as a part of this case agreed.

4. That on said 1 October, 1895, plaintiff also executed to defendant his bond in the penal sum of $2,400, conditioned for the payment of said loan seven years from its date, with interest from date, during said period, at the rate of six per cent per (614) annum, payable monthly, and further conditioned for the payment of $15.12 monthly, during said period, as monthly premium on an endowment or policy, copies of which bond and endowment or policy are hereto attached as a part of this case agreed.

5. That said endowment or policy for $1,200 was issued to plaintiff by defendant in pursuance of said application and simultaneously with the granting of said loan, and was on the same day assigned in writing to defendant by plaintiff to secure the performance of said penal bond, and the assignment thereon is hereto attached as a part of this case agreed.

6. That prior to 27 January, 1896, plaintiff paid to defendant certain sums of money on account of his said indebtedness, to wit, the sum of $21.12, and on said date tendered to defendant the sum of $1,203 in gold coin in payment of his said indebtedness, and demanded the cancellation of said deed of trust and the surrender of said bond, which defendant refused, and thereafter advertised the land described in said deed of trust to be sold under foreclosure, a copy of said advertisement being hereto attached.

7. That thereafter plaintiff procured the temporary restraining order, etc., as above stated.

8. That plaintiff is still ready and willing to pay said sum of $1,203, as tendered, it being the amount of said loan, with interest

thereon at the rate of six per cent per annum, payable monthly, but is unwilling and refuses to pay the premiums due on said endowment or policy of $15.12 per month, claiming that said contract is
(615) usurious under the laws of this State, and that the whole contract is a building-and-loan contract and is not such a contract as comes within the scope or powers recognized in law as pertaining to life insurance companies.

9. That defendant is a life insurance company, chartered for the purpose of carrying on the business of insuring lives, to cause themselves to be reinsured, to grant endowments and to contract for reversionary payments.

10. That at the time plaintiff applied for said loan of $1,200 defendant informed him that it used its money to increase its insurance business, and that it would make said loan if he would secure the same by trust deed upon good real estate and would take out a policy in defendant's company for the sum of $1,200 and assign the same to defendant as additional security for said loan, and this plaintiff agreed to do and did do.

11. That said contract between plaintiff and defendant is not usurious, except and unless as appears upon the papers hereinbefore referred to as constituting the same, as it may be construed by the court.

Plaintiff contends that on its face said contract is usurious, and that the defendant is only entitled to recover the principal of said loan, with interest at six per cent per annum.

Defendant contends that said endowment or insurance policy is a separate legal contract, based upon a valuable consideration, and that plaintiff was indebted to defendant on said 27 January, 1896, in addition to the interest on said loan and the principle thereof as tendered, the sum of $30.24, premiums on said endowment policy; and defendant denies that said contract or any part thereof is usurious under the laws of this State. Defendant further contends that its contract with plaintiff is not a building-and-loan contract nor such a contract as such companies issue, but one that life insurance companies have a right to make and one that belongs strictly to life insurance.

(616) On return day of the preliminary injunction the court was of opinion, and so held, that, on the evidence and exhibits, the injunction should be continued till the final hearing, and it was so ordered.

Thereupon, a jury trial being waived, in open court, the above statement was settled and agreed upon as the facts of the case, upon which the rights of parties should be determined, and upon said facts it was considered and adjudged by the court: "That the contract,

on its face, and without ulterior averments, is not usurious; that the injunction be and the same is hereby dissolved, and that defendant go without day and proceed to enforce and collect the amounts due, and according to methods set out and provided in contract, and that defendant have and recover of the plaintiff and sureties costs, to be taxed by the clerk."

From this judgment plaintiff appealed.

T. F. Kluttz for plaintiff.
MacRae & Day and John A. Coke for defendant.

FURCHES, J. The papers referred to in the case agreed and made a part of the case on appeal show, in addition to the facts set forth in the agreed case, that the property conveyed in the deed of trust to Overman and McCubbins was a town lot, worth about $1,000 without the improvements, and improvements on it worth about $1,500. And among the conditions are these requirements: That the plaintiff shall keep the buildings constantly insured in some good fire insurance company to be approved by defendant, and for defendant's benefit, for at least the sum of $1,200, which policy is also to be assigned to defendant; that plaintiff pay the $1,200, when due, and that he also pay the interest on the note on the last of each month, and that he pay the installments of $15.12 due on the life policy (617) of $1,200 on the last of each month, *for seven years.* And if plaintiff shall fail in doing and performing any one of these conditions it constitutes a breach, for which the trustees shall foreclose by sale; "and payment of said principal sum and all interest thereon, together with all monthly payments and fines on said endowment policy, and all costs and disbursements arising under this trust, including all taxes, assessments, insurance or other sums that may have been paid by said company as herein provided, may be enforced and recovered at once, by sale, foreclosure or otherwise, anything herein contained to the contrary notwithstanding."

"It is further stipulated and agreed that all the conditions of the said endowment policy are made part of this deed, as covenants of the parties of the first part."

It is admitted that it is lawful to loan money in this State at six per cent, and no matter what amount of security is required, if it is only the purpose of securing the repayment of the principal and six per cent interest thereon. It is also admitted that it is lawful to issue life insurance policies, such as that issued in this case, and defendant contends that it is impossible to take two transactions that are lawful

within themselves and make an unlawful transaction out of them, when combined into one transaction.

This fairly presents the question before us, and is a strong presentation of defendant's side of the case. But when it comes to be tested by the weight of authority and, we think, by the reason of the thing, it cannot stand the test. It is perfectly lawful, as admitted by all, to loan money at six per cent and to require any security for its repayment, with this lawful interest. It is entirely lawful for A to secure by mortgage the insolvent note of B as a separate and distinct
(618) transaction. But if A applies to C for the loan of $1,000, and C agrees to lend the money to A if he will include in the note to him the insolvent note of B, and A agrees to this and secures the insolvent note, the note thus made, including the money loaned and the insolvent note of B, is held to be usurious. *Shober v. Hauser,* 20 N. C., 222; *Massey v. McDowell, ib.,* 20 N. C., 252. The true rule is whether there was an intent—a purpose on the part of the lender to get more than the lawful rate of interest by the transaction. If there was, and by means of the transaction he may do so, the law pronounces it an unlawful and corrupt contract and usurious. But if this is not manifest from the transaction, but depends upon facts and circumstances connected with the transaction as a part of the *res gestae,* it then becomes a question of fact, as well as of law, and must be submitted to the jury. In the case of *Shober v. Hauser, supra,* where it was doubtful whether the note of B was not collectible at the date of the loan, and other circumstances therein mentioned which, if found as plaintiff contended, would have rebutted the allegation that there was a usurious purpose on C's part in requiring that B's note should be included, it was held to be a case for the jury. And so was the case of *Massey v. McDowell, supra.* The Court held that the question as to whether the small discount made was truly in consideration of the services of the assignee, as stated and contended by plaintiff, or whether that was a cloak and a device to cover the real transaction and to get more than lawful interest on the money, were questions of fact, and should have been submitted to the jury, with proper instructions.

But these cases hold the true rule to be this: Was it the purpose of the lender to get more than the lawful rate of interest, and was there any contingency by which he might do so? If there
(619) was, the transaction is usurious, whether it is so apparent that it becomes the duty of the court so to declare, or whether it is a case in which it is necessary that the jury should find the facts. These cases seem to decide the principle upon which the doctrine of

usury rests—that if it is the purpose of the lender to get more than the lawful rate of interest for loan of money, and if there be a provision, a condition, a contingency in or connected with the contract by which he may do so, it is usurious.

We intend to be governed by the rule, as we understand it to be laid down by this Court in *Shober v. Hauser* and *Massey v. McDowell, supra.* In our investigation we find much authority sustaining this rule and applying these principles to the case before us.

"Where, as a condition of making a loan, the borrower is required to take policies of life insurance from the lender and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, it is generally held that the profit thus derived by the lender is equivalent to additional interest, and therefore usurious." 27 A. and E. E., sec. 29, p. 1021, and note 1.

"All agreements which in legal effect give to the lender of money any profit or advantage, certain or contingent, more than at the rate of seven (here six) per cent interest, violate the statute. It is not necessary to allege or prove *aliunde* any peculiar intent or special corruption in such a case. It is usury upon its face, and the Court must so declare as a matter of law. It is only when the true character of the transaction is equivocal, * * * a device for usury, that the question becomes one of fact and belongs to the jury." *Thomas v. Murry,* 34 Barber, 171.

Where the lender takes the chance for more than legal interest, "this contingent benefit beyond the legal rate of interest, and where the lender has the right to demand the repayment of (620) the principal sum with the legal interest thereon, in any event, the contract is in violation of the statute prohibiting usury." *Brown v. Vurdenburg,* 34 N. Y., 197.

"A stipulation even for a *chance* of advantage beyond legal interest is illegal, and courts will not lend their aid to enforce an unlawful contract." *Butterick v. Harris,* 1 Biss., 443.

"The two transactions were combined into one; the loan would not have been made but for the insurance; six per cent, the full limit of interest, was charged for the money; but the loan depended upon the borrower's taking the policy of insurance. The policy was a thing of value to the plaintiff (here defendant), or it would not have required it to be taken as a condition precedent to the loan, and is usurious." *Ins. Co. v. Kittle,* 2 Fed., 116.

In our investigation of this important question we believe we may say that we have found no case or other authority that does not sustain the principle announced by this Court, that a usurious transaction is one in which it is intentionally provided that a party may take more

than the lawful rate of interest for the loan of money. But we have found cases that differ as to the application of this principle. We have found a few cases which hold that it does not *per se* make a transaction usurious for a life insurance company to require a party wishing to borrow money to take out a policy of insurance as a condition precedent to the loan. *Ins. Co. v. Mfg. Co.*, 25 N. J. Eq., 160; *Ins. Co. v. Crane*, 25 N. J. Eq., 418. But none of them dispute the principle here laid down, or decide that it would not be usurious if so intended, and the great weight of authorities is to the effect that it is usurious *per se*.

(621) Having ascertained the principle upon which our judgment should be founded, it yet remains to make the application to the facts of this case—a thing, in many cases, more difficult to do than to find and define the principle of law that should govern the case. If we take the cases cited from 34 Barbour, 43 N. Y., 2 Fed., and add to these that of the 27 A. and Eng. Enc. of Law, as authority, the question would seem to be settled, and it would only remain for us to declare the transaction usurious. But as there is some diversity of authority as to the application of this admitted principle, it seems proper that we should to some extent examine the question of applying the facts of this case. We cannot conceive of a case where the money loaned by the defendant to the plaintiff, Miller, could have been better secured than it was, without the assignment of the insurance policy.

The defendant had a deed in trust, made to its own selected trustees, on real estate worth $2,500 with the improvements, and $1,000 without any improvements, with a condition in the trust deed that the plaintiff at all times should keep the buildings on this lot insured to the amount of $1,200, in a good fire insurance company, to be selected or approved by defendant, and this policy should also be assigned to the defendant; that the plaintiff should pay all taxes, fines and assessments that should be levied, assessed or placed upon said property, and a failure on the part of plaintiff to keep and perform any of these conditions or requirements should amount to a breach, and the trustees should proceed at once to sell and apply the money. This being so, there can be no claim or pretense but that the money loaned ($1,200) was abundantly secured. But this was not all the conditions this remarkable deed contained. It is further pro-

(622) vided, as additional conditions, that plaintiff shall assign to the defendant the $1,200 life insurance policy he had been compelled to take out, and the payment of $15.12 to the defendant each month on this policy is secured to defendant, as one of the conditions in this deed of trust, for the term of *seven* years. And it was stated and admitted on the argument that plaintiff did not wish to

take out this policy, and would not have done so but for its enabling him to borrow the money. And it is proper to state that it was stated by counsel of defendant and admitted by counsel of plaintiff that the premiums charged on this policy were the usual charges on such policies.

Then, when the $1,200 loaned to plaintiff was amply and abundantly secured and every dollar to be repaid with lawful interest, the payment of which did not and does not depend upon the insurance policy, why was it that defendant made the insurance a condition precedent upon which it would loan the money?

It was admitted on the argument that if the plaintiff Miller should live out the seven years, the defendant would make $70 by the insurance. And if we adopt the rule laid down in the cases cited to sustain plaintiff's contention, that a contingent benefit over and above lawful interest taints the transaction with usury, this admission is sufficient to decide the case. But it does not seem to us that this admission reaches the truth of this transaction, as defendant has a bond that falls due seven years after date, and an insurance policy due in seven years, upon which $15.12 falls due every month, and the payment of this interest and this $15.12 per month is secured by a deed of trust. It is not clear whether this interest and these premiums end at the death of Miller or not. But suppose they do—and we do not put our judgment upon this speculation as to whether they end at Miller's death or not, as it is not clear to us how this is— (623) but taking it that it does, it is then clear to our minds that the admissions as to the profits made by the defendant do not reach the truth. It is true that if we take seven years and divide them into months we have eighty-four months, and $15.12 per month makes $1,270; but in this calculation there is no notice taken of the fact that defendant has no money invested in the policy of insurance—nothing but the risk of Miller's dying—and that Miller has been paying into its treasury $15.12 every month from the date the policy to the end of the seven years. If the interest is calculated on these premiums from the date of their payment to the end of the seven years at six per cent, with the $70 added, it will be found that defendant has made out of the insurance about $300 and the plaintiff has lost this amount, supposing he gets $1,200 at the end of the seven years. We say *supposing* he gets back $1,200 at the end of the seven years, for he is the creditor in that part of the contract and, like all creditors, takes the risk of getting his money back, be this risk much or little.

But the question of usury does not depend upon the question whether the lender actually gets more than the legal rate of interest

or not. If this were so, it could never be determined whether there was usury or not until the money was paid back. This would be like locking the stable after the horse was stolen. But it depends upon whether there was a purpose in the mind of the lender to make more than legal interest for the use of money, and whether, by the terms of the transaction and the means used to effect the loan, he *may* by its enforcement be enabled to get more than the legal rate. If so, the transaction is usurious.

(624) In this case the proposition of plaintiff was to borrow $1,200 upon abundant security. This proposition was rejected unless the plaintiff would take out a policy of life insurance in defendant company, by which the company has the *chance* to make $300 in addition to the legal rate of interest on the $1,200 loaned, and the question is, is this transaction usurious? Applying the principles laid down by this Court in the cases cited, and the principles of decided cases in other courts, and the application of the principle there made, as well as that of the Am. and Eng. Enc. of Law, the transaction is usurious; and this is sufficiently apparent by its terms and conditions to make it our duty so to declare.

There is error, and the judgment appealed from is

Reversed.

Cited: Roberts v. Ins. Co., ante, 433; *Hollowell v. Loan Assn.,* 120 N. C., 287; *Carter v. Ins. Co.,* 122 N. C., 339; *Cheek v. B. and L. Assn.,* 126 N. C., 245; *Riley v. Sears,* 154 N. C., 517; *Owens v. Wright,* 161 N. C., 140; *MacRackan v. Bank,* 164 N. C., 26.

M. I. AND J. C. STEWART v. THE STATE OF NORTH CAROLINA

JURISDICTION TO CONSTRUE STATUTE ON PETITION—MATTER OF PUBLIC INTEREST—ACTION AGAINST THE STATE—PUBLIC PRINTING—CONSTRUCTION OF STATUTE—CONTRACT.

1. *Quere,* whether a claim for damages against the State, arising out of the failure and refusal of a public officer to perform a statutory duty imposed on him, can be filed in this Court.

2. Where a matter has become a *quasi* public question and one of much concern to the several departments of the State government, this Court will (following the case of *Farthington v. Carrington,* 116 N. C. 315, and the precedents upon which that case was decided) entertain a petition for the construction of a statute and a contract made thereunder by State officials.

3. One holding a contract for State printing, under section 1, chapter 20, Acts 1895, which provided that all printing and binding required by the State

should be let to contract, is entitled to all the printing, binding and ruling, and the work incident thereto, required by the several departments of the State.

CLAIM against the State, filed by plaintiffs in this Court. (625)
The petition was as follows:

The plaintiffs complain and allege:

1. That on 27 February, 1895, they were residents and citizens of the city of Winston, in Forsyth County, in the State of North Carolina, and are now residents and citizens of said city, county and State.

2. That on said day in February, 1895, they were doing business in said city as printers, under the firm name of M. I. & J. C. Stewart.

3. That on said day in February, 1895, in compliance with the provisions of chapter 20 of the Public Laws passed by the General Assembly of North Carolina at its session of 1895, a copy of which act is hereto attached, marked "Exhibit A," and asked to be taken as a part of this complaint (see ch. 20, Laws 1895), the defendant, State of North Carolina, entered into with the plaintiffs the contract, a copy of which is hereto attached and marked "Exhibit B," and asked to be taken as a part of this complaint.

4. That immediately upon the ratification of the said contract by the General Assembly of North Carolina the plaintiffs entered upon their duties as Public Printers, and in order to comply with the terms of said contract the plaintiffs made an outlay of something like six thousand dollars in the purchase of additional machinery, type and other equipments, so that the work for the State of North Carolina might be done efficiently and speedily, and employed a corps of printers, pressmen, proof readers and other employees for .(626) the purpose of meeting every demand that their engagement with the defendant might make upon them, and the plaintiffs have always been ready, anxious and able to comply fully with the terms of the said contract, and are now so ready, anxious and able to fully perform the contract.

5. That on the day on which the contract was ratified by the General Assembly of North Carolina the plaintiff M. I. Stewart called upon the heads of the State departments in the city of Raleigh and notified them that the plaintiffs were prepared to execute their contract and to do any work needed to be done by any of the departments; and, at divers times since, the plaintiffs have notified and assured the said officials, both in person and by letter, that they were prepared and anxious to do all the printing, ruling and binding required by any of the State departments and institutions; that soon after 9

March, 1895, the plaintiffs mailed to the heads of many of the institutions notices citing the provisions of their contract with the State and asking for the printing of the institutions of the State; that receiving information that some of the departments and institutions were having printers other than the plaintiffs to do the work required, the plaintiffs, on 5 July, 1895, mailed to all the departments and institutions of the State copies of the notice hereto attached and marked "Exhibit C."

6. That although the plaintiffs have at all times been able and anxious to fulfill their contract, the defendant has violated its contract with the plaintiffs, greatly to the damage of the plaintiffs, in that it has in many instances, through its officers, refused to allow the plaintiffs to do the printing, ruling and binding required by the State,

(627) but it has employed other printers to do said work, thus entailing great loss on the plaintiffs, as well as depriving them of their reasonable and legitimate profits assured to them by the terms of said contract.

6. That it is impossible, from the nature of the case, for the plaintiffs, without the power of compelling the attendance of witnesses and the production of papers, to ascertain how much of the printing, ruling and binding required by the various departments and institutions of the State has been denied to them and awarded to other printers; but the plaintiffs do allege that, notwithstanding the lapse of eight months since their selection as Public Printers, they have received no requisitions for any printing, ruling or binding from the following State departments and institutions: State Penitentiary, University of North Carolina, the Eastern Hospital, the Colored Orphan Asylum, the North Carolina Agricultural Experiment Station, the College of Agriculture and Mechanic Arts, the Agricultural and Mechanical College, the Colored State Normal Schools located at Fayetteville, Elizabeth City, Franklinton, Goldsboro and Plymouth; and they allege the work required by these departments and institutions has been done by others. And the plaintiffs do further allege that, without noticing several small orders given to other printers, the following State departments and institutions have at times violated the said contract by employing other printers than the plaintiffs to do the printing, ruling and binding required to be done by the State, to-wit: The Deaf and Dumb and Blind Institution, the Department of State, the Department of Agriculture; and the plaintiffs believe that other departments and institutions have violated the contract by employing other printers.

7. That the Secretary of State, in one instance, since 9 March,

1895, employed Messrs. Edwards & Broughton to reprint two volumes of the Supreme Court Reports, and said Edwards & Broughton received in payment therefor from the State Treasurer (628) about one thousand dollars; that an immense amount of printing, pamphlet binding, circular and other work is required to be done by the North Carolina Agricultural Experiment Station, the station having issued as many as 246,900 pamphlets during the year ending with 30 June, 1895, none of which have the plaintiffs been allowed to do; that the Department of Agriculture, having in June, 1895, bought a printing press, is now operating it in its own building and doing much of the printing required by this department; that during the month of July, 1895, the said Department of Agriculture ordered from a firm in New York City one million and a half of guano tags, contrary to the provisions of said contract, and procured the printing required to be on said tags to be done by a printing establishment in New York City.

9. That the plaintiffs believe that the contract has been violated in many other instances and ways now unknown to the plaintiffs.

10. That the plaintiffs have been informed by the heads of several of the departments above named that they have refused to allow the plaintiffs to do the printing, ruling and binding required by their departments, for the reason that they did not consider that the work of their departments or institutions was covered by the aforementioned contract, and that they were free to award the printing and other work to any printers that they might choose, while the plaintiffs are advised and believe that their contract entitles them to all of the printing, ruling and binding of all of the departments and institutions above mentioned, as well as of all the other State departments and institutions.

Wherefore the plaintiffs pray that this honorable Court (629) may construe the said contract and declare the rights of the plaintiffs thereunder; that a trial of the issues of fact that may arise may be had by a jury or a referee appointed by this honorable Court; that the damages that the plaintiffs have sustained by the breaches by the defendant of the contract may be ascertained, and that the plaintiffs may recover of the defendant the amount of damages so ascertained to have been suffered by them, and for such other and further relief as they may be entitled to.

Jones & Patterson for plaintiffs.
Attorney-General and Shepherd & Busbee for the State.

MONTGOMERY, J. We are not prepared to say that a claim for

damages against the State, arising out of a failure and refusal of one of its servants to perform a statutory duty imposed upon him, can be filed in this Court. The petition sets forth that some of the State officers and heads of public institutions, who have refused and failed to have the printing and binding of their departments and institutions done by the plaintiffs under their contract with the State, have done so under a claim of discretion allowed to them under the law on this subject; and it was stated on the argument that a considerable quantity of such work was being withheld from the plaintiffs and would be withheld until this Court should decide whether or not the plaintiffs were entitled to the whole of the public printing and binding. The matter, then, has become a *quasi* public question, is of importance to the several departments of the State Government, and under
(630) the precedents of this Court (many of them being cited and commented on in the concurring opinion of *Furches, J.*, in the case of *Farthing v. Carrington,* 116 N. C., 315) we have concluded to give our construction to the act concerning the public printing (Laws 1895, ch. 20). We are requested to do this also in the petition of the plaintiffs.

Section 1 of the act provides: "That all printing and binding required by the State shall be let by contract," etc., and there is nothing in any subsequent part of the act to limit or qualify this plain language. The plaintiffs' contract with the State to do the work is admitted, and under the contract they are entitled to do all the printing and binding and ruling, and work incident thereto, which may be required by any and all of the State departments and by any and all of its public institutions.

As a remedy for the plaintiffs, in connection with their claim for damages by reason of the matters mentioned in their petition, it may be that the General Assembly, after hearing proof through one of its committees, may make to the plaintiffs a proper allowance, if any damage should be shown.

Petition Dismissed.

HENRY A. STYERS v. W. A. ALSPAUGH, J. H. REICH AND SAMUEL REICH

ACTION TO FORECLOSE COLLATERAL MORTGAGES—ASSIGNEE OF MORTGAGE—NECESSARY PARTIES—DEFECT OF PARTIES—PRACTICE.

1. Where the assignee of a mortgage deposits it as collateral security for a debt due by him, the mortgagee is not a necessary party to an action brought by the holder of the collateral against his debtor and the mortgagors to recover the debt and to foreclose the mortgage.

2. If the defect of parties is apparent on the face of the complaint, objection must be taken by demurrer; otherwise, by answer.

3. Where a party to an action is apprised by the complaint, or discovers during the trial that there is a defect of parties, he should move that they be joined, but will not be permitted to do so after an adverse verdict.

ACTION tried before *Brown, J.*, and a jury, at January (Special) Term, 1896, of FORSYTH.

The plaintiff claimed a debt on W. A. Alspaugh of $290, with interest, secured by notes and mortgages assigned as collateral, as appears in the pleadings, and prayed for judgment on debt and foreclosure of collateral mortgages.

W. A. Alspaugh, witness in his own behalf, testified: "I paid off the notes and mortgages set forth in the complaint; paid to H. Montague three notes. I told Montague I had come to pay them off. I paid him $200 with my own money. Montague asked me if I wanted them transferred to me, and said I had better do it, and transferred them to me. I then went to R. B. Kerner and told him I wanted to pay off his mortgage, and paid him $100. He asked me if I (632) wanted the note and mortgage transferred to me, and I told him I supposed so, as Montague had transferred his three mortgages; he transferred it to me. These are the mortgages set out in the complaint. It was my own money I paid Kerner, and I did all this in consequence of an agreement with Samuel Reich. I transferred all these notes and mortgages to plaintiff as collateral security for the purchase money of a tract of land I bought from him. I agreed to pay him $3,000, and transferred these notes and mortgages to him as collateral security for debt. I kept the land for twelve months, and then I had another bargain with plaintiff, and he agreed to take the place back at the same price, $3,000. I was to pay him $200, and the purchase of the land by me was to be rescinded and my note surrendered. These collateral notes and mortgages were to be surrendered. I offered him $200 and demanded the notes and mortgages, and he refused to deliver them up. I did not offer Styers $200 in cash, as I did not have the cash, but offered my note and interest for it, and also agreed as a condition to rescind the land trade and pay interest on the $3,000 for one year. I had paid $90 on that interest and agreed to pay $90 more, and have not paid that. I was to pay $290, all told, as a condition of rescinding the trade, in addition to what I had paid on interest. I surrendered Styers the land I bought from him and made him a deed. I still owe him $290 for rescinding the trade. I agreed to pay him $290 for rescinding the trade, and agreed to pay him this $290 on the $3,000 note and give up the land in settlement of it, and

Styers agreed to it. I did not have the cash, but offered him my note, and Styers refused to surrender the notes and mortgages sued on until I paid the $290. I could have borrowed money and paid him
(633) if he would surrender the notes and mortgages. This was agreed 9 October, 1893, and I made Styers the deed. I took the rents of the land for one year."

J. H. Reich, another defendant, testified: "I went with Alspaugh, who is my son-in-law, to Montague. I saw him pay Montague the money. He paid the notes and mortgages to Montague. Montague had threatened to sell the land. Montague transferred the papers to Alspaugh. Montague said he had better transfer them, and Alspaugh said 'All Right.' Sam Reich told Alspaugh that if he would pay the debt he would will him some property, but I don't know that he ever did so."

The burden of proof being on the defendant, and this being all the evidence offered, the plaintiff introduced no evidence and took the evidence offered the court.

The court instructed the jury to answer the issues in favor of the plaintiff, and defendant excepted.

The defendant also excepted, for that the mortgagees, Montague and the heirs at law of R. B. Kerner, who held the legal title, were not parties to the action. Upon the mortgages to H. Montague there was no endorsement. Upon the note the following endorsements appear: "For value received, I hereby transfer the within note and M. D. to W. A. Alspaugh, 22 February, 1890. H. Montague"—with similar endorsement heretofore from W. A. Alspaugh to plaintiff, dated 15 April, 1892. The endorsement on the Kerner note, which was also secured by a mortgage on another tract, was as follows: "Pay to W. A. Alspaugh without recourse on me. R. B. Kerner." And also the following: "For value received, I hereby transfer this bond and M. D., securing the same to H. A. Styers, this 15 April, 1892. W. A. Alspaugh."

(634) The issues submitted and the responses thereto were as follows:

1. Q. "Were the notes and mortgages set out in the complaint paid and discharged by defendant Alspaugh, as alleged by defendant?" Answer: "No."

2. Q. "Were the notes and mortgages set out in the complaint transferred to plaintiff by defendant Alspaugh as collateral security for a debt, and if so, what sum is due thereon by Alspaugh to Styers?" Answer: "Two hundred and ninety dollars, with interest from 9 October, 1893."

There was a motion for a new trial; motion overruled. The defendant excepted and appealed, assigning as error:

First exception. To dismiss for want of proper parties, to wit, the holders of the legal estate, or that the cause was improperly brought.

Second exception. To the charge of his Honor, "That upon this testimony the jury should answer the issues in favor of plaintiff."

Watson & Buxton for plaintiff.
J. S. Grogan for defendants.

MONTGOMERY, J. It appears from the complaint and answer that the notes and mortgages executed by the defendant Reich to Montague and Kerner were transferred to the defendant Alspaugh, and it follows, therefore, that these mortgagees were not necessary parties to this action. Where the defect of parties is apparent on the face of the complaint, the objection must be made by demurrer; if not so apparent, by answer. The Code, secs. 239, 240; *Kornegay v. Steamboat Co.*, 107 N. C., 115; *Leak v. Covington*, 99 N. C., 559. If the above admission, however, had not been made in the answer, the defendants, on discovering during the trial the defect of parties plaintiff, should have moved to amend their answers and to have Mon- (635) tague and Kerner, the mortgagees, made parties. His Honor below very properly refused to allow them to present their case to the jury, and then, after an adverse verdict, to make the exception that there was a defect of parties to the suit. The plaintiff was satisfied, it seems, to proceed, relying upon the sufficiency of the assignment of the notes and mortgages by the mortgagors, Montague and Kerner, to the defendant Alspaugh, and the assignment by him to the plaintiff, or, if not, upon the subjection of the equitable interests of the defendant Reich in the mortgaged land to the payment of his debt. The defendants should have made their objection, on account of defects of parties, before the case was put to the jury. His Honor instructed the jury that upon the testimony they should find the issues in favor of the plaintiff. The defendant Alspaugh testified that he, with his own money, paid off the notes and mortgages and took an assignment of them from the mortgagees to himself. What the witness said about an agreement between himself and one of the mortgage debtors in reference to the payment of the debt is too vague to amount to anything in law. The fact was that Alspaugh paid the notes and mortgages with his own money and took an assignment of them to himself,

and afterwards used them as collateral security for a debt he owed the plaintiff. There is

No Error.

(636)

T. L. VAUGHN v. COMMISSIONERS OF FORSYTH COUNTY

COUNTIES—POWER OF COUNTY COMMISSIONERS TO MORTGAGE COUNTY LAND—INJUNCTION—RIGHT OF TAXPAYER.

1. County commissioners have no power to sell property held for corporate purposes, where its alienation would tend to embarrass or prevent the performance of its duties to the public, and hence they have not the right to mortgage county land to secure bonds issued to build a courthouse thereon.

2. Power to sell is not a power to mortgage, and hence express authority conferred by statute upon county commissioners, without consent of the justices of the peace of the county, to sell real estate of the county, at a fair price, does not imply power to encumber the same by mortgage.

3. Though a proposed mortgage of county land by the county commissioners to secure bonds issued to build a courthouse would be void, and equity would enjoin foreclosure thereunder, a taxpayer may bring an action to restrain the execution of the mortgage without waiting until foreclosure is threatened.

ACTION for an injunction, pending in FORSYTH, heard before *Norwood, J.*, at chambers, 23 March, 1896, upon facts agreed, as follows:

That plaintiff is a citizen and taxpayer of Forsyth County, and defendant is the owner of a valuable lot of ground in the city of Winston, formerly used as a courthouse seat; that a courthouse until recently stood thereon. When it was found entirely insufficient for the wants of Forsyth County, and that the public business and convenience required a larger and more commodious building, for the purpose of constructing a building more suitable to the wants of the public, the courthouse which stood on said site was torn down,

(637) and the lot is now cleared and excavation made for a new building; that by an order of the board of commissioners, bonds or notes of the county were issued for an aggregate of $50,000, to be used in the construction of said courthouse; that this sum is not extravagant, but is sufficient for the purpose aforesaid; that the county of Forsyth has a population of about 29,000 people, its taxable property is $8,000,000, and it owes no debt, save a small floating debt for current expenses, that can be promptly met on presentation; that the facts set forth in article No. 4 of the complaint are true; that the defendants have made an effort to negotiate a loan in favor of the county and float the said $50,000 of notes, but have been unsuccessful;

that it cannot be done without some additional security; that defendants have negotiated to sell said bonds at par and mortgage said lot of land to secure said bonds; that this can be done and the money raised to construct the building; that the contemplated courthouse building is to be placed on the public square to be mortgaged.

The 4th article of the complaint, referred to in the agreed statement, is as follows:

4. "That for the purpose of erecting a courthouse building for the county of Forsyth on said square, the said board of commissioners have passed an order to issue bonds of the said county in the sum of $50,000, bearing six per cent interest, and payable as follows: $20,000 payable in two years; $20,000 payable in three years; $10,000 payable in four years. That for the purpose of securing said bonds, the defendants have adopted the following resolutions, adopted at an adjourned meeting of said board held on 11 March, 1896:

"Whereas the building of a courthouse for the county of Forsyth is a public necessity, for which it is necessary to (638) raise funds; and whereas as it now appears, it will be necessary to obtain additional legislation before the board of commissioners can levy a special tax for the purpose of meeting the payments of the notes which it will be necessary to issue and sell before the said courthouse is built; and whereas the county of Forsyth is at this time without a courthouse building, and parties have signified their willingness to purchase said notes if the same are amply secured; now, therefore,

"It is ordered that M. D. Bailey, chairman of the board of county commissioners, is hereby authorized and empowered to execute a deed of trust to the Wachovia Loan and Trust Company, as trustee, on the courthouse lot, 200 feet square, for the purpose of securing the payment of the principal and interest of the $50,000 courthouse notes to be issued, payable $20,000 in two years, $20,000 in three years, and $10,000 in four years, with interest from date at six per cent until paid, said notes to be issued for the purpose of securing money with which to erect a courthouse building.

"That in pursuance of said order and authority granted him by the board of commissioners, the said M. D. Bailey, chairman of the said board, is about to execute a deed of trust upon said county property for the purpose indicated in said order, which said deed of trust will contain a clause granting power of sale to the Wachovia Loan and Trust Company, trustees, to sell the said property of the county of Forsyth if said bonded indebtedness is not paid as it falls due."

His Honor refused the injunction and dissolved the restraining order which had previously been issued by *Starbuck, J.*, and plaintiff appealed.

(639) *Watson & Buxton and A. E. Holton for plaintiff.*
Glenn & Manly for defendant.

AVERY, J. The right to contract the contemplated bonded indebtedness has already been passed upon. *Vaughan v. Comrs.*, 117 N. C., 429. It may be that this or the former action was brought for the purpose of extracting advice from the court, but nothing appears upon the face of the record to show that it is not a *bona fide* controversy between parties, as it was properly constituted below and brought up for review, according to the regular course of the court. This Court has no right to indulge in or act upon mere conjecture.

A county is a governmental agency, created in part at least for the purpose of providing public buildings for the administration of justice and for the safe-keeping of prisoners. The county revenue is safe from seizure by creditors, or even for taxes due the Federal Government, because to admit the right to appropriate them in satisfaction of a claim would be to concede the power to destroy the State Government by depriving its agencies of the means of performing their proper functions. Subject to the restrictions contained in the Federal Constitution, the State is a sovereignty, and it is essential to its preservation to give to all the property held for it by such agencies, as counties, the same protection as is given to that held in its own name. *Hughes v. Comrs.*, 107 N. C., 598; *Meriweather v. Garnett,* 102 U. S., 473; *U. S. v. R. R.*, 17 Wall., 322. The same exemption from seizure and sale under execution is extended to property held for public use, such as public buildings, streets, engine houses and everything which is devoted to governmental purpose. Dillon Mun. Corp., sec. 576;
(640) *Hughes v. Comrs., supra; Gooch v. Gregory,* 65 N. C., 142.

For the same reason no lien is acquired by judgment creditors or mechanics against property devoted to governmental purposes, whether the title be in the State or a county, unless where the Legislature expressly provides for its acquisition. *Davenport v. Ins. Co.*, 17 Iowa, 276; *Schoffer v. Cadwallader,* 36 Pa. St., 126; *Leonard v. Brooklyn,* 71 N. Y., 498; *Bell v. Mayor,* 105 N. Y., 139; 2 Dillon, *supra,* sec. 577. It is equally well settled that neither a public corporation nor a *quasi* public corporation has the power to sell property held for corporate purposes, where the alienation of it would tend to embarrass or prevent the performance of its duties to the public. *Hughes v. Comrs., supra; Gooch v. McGee,* 83 N. C., 59.

It is contended that the amendatory act (Laws 1895, ch. 135, sec. 1) makes no change or no material alteration in the language of The Code, sec. 707 (20). But whether the contention be well founded or not, if the county commissioners have no authority to convey the land

on which they propose to erect the courthouse by a mortgage deed to secure the bonds issued to build it, and thereby render the site and buildings liable to sale for the satisfaction of the debt, it is needless to discuss the effect of the legislative amendment; for, though it be conceded that the effect of the amendment was to delegate to the commissioners, without the assent of the justices, the power "to sell or lease the real property of the county and to make deeds or leases for the same to any purchaser or lessee," they cannot by any fair implication claim the right under this authority to encumber by mortgage instead of making an absolute sale. The general rule, as laid down by almost all of the text writers and a majority of the courts of the States, is that a power to sell and convey real estate does not confer authority to mortgage. To bring a particular case (641) within the exception to the rule, it must appear from the language used and the nature of the property subject to the power that the principal donor or grantor of the power intended that the agent should be at liberty to raise money by mortgaging it. 1 Jones Mort., sec. 127; 2 Dillon, *supra,* sec. 579; *Stronghill v. Anstey,* 1 DeG. M. & G., 634 (490); *Morris v. Watson,* 13 Minn., 212. "A power to sell," said the Supreme Court of Massachusetts, in *Hoyt v. Jaques,* 129 Mass., 286, "implies that the attorney is to receive for the benefit of the principal a fair and adequate price for the land. A power to mortgage involves a right in the attorney to convey the land for a less sum, so that the whole estate may be taken on a foreclosure for only a small part of its value. So, under a will, a trust with power to sell *prima facie* imports a power to sell 'out and out,' and will not authorize a mortgage unless there is something in the will to show that a mortgage was within the intention of the testator." It is true that some decisions are to be found which are in conflict with the general consensus of opinion, especially where the controverted question is whether a strictly private corporation is authorized to mortgage its land. Corporations which exercise delegated governmental authority, such as counties, must be confined to a strict construction of the statutes granting their powers. There is nothing in the nature of their duties to give rise to the implication that the State intends to clothe them with any other power than that expressly conferred, and the further right to do what is necessary to the complete exercise of the express powers. Where the law so jealously protects the rights of the sovereign State against the sale of its property devoted to public purpose, by any implication, in satisfaction of mechanics' liens or judgments, it would be strangely inconsistent to infer from an express power to sell at a fair price the intent on the part of (642) the grantor of the power to permit an indirect alienation at

much less than the value of the property. Such latitude in construction appears still more unreasonable where the effect is to place an encumbrance upon a building and site provided for the administration of justice.

Where a taxpayer shows *prima facie* that an illegal tax is about to be levied by the county authorities, or that they are about to issue bonds of the county contrary to law, courts of equity will restrain such abuse of power at his instance. *McDowell v. Construction Co.,* 96 N. C., 514. Though the mortgage deed which the defendants propose to execute would be void, it would nevertheless cast a cloud upon the title of the county to the land (Beach on Ins., secs. 708, 709); and as a court of equity would enjoin a sale for foreclosure under the mortgage, it has for the same reason the right to grant its aid in the incipiency of the proceedings by thwarting the attempt to give a power of sale. In an action for possession by a purchaser at a foreclosure sale of the proposed mortgage it would become necessary to resort to extrinsic evidence to show the action of the commissioners, and then to establish the fact that they had transcended their powers. Beach on Inj., sec. 609; *Roth v. Insley,* 86 Cal., 134. Where a sale by virtue of a mortgage deed, though it be unlawfully executed, would tend to compel persons having an interest in the property which it is proposed to encumber to resort to such means for protection, the same reasons exist for taking time by the forelock upon a proper application, as where the mortgagee is about to sell to foreclose. The plaintiff has an interest in common with other taxpayers in protecting property purchased by the county tax fund, and especially where, if it be sacrificed at a
(643) foreclosure sale, the taxpayers will be called upon to provide other property for public use in its stead. For the reasons given, there was error in vacating the restraining order.

Reversed.

Cited: Gastonia v. Engineering Co., 131 N. C., 362; *Brockenbrough v. Comrs.,* 134 N. C., 22; *Hardware v. Schools,* 151 N. C., 511.

R. D. JOHNSTON v. NIAGARA FIRE INSURANCE COMPANY

ACTION ON INSURANCE POLICY—LOSS BY FIRE—CONSTRUCTION OF POLICY—"PATTERNS."

1. Where there is a conflict between the written part of a policy of insurance and the printed part, the former will govern.

2. Where the written part of an insurance policy insured plaintiff's "stock of cloth, cassimeres, clothing, trimmings and all other articles usual in a merchant tailor's establishment," and the printed part of the policy provided that "patterns" were not covered by the policy: *Held,* in an action to recover for the destruction of plaintiff's stock of cloths, etc., including a lot of "tailor's patterns," that no recovery can be had for the latter, they being not only not specially included, but specially excluded.

ACTION tried before *Brown, J.,* and a jury, at December (Special) Term, 1895, of FORSYTH.

The action was to recover loss by fire. The policy of insurance introduced by plaintiff contained the following provisions:

"This Company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities, nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, (644) manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or repair."

The typewritten description of property is as follows: On his stock of cloths, cassimeres, clothing, trimmings and all other articles usual to a merchant tailor's establishment, contained in the two-[story] brick and frame shingle-roof building occupied by assured and situated on the corner of Third and Liberty streets, Winston, N. C." Seventy-five per cent coinsurance clause attached to policy.

The plaintiff claimed damages on his suitings $654, and on his trimmings $98.83, making a total on suitings and trimmings of $652.83, and on patterns as follows:

481 coat patterns, at $1	$481.00
30 overcoat patterns, at $1.50	45.00
450 pants patterns, at 50 cents	225.00
180 vest patterns, at 50 cents	90.00
Total amount of damages claimed for patterns	$841.00

The following was the testimony as to patterns: "Patterns are made after I take the measure. I then cut a pattern out of paper,

called pattern paper, for the customer; then cut out the cloth and baste up the suit, and if the suit does not fit I alter the pattern to suit. After making the suit I mark the customer's name on the pattern and file it away. I had patterns for customers who buy my clothes. I cut them myself; did not buy them. They were useful to me in making clothes for my regular business. All of them are destroyed. I have customers in Goldsboro and Wilson and other
(645) places in eastern North Carolina. I came from that section. I worked about twenty hands and did all the cutting myself. I could not well get along without patterns."

Upon cross-examination plaintiff testified: "I use these patterns for making clothes for other persons besides those for whom they were cut. Some of these patterns were eighteen years old. I do not know how many customers are dead for whom these patterns were cut; I keep no record; there may be 350 dead. The patterns were worth something, even if they were dead. Styles change very year."

William Beard testified: "Patterns are used in a merchant tailor's establishment. All tailors usually keep patterns; can't well get along without them."

The defendant introduced no testimony.

The issues and responses were as follows:

1. "Did the plaintiff comply on his part with the stipulations in the policy regarding the appraisement and arbitration?" Answer: "Yes."

2. "Did the plaintiff furnish the inventory required by the policy?" Answer: "Yes."

3. "Did the defendant, through its agent, waive the stipulation as to inventory?" Answer: "Yes."

4. "What damages, if any, is plaintiff entitled to recover on account of loss under said policy?" Answer: "Loss and damages on account of merchandise and goods, $752; loss and damage on account of patterns, $360."

The plaintiff moved for a judgment on the verdict. His Honor gave judgment for the plaintiff for damages and loss on goods and merchandise but refused to give judgment for loss on account of destruction of patterns. The jury having found the value of the patterns $360, and there being $2,500 insurance in all, and the defend-
(646) ant company having issued its policy for $2,000, the motion of plaintiff, which was refused, was for four-fifths of $360. The plaintiff excepted to the judge's ruling and appealed.

Watson & Buxton and Jones & Patterson for plaintiff.
Glenn & Manly for defendant.

CLARK, J. When there is a conflict between the written part of the policy and the printed part, as, for instance, if the "tailor's patterns" had been named as insured, and the printed general exception had excluded any liability, as it does for "patterns," then the written part of the policy would govern (1 May Ins., 177, and numerous cases cited; Wood Fire Ins., p. 153, note 3); or if it were doubtful whether the "patterns" were embraced in the general exception, the doubt must be resolved in favor of the insured. 1 May, *supra*, sec. 175, and cases cited. But here the property insured is described as the plaintiff's "stock of cloth, cassimeres, clothing, trimmings and all other articles usual in a merchant tailor's establishment." "Patterns" are not named as being insured. They could only come with the words "all other articles," and when that construction is asked to be placed upon the contract we find in another part of the contract an express stipulation that "patterns" are not to be construed as covered by that policy. It is not the case of a conflict between the words of the written and printed parts of the policy, nor is it the case of a doubtful exception, but upon the face of the policy "patterns" are not specially included by name, and they are specially agreed to be excluded.

No Error.

(647)

SOLOMON CHITTY v. J. M. CHITTY

HOMESTEAD—FUGITIVE FROM JUSTICE—RESIDENT—CONSTITUTION, ART. X, SECS. 1, 2, 3, 8.

1. The Constitution guarantees the right of homestead to every resident on the land occupied by him, and whoever denies the right must show that the case falls within the constitutional exceptions or that the owner has lost it by nonresidence.

2. An absence from this State for a period of two years by a landowner, who leaves the State to avoid arrest and trial under a warrant for a crime, but who has the *animus revertendi* throughout his absence, does not debar him of the right of homestead, and a sale of his land under attachment and execution without allotment of the homestead is invalid.

3. The proper definitions of the terms "domicile" and "residence" commented on by the Chief Justice.

CLARK, J., dissents.

ACTION heard upon the report of referee, and exceptions thereto filed by defendant, before *Norwood, J.*, at the February Term, 1896, of FORSYTH.

There was judgment for the defendant, and plaintiff appealed. The facts appear in the opinion of the Court.

J. S. Grogan for plaintiff.
Watson & Buxton for defendant.

FAIRCLOTH, C. J. The facts found by the referee and sustained by the Court are as follows:

1. That plaintiff, in November, 1887, owned and occupied as his home place the land now in controversy, and left the State in that month to avoid a warrant out against him for false pretense,
(648) with the intention of returning as soon as the case against him should be thrown out of court, and that his wife and children remained on the place until plaintiff returned, about Christmas, 1889; that the plaintiff spent his time in visiting relatives in various States, intending to return to this State when he believed the charge against him to be buried.

2. That during his absence an attachment issued and the land was sold, and the defendant purchased it, no homestead having been assigned to the plaintiff.

His Honor held that the plaintiff, during his absence, was not a resident of this State, and therefore not entitled to a homestead. This is the only question presented.

The Constitution guarantees the right to a homestead to every resident on the land occupied by him, and whoever denies the right must show that the case falls within the constitutional exceptions, which is not the case in this instance, or that the owner has lost it by nonresidence.

"Residence" and "domicile" are so nearly allied to each other in meaning that it is difficult sometimes to trace the shades of difference, although in some respects they are distinct; and the definitions of "residence" are sometimes apparently conflicting, owing mainly to the nature of the subject with which the word is used, the purpose being always to give to it such meaning and force as will effectuate the intention of that particular statute. The great bulk of cases in the books are cases of statutory residence, as applied to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce proceedings, probate and administrations, limitations, attachments and the like cases. The word is frequently used in the sense of bodily presence in a place, sometimes a mere temporary presence and sometimes the most settled and permanent abode in a place, with
(649) all the shades of meaning between these extremes, and also with reference to the distinction between an actual and legal

residence. So it seems entirely proper to consider its meaning in connection with the subject-matter and the purpose of the statute in which it is found, as well as the relation of the citizen to the subject-matter.

The leading purpose of the Constitution (Article X, secs. 1, 2, 3, 8) is to secure the homestead to the debtor and his family, and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary.

Absence from the State does not necessarily mean a change of residence, in the legal sense, as that question depends upon the intention and other facts. A protracted residence in another State, engaging in a permanent business, with no home in this State, would be at least inconsistent with a residence here.

"Residence," strictly construed, would defeat the object of the Constitution (Article X) in relation to homesteads. If a citizen of Raleigh should go to Baltimore on business he could not be said to literally reside in Raleigh during his absence; but by allowing the doctrine of *animo revertendi* its reasonable force, the business is attended to and the purpose of the law is secured.

The question of domicile and residence has been so fully and frequently discussed by this Court that it would be superfluous work to repeat what has been decided. We will only refer to *Finley v. Saunders,* 98 N. C., 462; *Fulton v. Roberts,* 113 N. C., 421; *Hannon v. Grizzard,* 89 N. C., 115, and the several cases therein referred to, and to *State v. Johnston, post,* 1188.

The general rule from the cases is that when one leaves the State with the intention of returning he does not lose his (650) residence here. This will do for the present case, but to avoid any extreme conclusions from the above statement we will say that circumstances may easily lead to a different result; for instance, if the lapse of time should be long enough to rebut such intention, or if a residence should be acquired in another State, or by engaging in permanent business elsewhere without the *animo revertendi,* or by assuming the duties and privileges of a citizen in such other State. The question is one of law, and not of morals, and we could not inquire into the latter.

Our opinion is that the court below committed error and that the plaintiff is entitled to recover on the facts now in the record before us.

Reversed.

CLARK, J., dissenting: The sole question in this case is whether a fugitive from justice, wandering about in other States, without in-

tention of returning until a criminal indictment against him in this State can be procured to be dropped, and upon whom, therefore, personal service of summons cannot be made, is liable to be brought into court in a civil action by attachment of his property and publication, and if he can set aside the sale under such attachment proceedings on the ground that his homestead was not set apart. The question is in reality a single one, because unless such fugitive is a nonresident the attachment will not lie, and if he is a nonresident he is not entitled to the homestead. It would be singular if a party could thus not only defy the criminal process of the court, but by such indefinite and illegal absence from the State could also avoid service of civil process, and on his return could, as this plaintiff is attempting to do, take back his property with his debt paid by the purchaser at the sale
(651) which had been ordered by a court of justice.

It would seem that the decisions of the Court have been conclusive against this very ingenious and novel proceeding.

In *Wheeler v. Cobb,* 75 N. C., 21, it was held that one voluntarily removing to another State for the purpose of discharging the duties of an office of indefinite duration, though he may occasionally visit the State and may have the intent to return at some future day, is a nonresident for the purposes of an attachment. This has been often cited with approval, and as late as *Carden v. Carden,* 107 N. C., 214, this Court, again citing it, adds: "The prominent idea is that the debtor must be a nonresident of this State, not that he must be a resident elsewhere. The essential charge is that he is not residing or living in this State, *where process may be served so effectually as to reach him.* In other words, his property is attachable if his residence is not such as to subject him *personally to the jurisdiction of the court and place him upon equality with other residents in this respect.*" The Court then goes on to say that "visiting this State only once or twice a year, and with the general intention of returning at some indefinite time and making his home here," would not exempt his property from attachment. The Court further adds: "Nonresidence, within the meaning of the attachment law, means the actual cessation to dwell within a State for an uncertain period, without definite intention as to a time for returning, although a general intention to return may exist." For these propositions the opinion cites, besides *Wheeler v. Cobb, supra,* Waples on Attachment, 35; *Weitkamp v. Loehr,* 53 N. Y. Supr. Court.

If former deliverances of our own Court are to guide us, this would settle the present case, for this fugitive from justice not only did not "visit the State twice a year," but, so far from having an in-

tention to return at a definite time, he had a most definite and (652) fixed determination, for a very good and sufficient reason—the terror of the indictment which had been returned against him—not to return until "this charge against him was buried." There being no statute of limitation after indictment found, it was uncertain as to time and manner when the fugitive could procure the "burial" of the proceedings, and he did not return till it was done, and he was in fact absent from the State somewhat over two years. It was not necessary, as we have seen, that a residence should be obtained in another State; it is sufficient if the party has ceased to reside in this State.

In *Mayor v. Genet,* 4 Hun. (N. Y. Supr. Court), 487, it is held that a fugitive from justice who leaves the State is a nonresident and his property is liable to attachment. *Brady, J.,* say: "The effect of such an act must be to deprive the person committing it of his character as a resident. He places himself designedly beyond the reach of the power of the State by leaving its territory and in terror of its laws. He abandons deliberately his residence. When a man thus conducts himself *he waives acquired rights which depend upon his presence within the State,* or circumstances which warrant its presumption, and is to be treated as if he were not present *and had no rights founded upon that legal attitude.* He became, in other words, to all intents and purposes, for the enforcement of remedies, a nonresident of this State." On appeal, this decision was affirmed by the New York Court of Appeals, by a unanimous bench. 63 N. Y., 646. The same ruling was made as to another fugitive from justice in *Ins. Co. v. Dimmick,* 51 N. Y. (S. R.), 41. See, also, Kneeland on Attachments, secs. 182-193, and cases cited, and 21 Am. and Eng. Enc., 125, note 3.

If the attachment was valid, as under the above decisions in our own Court and elsewhere it must be, the purchaser ac- (653) quired a good title, for the plaintiff, if a non-resident, was not entitled to claim a homestead, which is given by our Constitution only if the lot or tract *"is owned and occupied by a resident of this State."* This point has been uniformly so held; indeed, the language of the Constitution could bear no other construction.

In *Baker v. Leggett,* 98 N. C., 304, *Merrimon, J.,* says: "The right of *homestead,* provided and secured by the Constitution, is incident to residence in this State. Only residents have and are entitled to it. A nonresident has no such right, although he may be the owner of real estate situate in the State." And the opinion goes on to hold that "when a resident removes from the State" he "abandons and relinquishes his right of homestead." In the next case in order, *Finley v. Saunders,* 98 N. C., 462, *Smith, C. J.,* says that "by the removal of the

debtor out of the State, with a view to a permanent residence elsewhere, although his family do not follow him to his new abode, he forfeits his constitutional right "to the homestead." We have seen it is held above that it is not essential to becoming a nonresident that another residence shall be acquired or contemplated elsewhere, if residence in this State has ceased, with only an intention to return at an indefinite time. But this case is important as showing that the right to the homestead depends upon the residence of the debtor himself, and cannot be held vicariously for him by his wife and children remaining here. In *Munds v. Cassidey*, 98 N. C., 558, *Smith, C. J.*, holds that "the person claiming the exemptions from execution must be *an actual, not a constructive, resident;* therefore, one who has removed from the State with the expectation of returning at some uncertain time is not entitled to the exemptions." In that case the debtor was employed upon a steamboat in Florida and ex-
(654) pected to return to this State. The learned Chief Justice further adds that this "benevolent provision" is for *actual residents*, and must not be construed as embracing cases of mere domicile, which is always retained till a right of domicile is obtained elsewhere. This, too, will remove the confusion brought about by cases like *Hannon v. Grizzard*, 89 N. C., 115, as to the right of suffrage, eligibility to office, and the like. All these depending upon domicile, the right to vote or hold office can be retained by constructive residence when no actual residence, with an *animus manendi*, has been acquired elsewhere. But as to attachments and homestead we see by this and other decisions above cited the rights are determined when actual residence ceases in this State. This is reaffirmed in *Lee v. Moseley*, 101 N. C., 311, which holds: "The words 'a resident of the State,' employed in the Constitution (Article X, sec. 2), in respect to homesteads, have a more restricted meaning than that usually given to *domicile;* to entitle a person to the constitutional exemption he must be an actual and not a constructive resident." In the opinion *Smith, C. J.*, combats the idea that the intent to return should be left to the jury, and says that "it is sufficient if in fact the debtor does change his residence, and the effect of his acts cannot be defeated by his declaration that he did not so intend." In the present case, was the fugitive from justice, moving round from State to State for more than two years, not daring to return here, and only expressing the conditional intention to return at some indefinite time, an *actual* or a *constructive* resident of this State? If the latter, upon the above unbroken line of authorities, he was not such a "resident" as could claim a homestead or an exemption from attachment of his property at the hands of the law which he was defying. *Fulton v. Rob-*

erts, 113 N. C., 421, cites as authority the above cases of (655) *Munds v. Cassidey, Baker v. Legget* and *Lee v. Mosely.* As bearing upon the present case, it is authority that the burden of showing the nonresidence of a party who has at one time been a resident of the State is upon him who claims that the homesteader has become a nonresident. That has no application here, as the facts are found by the referee, as above stated, and the intent of the party to return at some indefinite time, upon a contingency, as *Smith, C. J.,* says above, was immaterial. Our decisions have been uniform and have become "a rule of property," and at a sale ordered by a court of competent jurisdiction, which order was based on these rulings, the defendant has laid out his money. If he should ever lose it under such circumstances, so long a line of decisions should not be reversed for the benefit and at the instance of an admitted fugitive from justice, who even now has only ventured to return to the State because by some means, undisclosed to us, the original indictment against him has been "buried."

It is not necessary to obtain the benefit of a homestead exemption that the debtor should be a citizen. It is sufficient if he is a resident of the State. But he must be a resident, whether a citizen or not. Homestead and attachment affect property rights and are governed solely by residence, not by citizenship. Citizenship, once acquired, can be retained by constructive residence, plus the proper intent. Not so with homestead and attachment, which depend upon *actual* residence, which is a question of fact upon the circumstances of each case. As citizenship (and with it the right of suffrage and eligibility to office) cannot be acquired by mere residence without an *animus manendi,* it is right that it cannot be lost by mere nonresidence if there is the *animus revertendi.* But exemption from attachment, which is seizure before judgment, and homestead, which is exemp- (656) tion from seizure after judgment, are conferred by residence alone, and must therefore be lost by nonresidence. It is not always easy to draw the line between residence and nonresidence, but we know that mere incidential absence, as on a visit or a journey, is not nonresidence, and on the other hand we know it would do violence to both the legal and the ordinary use of the word to say that a man who flees the State to avoid being found by its officers, and who is skulking through other States to avoid extradition for more than two years, with no intention of returning till the criminal proceeding has been dropped, has during all those years been a resident of this State. It cannot be that on such state of facts the law will protect him from service of civil process by attachment of his property and preserve for

him the homestead which the Constitution confers upon no one unless he is a resident.

Cited: Cromer v. Self, 149 N. C., 166.

(657)

W. H. HERBIN ET AL. V. MARY E. WAGONER

APPEAL—CASE ON APPEAL, SERVICE OF—PRACTICE—IRREGULARITY OF DECREE—JUDICIAL SALE—INNOCENT PURCHASER.

1. A case on appeal or countercase must be served by the sheriff, unless service be accepted in writing and made a part of the record.

2. A purchaser at a judicial sale, if not a party to the proceeding, is not bound to look beyond the decree if the facts necessary to give jurisdiction appear on the face of the proceedings. If there has been an irregularity, or the jurisdiction has been improvidently exercised, it will not be corrected at his expense; *Hence,*

3. Where the report of commissioners to partition land, through the mistake of the draftsman, allotted "lot No. 1" to R. H. instead of to W. H., and the land was subsequently sold for assets by the administrator of R. H. and bought by W., who paid the price and received a deed, and the land was again sold for assets by the administrator of W. and bought by the defendant: *Held,* that the record of the original proceeding to which the plaintiffs were parties will not be corrected, to the injury of the defendant who purchased without any notice of the mistake.

THIS was a proceeding begun before the Clerk of ROCKINGHAM by William H. Herbin, by motion, founded on an affidavit and carried by the respondent, Mary E. Wagoner, by appeal to the Superior Court in term, where the judgment of the clerk set out in the record was affirmed, and the respondent appealed to this Court.

In February, 1880, the parties above named filed a petition in the Superior Court of Rockingham for a partition of the land of William and Robert Herbin, deceased, they being heirs at law of Robert and devisees of William Herbin. Partition was had, the report of the commissioners confirmed and registered in said year, and by this decree it is known as lot No. 1 in lot No. 2 and allotted to Robert Herbin, who soon thereafter died intestate in Guilford County. Subsequently William P. McLean was appointed his administrator, in Guilford, and filed a petition in the office of the clerk of the Superior Court of this county for license to sell the lands which belonged to Robert Herbin, as aforesaid, to make assets to pay debts, and to this proceeding all the parties in this cause, except the respondent, Mary E. Wagoner, and her husband, were made defendants. Under a decree rendered in

said cause the said W. P. McLean, administrator as aforesaid, sold the said land, which had been allotted to Robert Herbin, (658) as aforesaid, on 4 April, 1881, when one Simeon Wagoner became the purchaser, and upon said sale being confirmed the said administrator, as directed, executed to Simeon Wagoner the deed appearing in the record, marked "Exhibit A."

On 8 June, 1888, Simeon Wagoner, above named, having died intestate in Guilford County, Elizabeth Wagoner, who had theretofore been appointed his administratrix, filed a petition in the Superior Court of Guilford to sell the lands of her intestate to make assets to pay debts, and subsequently the same was sold by her, when the respondent, Mary E. Wagoner, bought this tract, known as lot No. 1, in subdivision No. 2, which was previously bought by Simeon Wagoner from William P. McLean, administrator, and Elizabeth Wagoner, administratrix, executed and delivered a deed therefor, which is duly recorded in Guilford County.

On 28 June, 1895, William H. Herbin filed a petition in the original partition cause in Rockingham, which had been begun in 1880, as aforesaid, alleging that a mistake had been made by the draftsman of the report, and that lot No. 1, in subdivision No. 2, should appear as having been allotted to him instead of to Robert Herbin, and asked the court to enter a decree correcting the same, in accordance with the prayer of his petition, and asking that a notice be issued to the respondent, Mary E. Wagoner, who claimed the land under Robert Herbin, requiring her to appear before the said clerk on a day therein named and show cause why the prayer of petitioner should not be granted. The said Mary E. Wagoner appeared and filed an answer. numerous affidavits were produced on both sides, and exhibits, including the transcripts of the two proceedings, had in (659) the Superior Court of Guilford, and the two deeds hereinbefore referred to.

The clerk rendered judgment for amending the record, whereupon the respondent excepted and appealed to the Superior Court. Upon a hearing before *Norwood, J.*, at Rockingham Superior Court, the judgment was affirmed, when the respondent, Mary E. Wagoner, again excepted and appealed to the Supreme Court, assigning as error:

1. In that the court held that the mistake complained of should be corrected, to the prejudice of Mary E. Wagoner, the purchaser, who had no notice of such mistake.

2. In not holding that the petitioner was barred on account of his *laches*.

John A. Barringer for plaintiffs.
Dillard & King and Shepherd & Busbee for defendant.

FAIRCLOTH, C. J. The defendant appellant had her case on appeal duly served on plaintiff's attorney, who prepared his exceptions thereto and returned the same, with his copy, to an attorney supposed by him to represent the appellant, without any acceptance or service by the sheriff. These papers remained with said attorney, and the papers were never sent to the judge who tried the case, and no case was settled for this Court by the judge. The appellant had the transcript docketed in this Court with her case on appeal. The plaintiff appellee now comes and moves for an order for a writ of *certiorari* to be issued to the lower court to settle the case, alleging on affidavit, among other things, that said attorney did represent defendant in the Superior Court, that service was waived, and an agreement (verbal) made that the papers should be sent to the judge to settle
(660) the case, etc. These allegations, by affidavit, are denied by the attorneys alleged to have represented the appellant in the Superior Court.

This Court would be embarrassed with the unpleasant duty of finding facts at issue between members of the bar but for the statute and rules and decisions of this Court to the effect that a case on appeal, or countercase, must be served by the sheriff, unless service be accepted in writing and made a part of the record. This case illustrates the reasonableness of such rules. Assuming, then, for the sake of argument only, that the plaintiff's allegations are true, that the counsel represented the defendant, we cannot grant his petition, for the reason that the waiver is denied and the countercase was neither duly served nor accepted in writing. *State v. Price,* 110 N. C., 599; *Forte v. Boone,* 114 N. C., 176; *Sondley v. Asheville,* 112 N. C., 694; *Graham v. Edwards,* 114 N. C., 228, and cases cited; Rule 39 of Supreme Court.

1. It appears that certain lands were partitioned among the plaintiffs and confirmed by decree of the court, and that in the division a mistake was made by the draftsman of the commissioners' report in allotting lot No. 1 to the heirs of Robert Herbin instead of W. H. Herbin, and that said land was afterwards sold for assets as the property of Robert and purchased and paid for by Simeon Wagoner and deed made by order of the court.

2. That subsequently the administratrix of Wagoner sold the same land for assets, and the defendant, Mary E. Wagoner, purchased and paid for the land and received a deed under a decree of the court. In June, 1895, the plaintiffs, who were parties to the original proceed-

ing, notified defendant to show cause in that original proceeding why said mistake should not be corrected by amending the record therein, and it was adjudged by the court that such amendment be made, and defendant appealed. In all of said proceedings all proper parties were before the court, and it is not denied that the (661) court had jurisdiction of the parties and the subject-matter.

The question is now presented whether the plaintiffs, who were parties to the action in which the mistake occurred, or the defendant, who was not a party and is a purchaser for value and without notice, shall bear the loss or inconvenience of the mistake.

The law favors protection to innocent purchasers at judicial sales, and all respectable courts have held that they should be protected against irregularities under their decrees when the jurisdiction is complete, even on a motion in the original cause.

The question was well considered by this Court in *Sutton v. Schonwald,* 86 N. C., 198, and it was held accordingly that the purchaser's title was not rendered invalid by the reversal of the decree on account of irregularity in the proceeding, of which the purchaser had no notice. In that case the defendant acted as guardian of two infants, being, however, guardian for only one, and sold the land of both under an order of the court, and the sale was upheld. The Court said: "Hence it is that a purchaser who is no party to the proceeding is not bound to look beyond the decree if the facts necessary to give the court jurisdiction appear on the face of the proceeding. If the jurisdiction has been improvidently exercised it is not to be corrected at his expense who had the right to rely upon the order of the court as an authority emanating from a competent source; so much being due to the sanctity of judicial proceedings, and upon every principle of policy or strict right, it should not be allowed to be reversed (though in a direct proceeding in the same court) at the cost of an innocent purchaser." The injured party must look elsewhere for his redress.

We have many other decided cases of the same import (662) in which the rights of third persons are protected. *Morris v. Gentry,* 89 N. C., 248; *England v. Garner,* 90 N. C., 197.

In this case it was sufficient for the defendant to see jurisdiction and a final decree, and she was justified in presuming that the proceedings on which the judgment was entered were regular.

Reversed.

Cited: Smith v. Smith, 119 N. C., 317; *Card v. Finch,* 142 N. C., 146; *Rackley v. Roberts,* 147 N. C., 208; *Lawrence v. Hardy,* 151 N. C., 129; *Credle v. Baugham,* 152 N. C., 20.

J. J. THOMPSON v. CITY OF WINSTON

ACTION FOR DAMAGES—MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—INJURY TO DRIVERS OF FIRE ENGINE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. The driver of a fire engine belonging to a town cannot be held to any more rigid rule of diligence in ascertaining and avoiding obstructions on the streets than any other citizen of the town.

2. In the trial of an action for injuries caused to the driver of a fire engine by a defective street the court could not assume from the fact that plaintiff had previous knowledge of the defects that he actually saw and understood the condition of the street at the time of the accident and recklessly disregarded the danger, since plaintiff was not required to carry about with him a map of obstructions, but had the right to assume and to act on the assumption that the defendant had discharged its duty by removing the defects.

3. It is not error to refuse instructions which assume that the jury "*must*" and not "may," find the facts according to the contentions of the party asking the instructions, where to do so would be to withdraw from the jury questions upon which it was their right and their duty to pass.

(663) ACTION for damages for personal injuries caused by alleged negligence of defendant in not keeping its street in proper repair, whereby plaintiff was thrown from a fire engine and hurt, tried at January (Special) Term, 1896, of FORSYTH, before *Brown, J.*, and a jury.

The plaintiff alleged that he was thrown from a fire engine, of which he was driver, while driving in the nighttime to a fire; that the accident was caused by a defect in the street, consisting of a depression from four to eight inches deep along the edge of blocks of stone at a street crossing, which defendant had negligently failed to repair. Defendant claimed that plaintiff was intoxicated at the time of the injury; that he knew of the defect in the street before the accident; that he had been warned against driving fast; that the seat on the engine of which he was driver, and the reins, were defective, of which facts plaintiff had knowledge.

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

1. "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" Answer: "Yes."

2. "Was the plaintiff guilty of contributory negligence?" Answer: "No."

3. "What damage, if any, is plaintiff entitled to recover?" Answer: "Seven hundred and eighty dollars."

The defendant submitted nine prayers for instructions. The court refused the first and second, and gave the third, fourth and ninth,

and substantially gave the others. The prayers of the defendant, except those given in terms, are as follows:

1. "That according to the plaintiff's own testimony he was well acquainted with the condition of his lines, the seat on the engine, and also with the condition of the streets, when the accident occurred; that these conditions had existed for a considerable time previous to the injury complained of; that there is no evidence (664) that plaintiff ever complained to the authorities of the town as to the street or the seat on the engine, and no evidence of actual or implied promise by the town to repair; that this being so, and the plaintiff remaining in the service of the town and continuing to drive the engine, he assumed all risk, and cannot recover in this action.

2. "That according to plaintiff's own testimony he did not use ordinary care in driving the team, and this want of ordinary care is contributory negligence, and the jury should answer the second issue 'Yes.'

5. "That the plaintiff knew the condition of the street, and that it was in an unsafe condition to drive his heavy engine over it at a great rate of speed, and with this knowledge drove his horses at a fast trot or gallop against a stone curb, projecting four or six inches above the surface, and was in this way thrown or knocked off his engine. Such driving would constitute contributory negligence, and the jury should answer the second issue 'Yes.'

6. "That the plaintiff alleges that the street had been out of repair for a considerable time; that he knew it well, passing it daily with his wagon, and frequently with his fire engine, which weighed about 5,000 pounds; that his lines were weak and his seat on the engine not well constructed; that if he had knowledge of all these conditions, and repairs were not made in reasonable time after notice to defendant, he had the right to quit the service of the defendant; and in case he remained in its service after this knowledge, and was injured while driving with the lines that he was daily using, riding upon a seat that he had been using, and along a street the condition of which had been well known to him for months, and his injury arose out of these causes, all of which were well known to him, it is contributory negligence on his part, and the jury should find the second issue 'Yes.'

7. "If the jury find from all the evidence that plaintiff (665) had been warned by the authorities of the town to stop his fast driving only a day or two before the accident, and directed not to try to compete with the paid department in getting to fires, but to drive slowly and carefully; that on the evening before the fire, which

occurred at 1 or 2 o'clock the next morning, he was under the influence of liquor, and still in the same condition as late as 10 o'clock at night, and that while in this condition, or for any other reason, he drove the engine recklessly, driving in disobedience of orders from his superior officers, he is guilty of contributory negligence, and the jury should find the second issue 'Yes.'

8. "That if the jury find that the plaintiff was injured, if injured at all, by reckless driving, and that in disobedience of orders from the officers of the city, they should find the second issue 'Yes.' "

Verdict and judgment for plaintiff. Appeal by defendant.

J. S. Grogan for plaintiff.
Watson & Buxton for defendant.

AVERY, J. The only assignment of error upon which the defendant has the right to insist here is the failure of the court to give the instructions asked, and the substitution of those given for them.

It was admitted to be the duty of the defendant to keep its streets and sidewalks in reasonably safe condition, and it seems that the instruction upon which the exceptions are founded does not relate to the question whether the municipality was negligent in suffering them to become obstructed, as described by the witnesses. The prayer of the defendant proceeds upon the idea of conceding that the city was culpable, but of denying that its carelessness was the proximate
(666) cause of the injury. It is not contended that the plaintiff is precluded from recovery on the ground that the injury was due to want of care on the part of a fellow-servant. Though he was employed to drive a team for the city, he could be held to no more rigid rule of diligence than that applicable to any other resident of the town. The fact that he had opportunity to become familiar with defects in the street was evidence which the jury might have considered in determining whether he was actually cognizant of and recklessly disregarded the danger at the time of the accident. The court could not assume, from the fact that the plaintiff had had previous knowledge of the obstruction, that he actually saw and understood the condition of the street at the time. He had a right to assume that the defendant had discharged its duty, and to act upon that assumption. *Russell v. Monroe,* 116 N. C., 720. Neither he nor other residents of the municipality were required, as the court properly told the jury, to carry in their hands a map of obstructions in the streets, made out like a mariner's chart, upon the supposition that the city authorities would never be aroused to action by a sense of their duty to the public.

The court also submitted fairly to the jury the questions whether the defendant was warned of the danger of driving fast and forbidden to do so, whether he was intoxicated at the time of the accident, and whether, if he was careless in either respect, such negligence contributed proximately or concurrently with the plaintiff's omission of duty to cause the injury. The attention of the jury was properly called to the subjects to which their inquiries should be addressed. The instructions asked by the defendant (numbered 5, 6 and 7) were so drawn as to assume that the jury *must*—not that they *might*—find the facts according to defendant's contention. It was not error, therefore, to refuse to adopt the language of the prayers and withdraw from the jury questions upon which it was their right (667) and their duty to pass.

Unless the jury found that the injury was caused by the carelessness of the city authorities in failing to provide a better seat or stronger reins, it was needless for them to know or consider the law relating to defective implements. But with the preliminary caution that the instruction upon this subject would be applicable only in case they should find the injury directly due to such defects, the court stated very clearly and correctly the rule of law governing the liability of the defendant in that contingency.

No other inference can be drawn from a careful review of the charge given in lieu of that asked in connection with the verdict than that the jury believed from the testimony (1) that the plaintiff was not intoxicated; (2) that either he had not been warned to drive slowly or had acted upon the warning if given; (3) that neither the defective condition of the seat nor the reins was the proximate cause of the accident; (4) that the plaintiff did not actually see or have his attention called to the obstruction of the street when he was driving towards it, just before the injury was sustained. We conclude, therefore, that there was

No Error.

Cited: Willis v. New Bern, ante, 137; *Little v. R. R., post,* 1078; *Sheldon v. Asheville,* 119 N. C., 609.

(668)

NATIONAL BANK OF GREENSBORO ET AL. v. J. E. GILMER ET AL.

JUDGMENT ENTERED DURING VACATION AND OUT OF COUNTY—CONSENT JUDGMENT, VALIDITY OF.

1. A judgment may by consent be rendered during vacation.

2. A judgment, when signed, with the consent of the parties, by the judge in a county other than that in which the action is pending is valid.

3. Where a summons in an action was regularly issued and a verified complaint filed for a sum certain, and no answer was filed, and an agreement was made by the defendants that if judgment should be taken against them by any other creditor, or if the debt should not be paid by a time certain, then judgment should be entered in favor of plaintiff, at term or in vacation, for the amount demanded in the complaint, and no fraud was suggested: *Held,* that a judgment rendered upon the happening of both the contingencies stated is valid and cannot be attached by other creditors whose judgments were rendered at or about the same time, but docketed later.

CREDITOR'S BILL, pending in Forsyth, wherein the National Bank of Greensboro and other judgment creditors of the North State Improvement Company, J. E. Gilmer and other sureties for said company were plaintiffs, and the said Gilmer and others, together with the Congregation of United Brethren and other judgment creditors of said Gilmer and said company, were defendants. The defendant, the Congregation of United Brethren, moved to set aside a judgment that had been rendered in favor of J. A. Leak, receiver, etc., against the defendant Gilmer and others, and for an injunction upon the grounds set out in the opinion of *Associate Justice Clark.* The
(669) motion was heard before *Brown, J.,* at January (Special) Term, 1896, of FORSYTH, who held that the judgment sought to be set aside was valid, and the defendant, the Congregation of United Brethren, appealed.

A. E. Holton for Congregation of United Brethren, etc., (appellant).

R. T. Bennett for J. A. Leak, receiver.

CLARK, J. The summons was regularly issued and served in the case in which the judgment, now attacked, was obtained, and at the November Term, 1893, a verified complaint for the sum certain due by promissory note was filed. The defendants therein filed no answer, and the plaintiff might have entered up judgment by default final, but consented to a continuance upon an agreement being executed by the defendants during said term that if judgment should be taken against them by any other creditor the plaintiff might at any time,

either in vacation or at term, after January, 1894, enter up judgment upon the complaint. Judgment was taken against the defendants by another creditor, and thereupon this judgment was entered up on 1 February, in vacation, and was signed in another county by the judge presiding in the district, said judgment reciting the above facts and the happening of the contingency and appending the aforesaid agreement. There is no objection raised by the defendants in said judgment, but another judgment creditor, a party to the present proceeding, which is a judgment creditor's bill to subject the land of the judgment debtor, seeks to have the aforesaid judgment set aside as void. There is no allegation of fraud.

His Honor properly held the said judgment valid and regular, and declined to set it aside. The cases cited as to the requirements of a confession of judgment without action. (The Code, secs. 570-572), and the submission of a controversy without action (The Code, secs. 567-569), have no application. Here there was an action regularly pending, a verified complaint filed for a sum certain, no answer, and an agreement executed at said term that on a contingency named (which is set out in the judgment as having occurred) the deferred judgment can be entered up in vacation. If so, it would almost necessarily be signed by the judge, if at all, while in some other county in the district. While the Court has never commended the habit of entering up judgments in vacation, it has in numerous cases held such judgments regular and valid. *Hervey v. Edmunds,* 68 N. C., 243; *Harrell v. Peebles,* 79 N. C., 26; *Molyneux v. Huey,* 81 N. C., 106; *Badger v. Daniel,* 82 N. C., 468; *Shackelford v. Miller,* 91 N. C., 181; *Branch v. Walker,* 92 N. C., 87; *McDowell v. McDowell, ib.,* 227; *Coates v. Wilkes,* 94 N. C., 174; *Bynum v. Powe,* 97 N. C., 374; *Anthony v. Estes,* 99 N. C., 598; *Brooks v. Stephens,* 100 N. C., 297; *Fertilizer Co. v. Taylor,* 112 N. C., 141; *Benbow v. Moore,* 114 N. C., 263. The signing a judgment by the judge in another county is valid when done by consent. *Young v. Connelly,* 112 N. C., 647, and cases cited. In some of the above cases the judge, by consent, came to his conclusion and rendered judgment in vacation and in another county or even in another district, but here he only signed a judgment consented to by the parties. Nor do the cases cited as to conditional judgments have any bearing here, for this judgment is absolute and unconditional. The only condition was in the agreement between the parties as to the occasion and time when the judgment should be entered up in vacation, and the judgment recites that the agreement in all respects had been observed. In refusing to set the judgment aside there was no error.

Affirmed.

Cited: Crabtree v. Schulkey, 119 N. C., 58; *Hawkins v. Cedar Works,* 122 N. C., 91; *Westhall v. Hoyle,* 141 N. C., 337, 338.

(671)

FIRST NATIONAL BANK OF WINSTON v. T. H. PEGRAM, JR., ET AL.

ACTION ON NOTE—NEGOTIABLE INSTRUMENTS—ENDORSEMENT—LIABILITY OF ENDORSER—PAROL EVIDENCE OF AGREEMENT LIMITING LIABILITY OF ENDORSER.

1. Parol testimony may be adduced under a blank endorsement to annex a qualification or special contract as between immediate parties; but between an endorser in blank and remote parties without notice such parol proof is inadmissible and the contract implied by law stands absolute.

2. In the trial of an action by a bank against the endorser of a note given in renewal of a former note, on which the defendant was also endorser, the latter may show as against the payee that at the time he signed such renewal the cashier of plaintiff informed him that the bank had sufficient funds of the maker to pay such renewal note, that its execution was a matter of form necessary to keep the bank accounts straight, and that the bank would not hold him liable thereon.

ACTION tried at January (Special) Term, 1896, of FORSYTH, before *Brown, J.,* and a jury.

There was judgment for the defendant T. H. Pegram, Sr. (surety), and plaintiff appealed.

The material facts are stated by *Associate Justice Montgomery.*

Watson & Buxton and Jones & Patterson for plaintiff.
Glenn & Manly and A. E. Holton for defendants.

MONTGOMERY, J. This action was brought to recover the amount alleged to be due on a note executed by the defendant T. H. Pegram, Jr., to L. W. Pegram and T. H. Pegram, and by the
(672) payees endorsed to the plaintiff. The defendant T. H. Pegram, in his answer, admitted the execution of the note, but averred that when Alspaugh, cashier of the plaintiff bank, requested him to renew the old note, he at first refused to do so, but on being told by Alspaugh that there was in the bank a fund which had been deposited by the assignee of the principal of the note, the defendant T. H. Pegram, Jr., sufficient to pay the note in full, but that the matters had not been fully arranged, and that it was necessary to renew the note to keep the bank matters straight, and that he would incur no liability on the note, he signed the same as surety. He further averred that he had since learned that that statement was untrue, and

that there was a large balance due on said note to the plaintiff, and that the defendant was fraudulently induced to sign the note, thinking that from the statement made to him it was only an accommodation to the plaintiff and that he would suffer no liability. Other defenses were set up by the defendants L. W. Pegram and T. H. Pegram (T. H. Pegram, Jr., did not answer), but it will not be necessary to notice them, as they were not supported by testimony. The plaintiff tendered the following issues, which his Honor declined to give, and an exception was entered:

1. "Was the defendant T. H. Pegram, Sr., induced to sign the note sued on by the false and fraudulent representations of the cashier of plaintiff bank?

2. "Did the cashier, with a fraudulent intent, represent to defendant T. H. Pegram, Sr., that his signing was a mere form and that it would in no way make said defendant liable on the note?"

In their stead the following were submitted to the jury:

2. "At the time of execution of the renewal note sued on, did Alspaugh, cashier of plaintiff bank, represent and state to T. H. Pegram, Sr., that there was enough money on deposit in the bank to pay this note, and that his signing it was a mere form, (673) and that the bank would not hold him (Pegram, Sr.) liable for it?" Answer: "Yes."

The defendants T. H. Pegram and L. W. Pegram testified to the alleged conversation between Alspaugh and T. H. Pegram at the time of the execution of the note, and Alspaugh denied that part of the conversation which concerned the plaintiff's exemption from liability. His Honor was right in refusing to submit the issues tendered by the plaintiff and to instruct the jury as the plaintiff requested. If it was lawful for the defendant T. H. Pegram to give in evidence the conversation which he alleged he had with Alspaugh, the cashier of the bank, at the time of the execution of the note, for the purpose of proving that he was not liable on the note, it was not necessary that the intent of Alspaugh should have been fraudulent or that his representations should have been false, to his knowledge. It was not a question of fraud which was to be tried, but the question whether or not oral testimony could be allowed to explain and to change the effect of the defendant's endorsement of the note. But the plaintiff insists that in no aspect of the case ought the defendant to be exempted from liability, even if the conversation did occur as related by him, because it would have been an easy matter for him to have found out that there was no money in bank applicable to the payment of the note, by further inquiry and by an examination of the deed of trust made by the

defendant T. H. Pegram, Jr., which was a matter of record. The answer to that is not difficult. The statement of the cashier relieved him of the duty of any further inquiry in that direction as to whether there were any funds in bank to be applied to this note; and the fact that the deed of trust showed other preferred creditors besides
(674) T. H. Pegram had no tendency to show whether or not the assignee had deposited in bank money, the proceeds of the assets of the debtor. The plaintiff further contends that if the defendant T. H. Pegram is held liable for the payment of the note he will not be damaged anyway, because he was liable on the old note when he executed the renewal one, upon which he is sued. It is true that he was liable on the old note, but he had the undoubted right to bring this liability to a culmination. He had the right to prefer that time—the time when he was asked to renew the note—as the best time for him to have the bank take what legal steps it chose for the collection of the note. For reasons of his own he chose to end his renewals of the note and to take the consequence. Most probably he thought such refusal would hurry up the application of the funds which the assignee of T. H. Pegram, Jr. (the principal debtor), had deposited in the bank, for he said in his testimony that he thought the debt had already been paid, and that the renewal preceding the last was nearly three years before the last.

The question, then, is, could the defendant, by parol evidence, prove the representations made by the plaintiff through its cashier and agent, Alspaugh, at the time the note sued on was executed? In section 723 of the first volume of Daniel on Negotiable Instruments the author writes: "The cases prohibiting the introduction of parol evidence to vary the contract, implied in an endorsement, are in direct conflict with others." * * * It would be useless to attempt to reconcile the authorities on the subject. In North Carolina, however, the matter is settled that parol testimony is admissible to prove such representations. In *Mendenhall v. Davis,* 72 N. C., 150, where an immediate endorsee sued the endorser on a bond, this Court held that the rule which governs between an endorser of a negotiable note and a subsequent *bona fide* holder for value (where the law
(675) implies that the endorser intended to assume the well-known liabilities of an endorser and will not be permitted to contradict the implication) did not apply between the original parties to the endorsement, but that in the latter case the agreement between the parties at the time the endorsement was written could be proved by parol. In *Hill v. Shields,* 81 N. C., 251, *Dillard, J.,* in delivering the opinion of the Court, said: "It is settled in this State, however, that parol testimony may be adduced under a blank endorsement to annex

a qualification or special contract as between immediate parties. But between endorser in blank and remote parties, without notice, the weight of authority is that parol proof is inadmissible, and the contract implied by law stands absolute." Lest it might be taken that the opinion of the Court in the last case had reference only to an explanation by parol, was to be confined to whether the endorsement was made either as guarantor or original promissor or endorser, and not to proving entire exemption from liability, the judge went on to say: "In treating of this subject, Daniel, in his work on Negotiable Instruments, says a parol agreement in the endorsement of a note, to the effect that the transfer should be *without recourse* on the endorser, cannot be interposed as a defense against a subsequent *bona fide* holder without notice." In *Davidson v. Powell,* 114 N. C., 575, section 50 of The Code is cited, and *McRae, J.,* said: "In the hands of the original payee an endorsement may be shown to be upon certain conditions; but a *bona fide* holder for value, before maturity and without notice, is not affected by equities existing between the original parties." In *Bruce v. Wright,* 10 N. Y., 548, it was held that in an action against any endorser by his immediate endorsee it is a good defense that there was a verbal agreement at the time of the endorsement that the endorsee should not sue the endorser, and (676) that "the contract between the two consists partly in the written endorsement, partly in the delivery of the bill to the endorsee, and partly in the actual understanding and intention with which the delivery was made, * * * and that the intention of the parties may be gathered from the words of the parties, either spoken or written." To the same effect is *Benton v. Martin,* 52 N. Y., 570. No question was raised below as to the power of Alspaugh, the cashier, to make the agreement alleged by the defendant, and found by the jury to have been made with him, at the time of the endorsement. The evidence offered to prove the agreement was not objected to by the plaintiff, and no instructions were asked from the court on this point, and the issues tendered by the plaintiff impliedly admitted the authority of Alspaugh to make it. The objections to other of the evidence of the defendant, made by the plaintiff, are untenable.

No Error.

Cited: Bresee v. Crumpton, 121 N. C., 124; *Sykes v. Everett,* 167 N. C., 606.

(677)

J. E. RICHARDSON AND WIFE v. E. M. REDD, ADMINISTRATOR OF A. J. BOYD, ET AL.

PARTNERS—RIGHT TO EXEMPTION—CONSENT OF COPARTNER—CONSENT OF ADMINISTRATOR OF DECEASED PARTNER—MARRIED WOMAN—ESTOPPEL.

1. One partner is not entitled to his exemption from an execution on a judgment against the partnership without the consent of his copartners.

2. Surviving partners are not entitled to exemption from execution on a judgment against the partnership without the consent of the administrator of a deceased partner.

3. Where a married woman, not a free trader, contributed largely to the capital of a firm and was dealt with by the partners as a copartner, they are estopped from setting up that, being a married woman and not a free trader, she was incapable of contracting as a partner, in order to assert a right to exemptions in partnership property without her consent.

ACTION tried before *Norwood, J.*, at January Term, 1896, of ROCKINGHAM.

The action was brought for the purpose of having a receiver appointed for the Boyd Manufacturing Company (a partnership composed, before its dissolution by the death of A. J. Boyd, of A. J. Boyd, G. D. Boyd and Mrs. T. A. Richardson) and to restrain the execution sale of partnership property by the defendant Bank of Reidsville on a judgment rendered in 1894. The defendant Redd is administrator of A. J. Boyd, deceased. A receiver was appointed, a reference made to ascertain the indebtedness, priorities, etc., and from a judgment confirming the report of the referee the defendants G. D. Boyd and S. H. Boyd appealed.

The facts essential to an understanding of the decision of the Court are stated in the opinion of *Associate Justice Furches.*

(678) *Johnston & Johnston and H. R. Scott for the plaintiffs.*
A. J. Burton for defendants.

FURCHES, J. A. J. Boyd, S. H. Boyd, G. D. Boyd and Mrs. T. A. Richardson were the individual members composing the partnership of the Boyd Manufacturing Company. A. J. Boyd is dead and the partnership is insolvent. The Bank of Reidsville has recovered a judgment against the concern for a partnership debt, sued out execution and is trying to enforce its collection by a sale of the partnership property. S. H. Boyd and G. D. Boyd each claim their personal property exemptions out of the partnership effects, and have each assented to the other's doing so; but Mrs. Richardson and the administrator of

the deceased partner object, and the question is, can S. H. Boyd and G. D. Boyd take their personal property exemptions out of the partnership effects, against the consent of Mrs. Richardson and the administrator, Redd? It has been repeatedly held by this Court that one partner is not entitled to this exemption without the consent of his copartners. *Stout v. McNeill,* 98 N. C., 1; *Scott v. Kenan,* 94 N. C., 296; *Burns v. Harris,* 67 N. C., 140. These authorities dispose of the case, unless there is some reason for distinguishing it from the cases cited. This the defendants S. H. and G. D. Boyd undertake to do by saying that A. J. Boyd is dead and cannot claim his exemption, nor can he give his assent to their doing so, and that Mrs. Richardson is a married woman now, and was at the time of the formation of this partnership, and was not and is not a free trader; that on account of this disability she was not then and is not now capable of contracting; that this being so, her individual estate needs no protection against the creditors of the partnership; that in fact she is not a partner and never has been, although she put $5,000 (679) in the concern and was considered and treated as a partner.

It does not become necessary that we should determine the relation of Mrs. Richardson to this concern further than to say that it appears from the case that she put $5,000 into the partnership and must have some interest, and it hardly lies in the mouths of those who have dealt with her, as a partner, to set up her coverture for their benefit. We have discussed Mrs. Richardson's relation more than was necessary for the purpose of showing that the reasoning of defendants, as to why she need not object, that she needs no protection for her individual estate against the creditors of the firm, does not apply to the estate of A. J. Boyd. And when it comes to a consideration of his interest it is contended that his estate cannot be protected because he is dead and can neither object nor assent. This is a right ingenious way of working the thing out. But it would be "to stick in the bark" and to abandon the principle upon which the rule has been established to sustain the contention of these defendants, that although the partnership was dissolved by the death of A. J. Boyd, still his estate (his administrator) has the same interest in its effects and is under the same obligation to its creditors that A. J. Boyd was when living. And if the rule was founded upon the principle of equitable lien that a partner has in the partnership effects, as is stated in *Stout v. McNeill, supra,* the estate (the administrator of A. J. Boyd) is as much interested in having the partnership assets applied to the satisfaction of the partnership debts as A. J. Boyd would be if living. So it is plain to see that the reason of the thing is against the claim of these defendants.

But if we should not be governed by the reason and spirit of the law, as we think we should, but conclude to "stick in the
(680) bark" and be governed by the letter of the law, we find these defendants in no better condition. The rule is that they are not entitled to this exemption "without the consent of the other partner or partners," and it is certain that A. J. Boyd has not given his consent to the allowance of these exemptions. The defendants S. H. Boyd and G. D. Boyd are not entitled to the exemptions claimed, and there is no error.

Affirmed.

BELLE R. BOYD v. E. M. REDD, ADMINISTRATOR OF A. J. BOYD, ET AL.

ACTION TO ESTABLISH RESULTING TRUST—PROCEEDINGS FOR ALLOTMENT OF DOWER—JUDGMENT—ESTOPPEL.

1. The judgment in a special proceeding for the allotment of dower to a widow was intended by the statutes (sections 278, 2111 and 2112 of The Code) to be and is conclusive upon the heirs, devisees or other claimants who may be made parties as to the title of the husband and the rights of the widow: *Therefore,*

2. Estoppels being mutual, a judgment allotting dower to a widow in all the lands of which her husband died seized in a proceeding to which the heirs and devisees of her husband were parties will estop the widow from afterwards maintaining an action to subject a portion of the lands to a parol trust, on the ground that her husband purchased such lands with money belonging to her.

ACTION tried before *Norwood, J.,* at Spring Term, 1896, of ROCKINGHAM.

This action was brought by Mrs. Belle Richardson Boyd,
(681) widow of A. J. Boyd, deceased, against the administrator of said Boyd, deceased, to recover judgment for various sums of money belonging to her and received by her husband, and against the heirs and devisees of her husband, to have them declared trustees for her as to 109 acres of land in the town of Reidsville, the complaint alleging that out of a specified sum of money collected for her by her late husband he invested the larger portion in said land, taking title to himself. The action was begun on 16 July, 1895. Previously she had filed her petition for dower, and among the lands alleged in the petition to belong to her husband, and out of which she claimed dower, was the tract of land mentioned in the complaint in this action. On 6 May, 1895, the final judgment in the proceedings for allotment of dower was entered, which confirmed to her as a part of her dower a

portion of the 109-acre tract sought in this action to be subjected to this trust. The administrator, heirs and devisees and creditors, having docketed judgment, were parties defendant to the special proceeding for dower.

The answer of the defendant Redd, administrator *c. t. a.* of A. J. Boyd, to the complaint contains the following paragraphs, which furnish a statement of the facts and defenses relied on:

"For second defense: 8. That the plaintiff ought not to be allowed to say 'that out of the sum of $1,333.33, derived from the sale made to John A. Smith, as aforesaid, the sum of $910 was invested by said A. J. Boyd, plaintiff's husband (and title taken to himself instead of to her) for said lands, as alleged in paragraph 10 of the complaint, because she alleged in a petition, duly filed by her in a special proceeding lately begun in said Superior Court for the county of Rockingham, aforesaid, for the purpose of having her dower allotted in the lands of which her said husband died seized, entitled (682) Belle R. Boyd against S. H. Boyd and others, wherein the parties to said proceedings are parties to this action, that her husband was, at the time of his death, seized in fee simple of said lands mentioned and described in paragraph 10 of the complaint, and divers other parcels of land are likewise mentioned in said petition; and that in said proceedings for allotment of her dower, aforesaid, the same was set apart to her out of the lands described in the complaint, covering .....acres thereof, and said allotment was duly confirmed, on motion of the plaintiff, as will fully appear by reference to the judgment roll in said proceedings, which [will] be produced at the trial of this action, and when produced will be asked to be taken as a part of this answer, and same is pleaded in estoppel of this action.'

"For third defense: 9. That the plaintiff ought not to be admitted to say 'that out of the sum of $1,333.33, derived from the sale made to John Smith, as aforesaid, the sum of $910 was invested by said A. J. Boyd, plaintiff's husband (and title taken to himself instead of to her) for said land, as alleged in paragraph 10 of the complaint, because in a special proceeding begun in the Superior Court of said county of Rockingham, entitled E. M. Redd, administrator *d. b. n.*, with the will annexed, of A. J. Boyd, against Belle R. Boyd and others, by issuing of a summons on 24 December, 1894, duly served on Belle R. Boyd, plaintiff herein, requiring her to appear at the office of the clerk of said court in Wentworth, in said county of Rockingham, on 7 January, 1895, and answer or demur to the petition to be filed in said office, which petition was duly filed in said special proceedings on 7 January, 1895, in which it was alleged that said A. J. Boyd was at the time of his death seized in fee simple of said

lands mentioned in paragraph 10 of the complaint in this
(683) action, and divers other tracts or parcels of land are likewise mentioned in said petition, and the relief demanded therein was that said lands be sold to make assets to pay the debts of said A. J. Boyd, etc., the said E. M. Redd, this defendant, having been duly appointed and qualified as administrator, as aforesaid, and the said Belle R. Boyd failed to appear and answer or demur to said petition or complaint, a decree was duly made therein on 7 October, 1895, empowering said E. M. Redd, as administrator, as aforesaid, to sell said lands, except the dower theretofore allotted to the plaintiff, as alleged in paragraph 8 of this answer, and all of the parties to this action were parties to said special proceedings, the judgment roll of which will be produced at the trial of this action, and when produced will be asked to be taken as a part of this answer, and same is pleaded in estoppel of this action.' ''

The plaintiff, Belle R. Boyd, replying to the new matters of defense set up in defendant's answer, said:

1. ''That as to the plea of estoppel, set up in paragraphs 8 and 9 of said answer, it should not bar the plaintiff's recovery in this suit, for the reason that, when said suits were brought and which are now pleaded as an estoppel, and long thereafter, plaintiff was utterly ignorant of her legal and equitable rights sought to be enforced in this suit; that it is true she was fully cognizant of all the facts set forth in her complaint, out of which said legal and equitable rights arise, but that she had not related them to her lawyer nor taken any counsel in regard to them at the time of the bringing of said special proceedings and until some time thereafter, being under the impression and belief that, notwithstanding said real estate mentioned in the complaint was purchased with her money, inasmuch as her husband had taken the title to himself instead of to her (a fact she did not
(684) known until after his death), she was without any legal or equitable rights in the matter, and would be forced to accept things as they were; and that it was under this impression that she filed her petition for dower, in which she alleged the property mentioned in the complaint in this cause to be the fee-simple estate of A. J. Boyd, and that by so doing she has in no way lessened or impaired the rights of the creditors of A. J. Boyd; but if said special proceedings are allowed to be used and pleaded as an estoppel upon her, to defeat her greater rights set up in this suit, great injury and damage will be done to her; that as soon as she was informed by her attorneys of her legal and equitable rights, arising out of the facts set forth in her complaint in this cause, she at once and without delay

instituted this suit; that it will be * * * and wrong and defeat the ends of justice for the defendant to be permitted to take such a technical advantage of the plaintiff. And, further, plaintiff alleges, at the bringing of this suit the said dower suit was then pending and undetermined and did not go to judgment until long after the bringing of this suit, and that the land laid off to her as dower in said suit is covered by the land mentioned in this suit. For the same reasons set forth, plaintiff did not file an answer in the suit of E. M. Redd, administrator, as aforesaid, to sell the real estate of A. J. Boyd; and, though true, E. M. Redd, in his petition, asked that the real estate mentioned in this suit be sold, together with other real estate mentioned in said petition, the same was not offered for sale and has not been sold, and such of the other real estate as is therein asked to be sold, though offered for sale on 30 November, 1895, has not as yet been sold and confirmed by the court, hence said special proceeding is not *res adjudicata,* but is still wholly within the breast of the court and subject to its orders and decrees; and that in this suit has (685) since its institution (July, 1895) a *lis pendens* of the plaintiff's claim has been filed, and all orders, decrees and proceedings had and done in said two special proceedings mentioned are subordinate to any orders or decrees that may be made in this suit; that said administration has not been wound up and no debts paid off by said administrator, and the rights of no purchasers, creditors or innocent parties will or can be affected by the results of this suit."

In deference to an intimation by his Honor that he should hold that the plaintiff was estopped to maintain her action, she submitted to a nonsuit and appealed.

John T. Pannill and Glenn & Manly for plaintiff.
H. R. Scott for defendant.

AVERY, J. A widow is entitled to dower in one-third of the legal or equitable estate in lands of which her husband was seized in fee at any time during coverture (The Code, sec. 2103), and the husband is generally deemed seized of any land "when he may have had any right, title or interest in the inheritance." The Code, sec. 1281 (12). Where no agreement is made between the widow and the heirs or devisees, the statute requires that she shall institute a special proceeding, and that the heirs and devisees and other persons in possession of or claiming estates in lands out of which she seeks to have dower allotted shall be made parties. The Code, secs. 2111, 2112. If it had never been expressly so held, it would be obvious from an examination of the statutes already referred to, and the other provisions of

The Code (secs. 278 *et seq.*), that these special proceedings for the allotment of dower were intended to be prosecuted to a judgment, which should be binding and conclusive, as to the title of the
(686) husband and the right of the wife growing out of his estate, upon the heirs and devisees, as well as upon other claimants who might be made parties. The very fact that persons in the adverse possession or claiming adversely are required to be made parties is evidence of the purpose of the Legislature to conclude them by a judgment in the proceeding. Estoppels must be mutual (*Springer v. Shavender, ante,* 33) ; and if the heirs or devisees are concluded from denying her right in the land allotted, she cannot be heard to deny the admissions in the pleadings as to their rights in the portion not assigned to her. The special proceeding is a controversy instituted for the purpose of determining the relative rights of the widow and the heirs. The plaintiff, as widow of A. J. Boyd, had obtained presumably a larger allotment of dower by alleging in her petition, as was admitted by the heirs, that her husband was seized, among others, of the very tract of land in which she now seeks as against the same heirs to set up a parol trust on the ground that the purchase money was paid by her husband, in part at least, out of funds accruing from the sale of her own separate real estate. The land allotted as dower to a widow is not subject to the payment of the husband's debts during her life (The Code, sec. 2105) ; and as the law allows the personal representative, on showing the insufficiency of the personal assets, to sell any or, if necessary, all of the real estate of the decedent, outside of the dower, to pay the debts and charges of administration of the dower, to pay the debts and charges of administration (The Code, secs. 1436 to 1444), the creditors for whom he acts are interested in maintaining the stability of a decree which affects their rights. The final decree confirming the allotment of dower was entered 6 May, 1892, and this action was not brought till 16 July thereafter. When the plaintiff brought her action, therefore, it had been adjudged in a proceeding in a court of competent jurisdiction, wherein
(687) the heirs at law and devisees of her husband were parties defendant, as they are in this action, that her husband was seized of the land of which she now claims to be equitable owner in her own right, and that on his death it descended to his heirs and devisees, subject to her dower. In consequence of this adjudication of seizin on the part of her husband, the value of her dower was increased *pro tanto.* After deriving such advantage from the allegation and admission of her husband's ownership in a controversy with the same parties as heirs at law and devisees, she will not be heard, when such proceeding is pleaded as an estoppel, to maintain an action founded

upon the allegation that the findings which constituted the basis of the decree in that proceeding were untrue. *Springer v. Shavender, ante,* 33. The plaintiff is clearly estopped from setting up the parol trust, and on the trial abandoned her claim to other relief demanded. The judgment of the court below is therefore

Affirmed.

Cited: Commission Co. v. Porter, 122 N. C., 699.

(688)

W. M. MOORE v. JOHN C. BYRD

EJECTMENT—TAXATION — CONSTITUTIONAL STATUTE — TAX TITLE — EVIDENCE— TAX DEED PRIMA FACIE EVIDENCE OF TITLE.

1. The collection of taxes upon real estate being in the nature of a proceeding *in rem,* and each tract of land being under a liability, which it cannot escape, to contribute its *pro rata* to the support of the government, it is competent for the Legislature to make the deed executed by the sheriff to one who has purchased under the State's preferred lien a *prima facie* title. *Hence,*

2. Section 74 of chapter 137, Acts 1887 (which is the same as section 66, chapter 119, Acts 1895), is not in conflict with the Constitution in providing that, in actions to recover land on title based on tax deed, the person claiming adversely to the tax deed must, in order to defeat the tax title, prove either that the property was not subject to taxation for the year named in the deed or that the taxes had been paid at the time of the sale.

3. Since such statute makes the sheriff's tax deed *prima facie* evidence of title, the purchaser, as plaintiff in ejectment, is entitled to recover upon proof of the tax deed conveying the land, if defendant introduces no evidence of his title and of his having paid the taxes for which the land was sold.

ACTION to recover land, tried before *Timberlake, J.,* and a jury, at Fall Term, 1894, of YANCEY.

His Honor directed a verdict for the defendant, and plaintiff appealed.

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

E. J. Justice for defendant.
No counsel contra.

CLARK, J. The real estate in controversy was sold for nonpayment of taxes as the property of S. M. Riddle, and after the lapse of one year, it not being redeemed, the sheriff executed (689) a deed to the purchaser, who is the plaintiff herein. This is an

action of ejectment for the premises, brought against the defendant in possession, who was not shown to be holding under Riddle or in privity with him. The plaintiff introduced the sheriff's deed and evidence as to rents and profits. The defendant introduced no evidence, and the court directed verdict for the defendant.

The difficulty of obtaining a good title under a sale for nonpayment of taxes, by reason of the many refinements and technicalities formerly existing, was such that the collection of taxes upon real estate practically could not be enforced unless the owner thereof would volunteer to pay them, and the Legislature, in 1885 (chapter 238), appointed a tax commission to report a more stringent law by which the collection of taxes could be more generally and impartially enforced, and the report of this commission, with some modifications, was adopted into chapter 137, Laws 1887, and its provisions have been re-enacted by each succeeding Legislature, with slight change, if any, and are now found in chapter 119, Laws 1895. One of these provisions, to be found in section 66 of this act of 1895 (being section 74 of the aforesaid act of 1887), is as follows: "And in all controversies and suits involving the title of real property claimed and held under and by virtue of a deed made substantially as aforesaid by the sheriff the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the said title, either that the said property was not subject to taxation for the year or years named in the deed or that the taxes had been paid before the sale, * * * but no person shall be permitted to question the title acquired by the sheriff's deed without first showing that he or the person under whom he claims title had title to the property at the time of the sale,
(690) and that all taxes due upon the property have been paid by such person or the person under whom he claims title, as aforesaid." There are safeguards and exceptions in the provisos to this section, and protection as to those under disability is provided for by section 69, but these points are not material to be considered here. Section 71 expressly makes the act applicable when the land is sold under the tax lien in the name of other than the true owner, subject, of course, to the true owner's right to show that he had discharged the State's lien. There is no constitutional inhibition disabling the Legislature from passing this act, and the courts must administer its plain provisions. The collection of taxes upon real estate is in the nature of a proceeding *in rem*, each tract of land being under a liability, not to be evaded, to contribute its *pro rata* to the support of government, and it is competent for the Legislature to make the deed executed to one who has purchased under the State's preferred lien a *prima facie* title. There is no hardship in this, for the State, having the ultimate

title to the soil (as is shown by the doctrines of eminent domain and escheats), and its lien for taxes being preferred to all others, its rights as such lienor, when transferred by deed to the purchaser at a sale for nonpayment of taxes, can only be defeated by one who shows that he had the true title at the time of the tax sale, and that the sale under the State's preferred lien upon the land in question for the taxes did not, in spite of the deed, pass the title to the grantee, because he (the defendant) had discharged said lien. If this were not so, the State could not collect taxes on any land whose true owner is unknown or where the title is in controversy. The State's lien is *in rem*. Taxes being public, every one is fixed with notice of the lien upon his real estate for taxes, and must always know whether he has discharged such lien or not. By section 237 of The Code a de- (691) fendant in an action of ejectment is required to give bond before he is "permitted to plead, answer or demur." In this case, before the defendant is permitted to question the title acquired by the State by virue of its lien on the *rem* for taxes and conveyed by it to the plaintiff, the defendant is required to show that he had title and had paid off the State's lien on the land. This may be a strong measure, but the Legislature has deemed it a necessary one, and they are the sole judges thereof. One who has failed to discharge the lien he owes the State for the taxes due and unpaid on his land cannot complain that the State has transferred to another, who has paid off such encumbrance, its prior lien, and that he cannot be heard in the State's court, when thus in default, to contradict the title conveyed to the purchaser under such lien. The act does not defeat the defendant's title, but changes the burden of proof, as it is always in the power of the Legislature to do, by requiring the party in possession, claiming adversely to the deed executed under the State's authority, to show that he has discharged the State's lien for taxes. In this case, the plaintiff having produced his tax title, it was incumbent on the defendant, under the plain terms of the statute, to negative the *prima facie* title thus made out by the plaintiff by showing title in himself, rebutting the presumption created by law and allowed to be rebutted, and that he had paid off the lien for taxes. Whether the land is sold as property of the true owner or as another's the true owner has one year in which to pay or tender the statutory amount. The verdict should be set aside.

New Trial.

Cited: Peebles v. Taylor, ante, 167; *Fulcher v. Fulcher,* 122 N. C., 102; *Patterson v. Galliher, ib.,* 515; *Edwards v. Lyman, ib.,* 742,

745; *Collins v. Pettitt,* 124 N. C., 729, 734; *King v. Cooper,* 128 N. C., 348; *McMillan v. Hogan,* 129 N. C., 315; *Stewart v. Pergusson,* 133 N. C., 285; *Beck v. Meroney,* 135 N. C., 533; *Board of Education v. Remick,* 160 N. C., 567; *McNair v. Boyd,* 163 N. C., 480; *Lumber Co. v. Pearce,* 166 N. C., 592.

(692)

J. D. CLARK v. J. A. RIDDLE

DISCRETIONARY POWER OF SUPREME COURT—NEW TRIAL—NEWLY DISCOVERED TESTIMONY.

In the discretion of this Court, a motion for a new trial on account of newly discovered testimony will be granted.

ACTION tried at Fall Term, 1895, of MITCHELL, before *Bryan, J.,* and a jury.

The defendant appealed from the judgment in favor of the plaintiff, and in this Court moved that a new trial be ordered for newly discovered testimony.

J. W. Bowman and Battle & Mordecai for defendant.
No counsel contra.

AVERY, J. In the exercise of the discretionary power vested in the Court it is ordered that a new trial be granted on account of newly discovered evidence. Such orders are made in this Court, as in the court below, for no other reason than that we think the ends of justice will be best subserved by taking that course, and are never, therefore, to be treated as precedents. *Sledge v. Elliott,* 116 N. C., 712; *Brown v. Mitchell,* 102 N. C., 347.

New Trial.

Cited: Nathan v. R. R., post, 1070; *Herndon v. R. R.,* 121 N. C., 499; *Chrisco v. Yow,* 153 N. C., 436.

(693)

W. S. HARVEY, TRUSTEE, v. THE LINVILLE IMPROVEMENT COMPANY ET AL.*

CORPORATIONS—STOCKHOLDERS—"POOLING" STOCK, ILLEGALITY OF—PUBLIC POLICY.

1. Every stockholder of a corporation, in person or by proxy, must be free to vote as he deems best for the interests of the corporation, and any combination or device by which any number of stockholders attempt to place the voting of their shares in the irrevocable power of another is against public policy. *Hence,*

2. An agreement between stockholders holding a majority of the shares of a corporation to "pool" their stock by transferring it to trustees, to be voted at corporate meetings and to pledge it as collateral for loans, is illegal and voidable as against public policy.

ACTION for an injunction and other relief, by W. S. Harvey, trustee, against the Linville Improvement Company, Hugh MacRae and others, pending in CALDWELL County, and heard, on motion, before *Timberlake, J.*, at Burnsville, on 22 May, 1895, upon complaint, used as an affidavit, and upon other affidavits and documents adduced in behalf of plaintiff and defendants.

His Honor refused the injunction and rendered the following judgment, in which the facts are succinctly stated:

"This cause coming on to be heard before me, in chambers, at Burnsville, N. C., on Wednesday, 22 May, 1895, that day having been set, by consent of all parties, for the hearing, in lieu of 20 May, upon the order heretofore made by me requiring the defendants Hugh MacRae, John F. Divine and T. B. Lenoir to show cause why an injunction should not issue enjoining them from voting certain shares of the stock of said Linville Improvement Company, (694) alleged in the complaint to have been purchased by the plaintiff from Wallace Hahn, D. G. Worth and S. T. Kelsey, and requiring the defendant, the said Linville Improvement Company, to show cause why an injunction should not issue enjoining it and its officers from signing, issuing, selling or otherwise disposing of any of the bonds of the company mentioned in the complaint, and from selling, conveying or encumbering in any way any real or personal property of the said company; and having been heard upon the complaint, used by the plaintiff as an affidavit, and upon the other affidavits produced in writing before me, and upon argument of counsel for the plaintiff and for the defendants, except the defendant T. F. Parker, who was represented by the counsel for the plaintiff, it is now found and declared

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

by the court that the defendant T. B. Lenoir instituted the action now pending in the Superior Court of Mitchell County against the defendant corporation, in which the receiver was appointed, in good faith and upon the advice of his counsel, for the purpose of recovering a debt due him as executor of Walter W. Lenoir and without any combination or confederation with any of the other defendants; that it is not true that he and the said Hugh MacRae and Donald MacRae or either of them circulated among the other stockholders unfounded statements affecting the integrity of the officers of the company or its condition, to create any feeling of distrust or alarm among them for their investments; that it is true the majority of the stockholders in the defendant corporation, including the said Wallace Hahn, David G. Worth and S. T. Kelsey, executed an agreement—a copy of which is attached to the complaint and called the 'pool agreement'—for the purposes of borrowing money to pay off the debts of the company, and that the defendants Hugh MacRae, T. B. Lenoir and John F. Di-

(695) vine, trustees named in said 'pool agreement,' have actually borrowed the sum of $9,000 upon the pledge of all of the stock conveyed to them by said 'pool agreement,' including the stock which was owned by the said Hahn, Worth and Kelsey, which the plaintiff claims to have purchased from the said parties, for the purpose of paying the debts of the said company, and upon the pledge of all of the said stock included in the said agreement, and that this was done before the said Harvey purchased the said stock, and that the said money is now owing and unpaid; that at an adjourned meeting of the stockholders of the said company, held at Hickory, N. C., on 26 September, 1894, at which were present, either in person or by proxy, over fourteen hundred shares of the capital stock of the said company, out of a total issue of fifteen hundred shares, a resolution was adopted by a majority vote of all of the stock present to issue first-mortgage bonds to the amount of $60,000, secured by a mortgage upon a part of the property of said company, for the purpose of paying off the debts of the company and getting it and its property released out of the hands of the receiver; that at this meeting the said stock was voted by the stockholders themselves or by their proxies, and was not voted or controlled in any way under the 'pool agreement' or by the trustees therein.

"It was admitted on the part of the plaintiff that he had an option for the purchase of a sufficient number of shares of the capital stock of the company to give him a majority thereof, and intended to purchase the same, provided he could get control of the company; that this action has been brought by the plaintiff to have the said 'pool

agreement' and the said issue of bonds declared invalid, in order that he may purchase said majority of the capital stock (696) of the said company and obtain the control thereof.

"It is thereupon ordered and adjudged by the court that the plaintiff's motion for an injunction be and the same is hereby in all respects denied."

The "pooling" agreement referred to in the judgment was as follows:

"Whereas the Linville Improvement Company is indebted to various persons in large sums of money and is now in the hands of a receiver appointed by a decree of the Superior Court of the county of Mitchell, in the State of North Carolina; and whereas the undersigned, who are stockholders, and some of whom are also creditors of the said company, are desirous to extricate the company from its present financial embarrassment, to pay off its debts and enable it to resume its operations; now, therefore, we, the undersigned stockholders of the Linville Improvement Company, have agreed and do hereby agree with each other as follows:

"That for the purpose herein set forth we will pool off the stock of the said company owned by us, respectively, and will transfer the same to John F. Divine, T. B. Lenoir and Hugh McRae, to be held by them and their successors, upon the trusts and for the purposes herein declared. The said trustees shall give proper receipts for the stock so transferred to them. The said trustees shall have power to vote the said stock so transferred to them in all meetings of the stockholders of said company, to borrow money to pay off and discharge the present indebtedness of the company, and to pledge the stock so held by them, or any part of it, as collateral security for the money so borrowed.

"If any vacancy among the said trustees shall occur at any time, the same shall be filled by the votes of the holders of the majority of the stoock represented in the agreement; and the holders of the majority of such stock shall have the right, whenever they (697) see proper to do so, to instruct the said trustees how to vote upon matters arising or to arise in any meeting of the stockholders of said company. Any one or two of the said trustees may vote the entire stock so transferred to them in any meeting of the stockholders of said company, being so duly authorized in writing by the other or others. Any one or more of the said trustees or of their successors herein may at any time be removed and their places filled by a vote of the majority of the stock herein represented. All stockholders shall at once pay up all unpaid subscriptions owing to the company on the

stock held by them. A meeting of the stockholders executing this agreement may be called by the trustees at any time, upon .....days' notice, and shall be called by them upon like notice at any time, upon request of any three or more of the stockholders executing this agreement; and in all such meetings a majority of the said stock, being present in person or by proxy, shall be a quorum, and any action taken by them shall be binding on all.

"This agreement shall be void if not executed by holders of the majority of all the stock of said company, but when so executed it shall be enforced and binding upon all who sign it for the period of five years from the date hereof, unless it be sooner determined and put an end to by a vote of the holders of two-thirds of the stock represented herein. Upon the determination of this agreement the trustees shall transfer to each of us the stock owned by us respectively. Dated 23 April, 1894."

The plaintiff appealed from the judgment of his Honor refusing injunction, etc.

(698) *Davidson & Jones for plaintiff.*
Junius Davis for defendants.

CLARK, J. At common law, stockholders could not vote by proxy. *Taylor v. Griswold,* 14 N. J. Law, 22, and other cases cited in Cook on Stocks, sec. 610. This is now otherwise, but it is still held that each stockholder, whether by himself or by proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy. *Cone v. Russell,* 48 N. J. Eq., 209. Various devices have been resorted to for the purpose of so tying up the stock that no one of the parties to the "pool" or combination can break the agreement. "Irrevocable" proxies to vote the stock have been given to a designated party who acted as trustee or agent, but the courts held such proxies not irrevocable and that they might be revoked at any time. Cook, *supra,* secs. 610, 622; *Woodruff v. Dubuque,* 30 Fed., 91; *Vanderbilt v. Bennett,* 2 Railway and Corp. L. J., 409. Another plan was to place the stock of the various parties in the hands of trustees, with power to transfer the stock to themselves and to hold and vote the same, trustees' certificates being issued to the various parties, specifying the amount of stock so deposited by them and their interest in the pool, but the courts held that any holder of a trustee's certificate

might at any time demand back his part of the stock. *Woodruff v. Dubuque, supra,* and other cases cited in Cook, *supra,* sec. 622. Another device was that the parties contracted together not to sell their stock for a specified time, or only to a purchaser acceptable to them all. It was held that, notwithstanding such contract, (699) any one of the parties might sell his stock to anyone he pleased and at any time. *Fisher v. Bush,* 35 Hun., 642; *Williams v. Montgomery,* 68 Hun., 416. Another plan was to restrict by a bylaw the right to transfer stock, but this was held illegal. *Morgan v. Struthers,* 131 U. S., 246, and other cases cited in Cook, *supra,* sec. 332. A provision that a purchaser of a certificate of stock who sold in violation of the agreement should be entitled to the dividends but should receive no right to vote, was likewise held invalid. *Harper v. Raymond,* 3 Bosw. (N. Y.), 29. Numerous decisions affirm the correctness of the above rulings, which are based upon the illegality, because against public policy, of permitting large blocks of stock to be irrevocably tied up for the purpose of being voted *in solido* for the interest of a clique or section of the stockholders, and not according to the judgment of each individual stockholder for the benefit of the entire corporation. There are some few decisions trenching more or less upon the principles above stated, but we deem them contrary to sound principles of public policy, and hence not authority. In short, all agreements and devices by which stockholders surrender their voting powers are invalid. 5 Thompson Corporations, sec. 6604. The power to vote is inherently annexed to and inseparable from the real ownership of each share, and can only be delegated by proxy, with power of revocation. The "pooling" arrangement, admitted to have been entered into by the majority of stockholders in the present case, is contrary to public policy and voidable (*Woodruff v. Dubuque, supra*), and the plaintiff, assignee of certain of the trustees' certificates, is entitled to have his name entered as the owner and holder of the shares of stock represented by said trustees' certificates, and to have said shares issued to him, should the facts be found in (700) accordance with his allegation, and to have the defendant restrained till the hearing from voting or controlling in any way the stock purchased by the plaintiff, or in anywise interfering with the plaintiff's right to vote, control or dispose of said stock.

Error.

Cited: Bridgers v. Staton, 150 N. C., 218; *Sheppard v. Power Co., ib.,* 779; *Bridgers v. Bank,* 152 N. C., 298.

(701)

J. M. BERNARDT ET AL. v. GEORGE W. BROWN ET AL.

PROCESS, MODES OF SERVICE OF—PUBLICATION—PROCEEDING IN REM—JUDGMENT—COLLATERAL ATTACK — PRESUMPTION — EXECUTION — JUNIOR JUDGMENTS—NEW TRIAL—HEARING OF MOTION—SETTING OUT EXCEPTIONS TO CHARGE—PRACTICE—JUDGMENTS OF SUPREME COURT—"NEW TRIAL" AND "REVERSED"—MOTION TO MODIFY JUDGMENT OF SUPREME COURT.

1. There are three modes for the "due service of process"—(1) by actual service (or, in lieu thereof, acceptance or waiver by appearance); (2) by publication, in cases where it is authorized by law, in proceedings *in rem*, in which cases the court already has jurisdiction of the *res*, as to enforce some lien on or a partition of property in its control; (3) by publication of the summons, in cases authorized by law, in proceedings *quasi in rem*, in which cases the court acquires jurisdiction by attaching property of nonresident, absconding debtor, etc. A judgment obtained under process served by the two last-named methods has no personal efficiency, but acts only on the property.

2. A proceeding to enforce a mechanic's lien being *in rem*, the service of summons by publication is authorized by section 218 (4) of The Code, if defendant cannot, after due diligence, be found in the State, whether he is a nonresident or a resident.

3. In an action to enforce a mechanic's lien, and in all other proceedings *in rem*, it is not necessary, as in proceedings *quasi in rem*, to acquire jurisdiction by actual seizure or attachment of the property, the mere bringing of the suit in which the claim is sought to be enforced being equivalent to seizure.

4. While the purchaser of land under a junior judgment may not collaterally attack prior judgments for irregularity, he may do so if they are void, because of being rendered without service of process, in any mode prescribed by law.

5. A judgment, when collaterally attacked, will be presumed valid, in the absence of a transcript of the proceedings in which it was rendered.

6. Prior to the passage of the act of 1889 (chapter 108) there was no provision for service upon a domestic corporation whose officers and agents could not be found in the State (except in the instances mentioned in section 218 (2) and 218 (4) of The Code), and hence a judgment against such corporation on substituted service of summons is void.

7. It is within the power of the Legislature to prescribe that service of process on parties residing in the State may be had by publication when such parties cannot, after due diligence, be found, not only in cases where they have left the State or have concealed themselves therein with intent to defraud creditors or avoid service of summons, but also when such intent cannot be shown.

8. The act of 1889 (chapter 108), authorizing service of summons by publication against a domestic corporation whose officers cannot, after due diligence, be found in the State, omitted to amend the attachment law (section 349 of The Code), so as to authorize an attachment of defendant's property in such

case, and hence, no attachment being authorized by law, the attempted service of a domestic corporation by publication of summons and warrant in attachment proceedings was insufficient for any purpose.

9. While it is the better practice that the grounds of exceptions to the judge's charge should be set out on the motion for a new trial, so as to afford him an opportunity, on further reflection, to correct any errors committed by him, and save the delay and expense of an appeal, yet such course is not necessary, and it is sufficient if such exceptions be set out in the case on appeal.

10. The holder of a senior judgment has no power to forbid a sale of land under an execution on a junior judgment.

11. The purchaser of land at an execution sale under a junior judgment gets the title of the defendant, subject only to the encumbrance of the senior judgments. If executions on the senior judgments are in the hands of the sheriff at the time of the sale advertised under the junior judgment, the purchaser will get a full title to defendant's interest, and the lien of the senior judgments is transferred to the proceeds of sale.

12. When, on appeal, error is found as to the proceedings on the trial of a cause below, anterior to and including the verdict, this Court can only declare error and order a new trial; but when the error is solely in the judgment rendered upon an admitted or ascertained state of facts, then and in such case only can this Court order the judgment below to be *reversed.*

13. This Court will not, on motion, amend its judgment ordering a "new trial," which was based on errors of the court below, anterior to and including the verdict, by directing the judgment to be "reversed," upon the assumption that the errors for which the new trial is granted are so vital that the appellee will, in deference to the ruling of this Court, submit to a final judgment without amending his pleadings or adducing new evidence.

ACTION for the recovery of land and to determine con- (702) flicting titles to the same, tried before *Bryan, J.*, and a jury, at Fall Term, 1895, of BURKE.

It was admitted that both parties claimed under the North Carolina Estate Company (Limited), and that the land in controversy had been conveyed to the company by deed, in June, 1886.

In response to issues submitted, to which there were no (703) exceptions, the jury found that there had been two execution sales of the land in controversy; that at the first sale, made 6 May, 1889, when the defendant George W. Brown purchased, the sheriff sold under four executions; that at the second sale, made 8 July, 1890, when the plaintiffs (or John Paalzow, under whom they claimed) purchased, the sheriff sold under only one execution, and that an execution issued on a judgment in favor of John Paalzow. The executions under which the first sale was made issued on judgments in favor of A. H. Wilson, the Shuford Hardware Company, Dunovant &

McConnaughey and Brown & McDowell, all against the North Carolina Estate Company, Limited.

The A. H. Wilson judgment was rendered in the Superior Court of Burke County on 4 March, 1889, in an action brought by him for the enforcement of two mechanics' liens, filed 16 July, 1888, against certain town lots in Glen Alpine, for work and labor done thereon. This judgment was for $359.60 and costs, and the same was declared a lien on said lots from 16 July, 1888, the date of filing said liens. The execution which issued on this judgment, 30 March, 1889, declared the same a lien from 16 July, 1888, on said lots, and ordered the sheriff to sell said lots to pay the same. The other three judgments were justices' judgments in attachments, and were declared to be liens upon the land in controversy and upon the Glen Alpine lots. The judgment in favor of Dunovant & McConnaughey and the Shuford Hardware Company were both rendered the same day and transcripts issued and docketed the same day. In each of these cases a warrant of attachment was issued the same day and levied by the sheriff the same day, 24 January, 1889, upon the land in controversy and upon
(704) the Glen Alpine lots. Judgments were rendered in these two actions on 22 February, 1889, and transcripts docketed in the Superior Court of Burke County, 25 February, 1889. The judgment in each of these actions was declared a lien upon the land in controversy and upon the Glen Alpine lots. Executions issued on these two judgments from the Superior Court of Burke County, on the Shuford judgment, 1 April, 1889, and on the Dunovant & McConnaughey judgment, 1 May, 1889. The judgment in favor of Brown & McDowell was rendered 6 April, 1889. The warrant of attachment had been issued, and the same was levied upon the land in controversy, on 8 March, 1889, and the judgment was declared an attachment lien on the said land and lots, and a transcript of said judgment was docketed in the Superior Court 1 May, 1889, and execution issued 1 May, 1889. Under executions issued on these four judgments the land in controversy was sold 6 May, 1889, and defendants purchased. There was no personal service of summons upon the North Carolina Estate Company, Limited, in any of these cases, but in all of them there was constructive service by publication. In three of them an attachment was levied upon the land in controversy and publication made thereof; in the other, a statutory lien upon the Glen Alpine lots and publication. At the sale, 6 May, 1889, when the defendants purchased under these four executions, the Glen Alpine lots were first sold, and realized $200, which was not sufficient to discharge the A. H. Wilson execution, which was the first lien thereon. At the second sale, made 8 July, 1890, when the plaintiffs purchased, the sheriff sold only under

one execution, issued from the Superior Court of Catawba County 8 March, 1890, on a judgment in favor of John Paalzow against the same company, rendered in said court at Spring Term, 1890, a transcript of which was received and docketed in Burke County, 10 March, 1890.

From the judgment rendered on the verdict for the de- (705) fendants the plaintiffs appealed.

J. G. Bynum, J. T. Perkins, G. N. Folk and Edmund Jones for plaintiffs.

Shepherd & Busbee, S. J. Erwin and Isaac T. Avery for defendants.

CLARK, J. "Due process of law" requires that service of process shall always be made. There are three modes in which this can be done:

1. By actual service (or, in lieu thereof, acceptance of service or a waiver of service by an appearance in the action). Whether actual service shall be made by reading the summons or notice to the defendant, or leaving a copy with him personally or at his usual place of residence, is for the Legislature to prescribe. The Code, secs. 214, 217, 597.

2. By publication of summons in cases in which it is authorized by law, in proceedings *in rem.* In these cases the Court already has jurisdiction of the *res,* as to enforce some lien or a partition of property in its control, or the like, and the judgment has no personal force, not even for the costs, being limited to acting upon the property.

3. By publication of the summons, in cases authorized by law, in proceedings *quasi in rem.* In those cases the court acquires jurisdiction by attaching property of a nonresident or of an absconding debtor, and in similar cases, and the judgment has no personal efficiency, extending no farther than its enforcement out of the property seized by attachment.

Proceedings in divorce are *sui generis,* as the judgment therein merely declares a personal status, and publication of the summons is allowed without the acquisition of jurisdiction by attachment of property, the court having jurisdiction of the person of the plaintiff. The Wilson judgment to enforce a mechanic's lien was a (706) proceeding *in rem,* and service by publication was authorized by The Code, sec. 218 (4). In *Pennoyer v. Heff,* 95 U. S., 714, it is said: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or *lien respecting the same,* or

to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose." This is cited and approved in *Winfrey v. Bagley,* 102 N. C., 515, and *Long v. Ins. Co.,* 114 N. C., 465. In proceedings under this class—proceedings *in rem*—it is not necesary, as in proceedings *quasi in rem,* to acquire jurisdiction by actual seizure or attachment of the property, but "it may be done by the mere bringing of the suit in which the claim is sought to be enforced, which in law (in such cases) is equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit." *Heibeitter v. Oil Co.,* 112 U. S., 294. And as to this class of cases the statute prescribes publication of the summons, whether the defendant is a nonresident or a resident, whenever, "after due diligence, he cannot be found in the State." The Code, sec. 218 (4); *Claflin v. Harrison,* 108 N. C., 157. His Honor, however, properly instructed the jury, as prayed, that a sale under the Wilson judgment could pass no title as to any of the property of the defendant in such judgment other than the property covered by the mechanic's lien.

The plaintiff could not collaterally attack the three justice's judgments, under which the sale of 6 May, 1889, was alleged to have been made, for irregularity, but he has the right to insist that they are void if there was no service of process in such cases in any mode
(707) prescribed by law, having acquired his own rights by purchase under a junior judgment. The defendant in such justice's judgments was not served personally, and, being a resident of this State, *i. e.,* a domestic corporation, could not, till the act of 1889, be served by publication, except in the instances mentioned in The Code, secs. 218 (2), 218 (4). Laws 1889, ch. 108, extended these instances by providing that where the defendant is a corporation created by or organized under the laws of this State, and no officer or agent thereof, upon whom service of process can be made, can after due diligence be found in the State, and that fact is duly made to appear by affidavit to the satisfaction of the clerk of the Superior Court of the county in which such process was issued, such clerk shall grant an order that service of such process may be made by publication in the manner therein provided. This act was ratified 13 February, 1889. Until the passage of this act there was no means provided for service of process against a domestic corporation whose officers and agents could not be found. It was simply a *casus omissus.* Service could be had upon nonresident defendants and corporations by publication of summons when personal service could not be had, provided jurisdiction was procured by attachment of property [The Code, secs. 218 (1), 218 (3); *Long v. Ins. Co., supra*], and against residents and non-

residents alike (when personal service could not be made), to enforce a lien or interest in property in this State, and in actions for divorce [The Code, secs. 218 (4), 218 (5)], and against residents of the State (who could not after due diligence be found) when they had departed from the State with intent to defraud creditors or to avoid service of summons, or kept themselves concealed in the State with like intent [The Code, 218 (2)], in which case, also, attachment of property is the basis of the jurisdiction. The Code, sec. 349. There can be no question that the State has the right to prescribe that service upon parties residing here can be made by publication when (708) such parties cannot after due diligence be found, not only in those cases in which it can be averred by affidavit that they have departed this State or have concealed themselves herein with intent to defraud creditors or avoid service of summons, but also in cases where such intent cannot be averred; and certainly it is competent for the Legislature to provide that, as to a corporation created by it, if no officer or agent of such corporation can be found in the State, then service can be had by publication; otherwise creditors would have no redress if a domestic corporation should keep the names of its officers concealed or should elect officers living outside of the State. It might, as in this case, own large bodies of land, and creditors would be powerless to secure service of process, and even stockholders could not begin proceedings, in a proper case, for the appointment of a receiver. But till the act of 1889 there was such defect, and two of the justice's judgments are void, because they were taken 22 February, 1889, and there was not the service by advertisement for four weeks, under authority of the act of 1889, since that act was not ratified till 13 February, 1889. The other judgment was taken 6 April, 1889, and in the absence of the transcript of the proceedings therein the presumption of law is that it is regular in all respects, including service, but it appears that there was no personal service of the summons; and though the act of 1889 authorized publication of the summons against a domestic corporation whose officers cannot be found in the State, unfortunately the Legislature omitted to amend the attachment law (The Code, sec. 349) so as to authorize an attachment of the defendant's property in such case, and, as we have seen, substituted service in such cases can only be based upon the seizure of property, it being (709) a proceeding *quasi in rem.* No attachment having been authorized by law, the proceeding was merely *in personam,* and jurisdiction could not attach by mere publication, and the attempted service in that mode was insufficient for any purpose. *Winfree v. Bagley, supra.* The act of 1889 was needed to supply a *casus omissus,* and the authority of the Legislature to enact it cannot be controverted; but,

doubtless by an inadvertence, the act did not amend the attachment law, so as to give a basis for jurisdiction to proceed against the property of the defendant in such cases, and the courts cannot supply the defect in the act. Recourse must be had to the Legislature.

While it is a good and convenient practice to set out the grounds of exception to the judge's charge on the motion for a new trial before him, to the end that on fuller reflection he may have the opportunity to correct the errors, if any, committed by him, and save the parties the delay and expense of an appeal, this is not absolutely required, and it is sufficient if the exceptions to the charge are set out in the appellant's statement of the case on appeal. *McKinnon v. Morrison,* 104 N. C., 364; *Lowe v. Elliott,* 107 N. C., 718; *Blackburn v. Ins. Co.,* 116 N. C., 821; Supplement to Clark's Code, p. 64.

It is not necessary to notice the exceptions made, other than those involved in the above discussion; but as the point was earnestly debated before us, we may note that the sixth instruction given by the court was erroneous; for, although the Paalzow judgment was a junior judgment—conceding for the argument that the three justice's judgments were valid—the holder of the senior judgments had no power to forbid a sale under the junior execution, and the purchaser at a sale under an execution issued upon a junior judgment gets the
(710) title of the defendant in the execution, subject only to the encumbrance of the senior judgments. *Worseley v. Bryan,* 86 N. C., 343; *Halyburton v. Greenlee,* 72 N. C., 316; *Isler v. Colgrove,* 75 N. C., 334. If the executions on the senior judgments are in the sheriff's hands at the time of the sale, the purchaser gets full title, and the lien of the senior judgments is transferred to the proceeds of the sale. *Cannon v. Parker,* 81 N. C., 320; *Gambrill v. Wilcox,* 111 N. C., 42.

New Trial.

After the opinion in this case was handed down, the plaintiff (appellant) moved to modify the judgment at this term.

CLARK, J. In this case the Court, having found error in the instructions to the jury and to the rulings upon the admission of evidence, as pointed out by the exceptions, directed a new trial. This is a motion to correct the judgment and have the Court to enter a judgment here and reversing the judgment below. It is true that if this Court reverses or affirms the judgment below, it may in its discretion enter a final judgment here or direct it to be so entered below. By preference, and as a matter of convenience, the latter course is, unless in very exceptional cases, the course pursued, especially since Laws 1887, ch. 192, which provides that an appeal does not vacate, but

merely suspends, the judgment appealed from. To enter a final judgment here would necessitate the issuance of execution from this Court, which can be more conveniently issued from and returned to the court below.

It is true that when by inadvertence the opinion of the Court granting a new trial is closed with the entry "reversed," or *vice versa,* or in the case of any other inadvertence of like character, the Court, on motion, even at a subsequent term, will (711) correct the judgment to correspond with the opinion. *Scott v. Queen,* 95 N. C., 340; *Cook v. Moore,* 100 N. C., 294; *Summerlin v. Cowles,* 107 N. C., 459. But there could be no inadvertence in ordering a new trial in this case, since error was found in the rulings upon which the verdict was rendered. When the facts are settled by consent, or by case submitted on agreement, or the facts are found by the court, or even by a verdict, when the only error suggested is that, upon the facts found, taking them as conclusive and unexcepted to, a different judgment should have been entered by the court below, then this Court, if of that opinion, will adjudge that such judgment be reversed. But it is only in cases in which the facts are fixed, and the only controversy is that the judgment rendered upon such state of facts is erroneous, that this Court can adjudge "reversed." In the present case the errors affected the proceedings and went into and brought about an erroneous verdict. The mover, however, insists that the error is so vital that this Court can see that on its correction the verdict on the next trial must be for the opposite party. It may be so. It may also be true that on the next trial there may be amendments to the pleadings or new evidence brought forward. The Court cannot consider argument as to the possibility or probability of such changes. If the error declared by the Court is vital and irremediable, then on the new trial below the appellee will simply, in deference to our ruling, submit to a final judgment. This Court cannot enter or direct "judgment reversed" upon the assumption that the appellee will be compelled to take that course. When, on an appeal, error is found as to the proceedings anterior to and including the verdict, we can only declare error and order a new trial. When the error is solely in the judgment rendered upon an admitted or as- (712) certained state of facts, then and in such cases only can we order the judgment below to be *reversed.*

Motion Denied.

Cited: *Holden v. Warren, ante,* 328; *Bernhardt v. Brown,* 119 N. C., 506; *Graham v. O'Bryan,* 120 N. C., 464; *Caldwell v. Wilson,* 121 N. C., 473; *Balk v. Harris,* 122 N. C., 66; *Parker v. Harden, ib.,*

113; *Cooper v. Security Co., ib.,* 465; *Bernhardt v. Brown, ib.,* 590; *Ditmore v. Goings,* 128 N. C., 331; *McClure v. Fellows,* 131 N. C., 517; *Harris v. Quarry Co.,* 132 N. C., 1151; *S. v. Marsh,* 134 N. C., 187; *Corporation Commission v. R. R.,* 137 N. C., 21; *Cameron v. Power Co., ib.,* 102; *Hollingsworth v. Skelding,* 142 N. C., 252, 254; *Matthews v. Fry,* 143 N. C., 385; *Durham v. Cotton Mills,* 144 N. C., 715; *Vick v. Flournoy,* 147 N. C., 212; *Lawrence v. Hardy,* 151 N. C., 128; *Warlick v. Reynolds, ib.,* 610; *Jones v. Williams,* 155 N. C., 193; *State's Prison v. Hoffman,* 159 N. C., 570; *Armstrong v. Kinsell,* 164 N. C., 126; *Johnson v. Whilden,* 166 N. C., 109.

FRANCES BARCELLO v. L. S. HAPGOOD

THE CODE, SECS. 632, 640, 685, 1590, 1602, 2779, 2781—JUDICIAL SALES OF INFANT'S LANDS—PRIVATE SALES BY ORDER OF COURT—JURISDICTION IN EQUITY—PURCHASERS AT JUDICIAL SALES PROTECTED—FOREIGN CORPORATION'S RIGHTS TO REAL ESTATE—DEEDS OF CORPORATIONS—PROOF OF CHARTER OF FOREIGN CORPORATION—OFFICIAL ACTS PRESUMED VALID—PROBATE OF DEEDS OF NONRESIDENTS AND CORPORATIONS—IMPLIED POWERS OF CORPORATIONS—FORESTALLING—"BROADSIDE" EXCEPTIONS—GREAT SEAL OF A STATE.

1. It is not irregular or erroneous to order the sale of an infant's land to be made privately by the guardian.

2. The Code does not take away from the Superior Courts the jurisdiction heretofore exercised by courts of equity.

3. By section 1602, The Code, the clerk and court in term have concurrent jurisdiction in the matter of ordering a sale of infants' lands upon petition of their guardians.

4. A stranger who purchases lands in good faith at a sale made under the judgment of a court having general jurisdiction over the person and subject-matter acquires a good title. He is not required to look behind the
(713) judgments of the higher courts and pass upon their regularity.

5. A guardian petitioned for a sale of land, owned by herself and her wards, under section 1602, The Code. The clerk, as probate judge, ordered a reference to ascertain the truth of the petition and advisability of a sale. The referee reported favorably, and his report was confirmed by the clerk; then the Judge of the Superior Court rendered judgment authorizing a sale of the land by the guardian at private sale: *Held,* that the purchaser at such sale acquired a good title.

6. The Code, sec. 1590, requiring sales by guardians to be publicly made, does not apply to sales made under directions of the Superior Court in exercise of its general jurisdiction in equity.

7. The Code, sec. 640, confers full authority upon clerks of courts of record in other States to probate deeds, and the courts of this State will take judicial cognizance of the official seals of such officers attached to certificates of probate.

8. Commissioners of affidavit are empowered by The Code, sec. 632, to take acknowledgments of deeds in other States by residents of this State and of the State for which such commissioners are appointed; and by section 640 equal authority is vested in clerks of courts of record in other States.

9. Foreign corporations, having a right under their charters to acquire and sell land, can exercise such rights in this State to the same extent that corporations of this State can do so.

10. A strictly private corporation can lawfully sell any of its property, real or personal, just as an indivdiual can; but such is not the case with corporations which are *quasi* public and have duties to perform in which the public are interested.

11. A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business.

12. When it is doubtful whether the right to hold land comes within the purview of a corporation's powers, that question can be raised as against any corporation exhibiting title to realty only by a proceeding authorized by the State.

13. Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed.

14. The Code, sec. 685, directing the method by which corporations may execute deeds, is not exclusive. The common-law methods of executing such deeds are still valid. (714)

15. A corporation's deed for realty may be executed by any agent having authority from the company to represent it for that purpose.

16. Acts of corporate or State officials purporting to be done by virtue of their offices are taken to be correct and are *prima facie* valid and true.

17. The great seal of this or one of the other States of the Union requires no proof.

18. The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State of the State in which the corporation was created.

19. Where a vendor in a contract to convey land has only a defective title, and his vendee buys up the outstanding claims for the purpose of forestalling such vendor and preventing his complying with his contract, such vendee can only recover what he actually paid for the outstanding claims.

20. "Broadside" exceptions to the judge's charge and the judgment as rendered will not be considered.

21. A State grant should be recorded without further proof than the great seal of the State being affixed to it.

BARCELLO *v.* HAPGOOD.

ACTION tried before Timberlake, J., at Spring Term, 1895, of BURKE.

The action was brought to rescind a contract to purchase land because of alleged defects in the title of the vendor, and recover the portion of the purchase money already paid.

The tracts of land covered by the contract to convey consist of one 300-acre tract, one 22½-acre tract, one 100-acre tract, one $78^1/_3$-acre tract and one 8-acre tract. There was no dispute as to the $78^1/_3$-acre tract or the 22½-acre tract; the controversy was solely as to title to the 300 acres, the 100 acres and the 8 acres.

In order to show he was able to comply with his contract to convey to the three tracts in dispute, the defendant introduced a
(715) grant from the State to one McKlesky, dated 15 March, 1780.

This grant was objected to, on the ground that it was registered without being proven before the clerk, or by him ordered to be registered. Objection overruled. Exception. This grant proposes to convey 300 acres of land in Burke County, on the waters of Silver Creek.

The defendant next offered a deed from C. L. S. Corpening, late Clerk and Master in Equity for McDowell County, to Christiana J. and Huldah E. Pearson, dated 19 April, 1871.

The defendant next offered a deed from Christiana J. and Huldah E. Pearson, by their guardian, Rachel W. Pearson, and by Rachel W. Pearson in her own right. Objected to, for want of power in Rachel W. Pearson to convey as guardian, and for want of proper probate and registration. Overruled. Exception by plaintiff.

The certificate of probate and registration is as follows:

"NORTH CAROLINA—Burke County.

"I, J. H. Hallyburton, Clerk of the Superior Court, do hereby certify that B. S. Gaither, the subscribing witness, appeared before me this day, and the due execution of the annexed deed was duly proven by him. Let the same, with this certificate, be registered.

"Witness my hand and seal, this 29 May, 1880.

[Seal of Court.] "J. H. HALLYBURTON, *Clerk.*"

4. The defendant next introduced a deed from L. S. Hapgood to Hancock Gold Mining Company, dated 3 July, 1880. Objected to, on the ground that no power in the Hancock Gold Mining Com-
(716) pany to hold lands had been shown, or that there was any Hancock Gold Mining Company. Objection overruled. Exception.

5. The defendant next introduced power of attorney by Hancock Gold Mining Company to L. S. Hapgood, its treasurer, to convey their lands, dated 11 July, 1883.

6. Next was introduced a deed from Hancock Gold Mining Company to C. C. Barton, executed by said company, through its agent, L. S. Hapgood, dated 15 June, 1888. Objected to, for the same reason as number 4. Overruled. Exception by plaintiff. This deed purports to be executed by the Hancock Gold Mining Company, under its seal, by L. S. Hapgood, treasurer.

The certificate of probate is as follows:

"COMMONWEALTH OF MASSACHUSETTS—Suffolk—ss.

6 July, 1888.

"Then personally appeared the above-named, L. S. Hapgood, treasurer, and acknowledged the foregoing instrument to be the free act and deed of the Hancock Gold Mining Company before me.

"JOSEPH A. WILLARD,

[Seal.] *"Clerk of the Superior Court."*

On the left of the signature is the seal of Superior Court affixed.

The following is the certificate of the Superior Court of Burke County:

"NORTH CAROLINA—Burke County.

"The foregoing certificate of Joseph A. Willard, Clerk Superior Court of Suffolk County, Mass., is adjudged to be correct. Let the deed and this certificate be registered.

"17 July, 1888. "S. F. PEARSON,

"Clerk Superior Court."

"BURKE COUNTY. (717)

"Filed for registration on 17 July, 1888, and registered in the office of the Register of Deeds for Burke County, N. C., on 17 July, 1888. "J. L. J. ESTES,

"Register of Deeds for Burke."

"Clerk will copy power of attorney to L. S. Hapgood, above, and mark 'Exhibit F.' "

Next introduced deed from Hancock Gold Mining Company to C. C. Barton, 1 September, 1893. Objected to, for the reason that the Hancock Gold Mining Company had no right to convey land. Overruled, and exception.

8. Next introduced deed from C. C. Barton to L. S. Hapgood, 15 June, 1888. Objected to, for want proper registration and probate. Overruled, and exception.

The certificate of probate is in the following words and figures:

"COMMONWEALTH OF MASSACHUSETTS—Suffolk County—ss.

6 July, 1888.

"Then and there personally appeared the above-named Charles C. Barton, and acknowledged the foregoing instrument to be his free act and deed before me. "JOSEPH A. WILLARD,

[Seal.] *"Clerk Superior Court."*

On the left side of the signature is the seal of the Superior Court affixed.

The following is the certificate of the Clerk of the Superior Court of Burke County:

"NORTH CAROLINA—Burke County.

"The foregoing certificate of Joseph A. Willard, Clerk of the Superior Court of Suffolk County, Mass., is adjudged to be correct. Let the deed and certificate be registered.

"S. T. PEARSON,
"Clerk Superior Court of Burke."

(718) The certificate of registration is as follows:

"Filed for registration on 17 July, 1888, and registered in the office of the Register of Deeds for Burke County, North Carolina, on 17 July, 1888, in book 'P,' pages 56-57.

"J. L. J. ESTES,
"Register of Deeds for Burke."

Next was introduced the record of special proceedings in the case of Christiana J. and Hulda E. Pearson, by their guardian, Rachel Pearson, *ex parte,* in which the petition set forth that the petitioner, Rachel, as widow, and the infant petitioners, Christiana and Hulda, as the only heirs at law of Patton Pearson, were the owners of certain lands (described), and that they had been offered $1,400 in cash for the land by L. S. Hapgood, of Boston; that it was to the interest of all parties to sell, etc., and praying the court to order a sale of the lands by a commissioner, after the inquiry and report as to the value of the lands, etc. The record also showed a report by a commissioner as to the value of the lands, and a recommendation that a sale should be made, the facts contained in the report being set out in the decree. The report was filed 19 May, 1880, and confirmed on same day by the clerk. The record of said special proceedings also contained the following decree, signed by *Judge Gilmer:*

"This case coming on to be heard before *John A. Gilmer,* one of

the judges of the Superior Courts of the State, now holding the several courts of the Eighth Judicial District, at chambers, and being heard upon the petition and exhibits, the former order of the court, the report of the commissioner, G. P. Erwin, and the [report] on file, the court doth find and declare the facts to be:

"1. That the petitioners are tenants in common of the (719) land described in the petition; that the petitioner, Rachel W. Pearson, is entitled to dower in the said lands and has title to two-thirds of the mineral interest therein in fee simple; that the petitioners, Christiana J. Pearson and Hulda E. Pearson, are entitled to all the land and one-third the mineral interest in fee simple, subject to the dower of the said Rachel W. Pearson during her life; that the value of interest of Rachel W. Pearson is equal to the one-half of the present value of the land and all the minerals therein, and that the value of the present interest of the said Christiana J. and Hulda E. Pearson, jointly, is the one-half of the value of the land and all the minerals therein, and that the value of the lands is $800; that the said Christiana J. is nineteen and the said Hulda E. Pearson is seventeen years of age, and are infants; that the petitioner, Rachel W. Pearson, their mother, has been duly appointed their guardian; that the said Rachel W. Pearson, for herself and in behalf of her said wards, has made a contract to sell all the said land at the price of $1,400 in money, in hand paid, has entered into a written contract with Lyman S. Hapgood, of Boston, in the State of Massachusetts, to that effect, and the court finds the fact to be, and so declares, that the interests of the two minor petitioners, C. J. and Hulda E. Pearson (as well as that of the petitioner Rachel W. Pearson), would be materially promoted by a sale of said land at the price of $1,400 and the proceeds of the sale partitioned among the petitioners according to their respective interests, and that part belonging to the said minors paid into this court and placed under control of the court, to be invested or loaned as the court may direct.

"It is therefore ordered, adjudged and decreed that the (720) said Rachel W. Pearson, guardian of the said Christiana J. and Hulda E. Pearson, is authorized and empowered by this court to specifically perform said written contract with said Lyman S. Hapgood upon his paying for said land the sum of $1,400, money in hand, and that she be authorized and empowered to convey all the interest, right, title and claims of her said wards in the said lands in fee simple, with the usual covenants of warranty; and that said conveyance, made in pursuance of this decree, shall pass the title of the said wards in the same manner and to the extent as if made by the said Christiana J. and Hulda E. Pearson, in proper person of full age.

"The court doth adjudge that the said purchase money shall be divided into two equal parts; one part thereof shall be the share of Christiana J. and Hulda E. Pearson, jointly, and be paid into this court immediately after the sale of the land; that the same be reinvested, or loaned, to the use and benefit of the said minors, as the judge of this court may specify and order; and it is further ordered that this case be retained for further orders. It is adjudged that the petitioner, Rachel W. Pearson, pay the cost of this proceeding out of her part of the proceeds of such sale, and that George P. Erwin, the commissioner, be allowed $5 for taking the testimony and making his report, 24 May, 1880. JOHN A. GILMER,

Judge."

The report of Rachel Pearson follows:

Rachel Pearson, guardian of her two daughters, C. J. and Hulda E. Pearson, has the honor to report to this court that she, as
(721) guardian of her said wards, and in her own behalf, has specifically performed the written contract entered into with Lyman S. Hapgood on 29 April, 1880, in behalf of herself and in behalf of her said wards by selling and conveying to the said Lyman S. Hapgood the lands described in the proceedings in this case, under and in pursuance of the former order of this court, having received in payment for said land the sum of $1,400 of money in hand paid, one-half of which is the money due my wards for their interest in said lands; and I do now return and pay into this court, for the use and benefit of my said wards, the sum of $700, agreeable to the order of this court, made in this case this 29 May, 1880. (Signed by Rachel W. Pearson.)

The receipt of clerk follows:

"The within report, on this 31 May, 1880, was returned into court and the sum of $700 paid into court by Rachel W. Pearson, guardian of her wards, C. J. and Hulda E. Pearson, for their use and benefit, to be invested by the order of this court for them, agreeable to the former order made by the judge of this court, and the clerk of this court has given his receipt for the same, this 31 May, 1880.

"J. H. HALLYBURTON,

"Clerk Burke Superior Court."

Next was introduced a grant from the State to James Greenlee, James and William Erwin, dated 7 December, 1795.

Next was introduced a deed from George P. Erwin, trustee, to the Hancock Gold Mining Company, covering the 8-acre tract, and

it was admitted that G. P. Erwin, as such trustee, had power to convey the title to lands belonging to the heirs of the said Greenlee and the said Erwin within the boundary of this grant. There (722) was evidence that the 8-acre tract was within the boundaries of this grant.

Next was introduced a grant from the State to J. H. Hall, dated 25 November, 1853, covering 100 acres.

Next was introduced a deed from James Terry and wife to L. S. Hapgood, dated 23 July, 1880.

Next was introduced letters of incorporation of the Hancock Gold Mining Company, with certificate by the Secretary of State for Maine, as follows:

"The undersigned, officers of a corporation organized at Portland, in the county of Cumberland and State of Maine, at a meeting of the signers of the articles of agreement therefor, duly called and held at No. 93 Exchange, in said Portland, on Saturday, 19 June, A. D. 1880, hereby certify as follows:

"The name of said corporation is the Hancock Gold Mining Company. The purposes of said corporation are the mining and milling of gold and other minerals, and especially the mining and milling of gold and other minerals in Silver Creek Township, Burke County, and State of North Carolina.

"The amount of capital stock is $300,000 and is paid in full, and the shares thereof are to be forever nonassessable. The par value of a share is $10.

"The names and residences of the owners of said shares are as follows: Lyman S. Hapgood, Boston, Mass., $10,000; John F. Eldridge, Boston, Mass., $10,000; Alpheus P. Blake, Boston, Mass., $10,000.

"Said corporation is located at Portland. The number (723) of directors is three, and their names are Lyman S. Hapgood, John F. Eldridge and Alpheus P. Blake. The undersigned, John F. Eldridge, is president; the undersigned, Lyman S. Hapgood, is treasurer, and the undersigned, John F. Eldridge, Lyman S. Hapgood and Alpheus P. Blake, are a majority of the directors.

"Witness our hands, this 19 June, A. D. 1880.

"JOHN F. ELDRIDGE,
President and Director.
"LYMAN S. HAPGOOD,
Treasurer and Director.
"ALPHEUS P. BLAKE,
Director."

"CUMBERLAND—SS. 19 June, A. D. 1880.

"Then personally appeared John F. Eldridge, Lyman S. Hapgood and Alpheus P. Blake, and made oath that the foregoing statement, by them subscribed, is true.

"Before me: "A. J. BRADSTREET,
"Justice of the Peace."

"STATE OF MAINE,
"ATTORNEY-GENERAL'S OFFICE, June, A. D. 1880.

"I hereby certify that I have examined the foregoing certificate, and the same is properly drawn and signed, and is conformable to the Constitution and laws of the State.

"HENRY B. CLEAVES,
"Attorney-General."

"STATE OF MAINE,
"OFFICE OF SECRETARY OF STATE.

"I hereby certify that the foregoing is a true copy from the records of this office. In testimony whereof I have caused the seal of the State to be hereunto affixed.

(724) "Given under my hand at Augusta, this 6 February, A. D. 1894, and in the one hundred and eighteenth year of the Independence of the United States of America.

"J. J. CHADBOURNE,
[Official Seal.] *"Secretary of State."*

Objected to by the plaintiff, for defective certificate, and there was no power conferred in the certificate upon the alleged corporation to hold and convey the land described in the deeds to and from it. Objection overruled, and exception by the plaintiff.

For the purpose of showing the unequitable conduct of the plaintiff towards her bargainor, the defendant, by her agent, copartner and coplaintiff, the defendant introduced a tripartite contract between the plaintiff, J. C. Landreau, Rev. Father Crowly and Mrs. Barcello (see Exhibit B); also, affidavit of Landreau, showing that he was a party in interest (Exhibit C).

Plaintiff objects. Overruled. Exception.

These exhibits are omitted here because the purport of this evidence is sufficiently stated in the opinion.

Plaintiff introduced no evidence. There was a verdict and judgment for defendant, and plaintiff appealed, and assigned as error as follows:

1. Admission of improper testimony.
2. Refusal to give instructoins asked for by plaintiff.
3. For error in instructions given.
4. To the judgment.

As these assignments of error are held to be too vague and indefinite, as far as the judgment and instructions are concerned, and the judge's charge and prayers for special in- (725) structions are not passed upon by the court, they are omitted.

Cilley & Hufham for plaintiff.
P. J. Sinclair and Isaac Avery for defendant.

AVERY, J. The action was brought to rescind a certain contract, whereby the defendant Hapgood covenanted to convey to the plaintiff, Francis A. Barcello, 550 acres of land in Burke County, known as "Hancock Gold Mine," on account of defect of defendant's title, and for the recovery of $2,000, purchase money, already paid by the plaintiff, and the amount expended in improvements on the land, less the profit realized from working a gold mine thereon. The defendant denied the allegations. The controversy has narrowed down to the question whether the defendant could make a good title to three out of the five tracts of land described in the contract, to-wit, the 300-acre tract, the 100-acre tract and the 8-acre tract.

The title deeds, which gave rise to the exceptions as to form of probate and power of agents to execute, were those offered by the defendant Hapgood to show that he was able to specifically perform his contract. "It is usual," said the Court, in *Rowland v. Thompson,* 73 N. C., 504, "for sales made by order of the court of equity to be public sales; but the court, as the guardian of infants, has full power in regard to the mode of sale, and, under special circumstances, not only has power, but should, in the exercise of its discretion, authorize and confirm what is called a private sale; that is, a sale without advertisement and public outcry." It is settled by a number of adjudications "that The Code has not taken away from the Superior Courts the jurisdiction heretofore exercised by courts (726) of equity. *Wadsworth v. Davis,* 63 N. C., 251; *Wilson v. Bynum,* 92 N. C., 717; *Clement v. Cozart,* 107 N. C., 695; *S. v. Georgia Co.,* 112 N. C., 34.

In 1880, when Rachel Pearson, as guardian of her infant children, filed the petition before the clerk of the Superior Court, he was acting in the capacity of probate judge and authorized to take jurisdiction of the special proceeding, under what is now section 1602 of The Code, which, since the enactment in its present shape, in 1885, confers the

same authority on him as clerk. But, though he could take cognizance of it, his right to do so was not exclusive, but, under the rule laid down in the cases already cited, concurrent with that of the Superior Court in the exercise of the powers of a court of equity. The Superior Court had general jurisdiction, both of the persons who were parties and the subject-matter of such a proceeding, it being equitable in its nature (*Houston v. Houston,* 62 N. C., 95; *Ex parte Dodd, ib.,* 97; *Harrison v. Bradley,* 40 N. C., 136); and a third person, purchasing in good faith at a sale made under the decree of the Superior Court, signed by *Judge Gilmer,* and relying upon the stability of that judgment, got a good and indefeasible title. *Sutton v. Schonwald,* 86 N. C., 203; *England v. Garner,* 90 N. C., 197; *Branch v. Griffin,* 99 N. C., 173; *McIver v. Stephens,* 101 N. C., 255. The purchaser was not bound to look behind the judgment of the higher court and pass upon the irregularity, if the signing of the decree of sale upon the coming in of the report of the referee, by the judge of the Superior Court instead of by the judge of probate, subject to the approval of his superior, was in fact not in accordance with the regular course of the court.
(727) The sale was not only made under an order of a court having general jurisdiction, both of the parties and the subject-matter, but it was made after careful inquiry by a referee and a report by him that the interest of the infants would be promoted by a sale. *Harrison v. Bradley, supra.* The making by the probate judge of an order confirming this report on its coming in, instead of making the order of sale, was but an irregularity, which does not subject the proceeding to collateral attack, and which, if a direct attack was made, would not affect the validity of the title acquired under the decree, if the purchaser were a stranger to the record. Section 1590 of The Code is the act of 1794, ch. 413, secs. 1 and 2, and has been in force since its first enactment (Rev. Statutes, ch. 54; Rev. Code, ch. 54, sec. 26; Bat. Rev., ch. 54, sec. 27), and, being a part of the statute law, it is manifest that the court has always construed it as referring to sales other than judicial. It was intended as a restriction upon the discretionary power of the guardian, not upon the authority of a court of chancery having the supervision and oversight of their conduct. The evil intended to be remedied by the statute was not the abuse of power by the court, but by guardians when not acting under the restraint of its orders.

The statute (The Code, sec. 640) confers upon clerks of courts of record in other States the powers both of commissioners of affidavits and of deeds and of commissioners regularly appointed by the courts, and the courts will take judicial notice of their seals. *Hinton v. Ins. Co.,* 116 N. C., 22. Commissioners of affidavits are empowered, under

section 632 of The Code, to take acknowledgments of deeds in other States by residents both of this State and of that for which such commissioners are appointed. *Buggy Co. v. Pegram,* 102 N. C., 240. Willard, the Clerk of Suffolk Court, therefore had authority to take the probate, and upon the adjudication by the Clerk of (728) the Superior Court of Burke County that it was correct it was properly admitted to registration. *Buggy Co. v. Pegram, supra.* For the same reason the same clerk was empowered to take the acknowledgment of the grantor, Barton, to Hapgood, and it is needless to cite authority to show that the acknowledgment that the "foregoing instrument was his free act and deed" was sufficient in law. The certificate of Hallyburton, clerk, that B. S. Gaither, the subscribing witness, appeared before him "and the due execution of the annexed deed was duly proven" by him was also sufficient to authorize the order of registration and the recording of the deed.

While a foreign corporation is not authorized to exercise powers in another State not granted in its charter (*Match Co. v. Powers,* 51 Mich., 145; *Bank v. Godfrey,* 23 Ill., 579), yet where the privilege of holding real estate is therein conferred, it may, under the rules of comity, buy, hold and sell land to the same extent that domestic corporations are authorized to deal in it, and, whether foreign or domestic, if authorized to hold land at all, they have all of the powers of an individual in relation to it, except in so far as they are expressly restricted by law. *Lancaster v. Improvement Co.,* 24 L. R. A., and note; 140 N. Y., 576; *Com. v. Railroad,* 15 Am. St., 724, and note; 129 P. A. St., 463; *Blair v. Ins. Co.,* 47 Am. Dec., 129, and note; 10 Mo., 559; *Ducat v. Chicago,* 95 Am. Dec., and note; 48 Ill., 172; 6 Morawitz Pr. Corp., secs. 960-965. The corporation was created for the purpose of "mining and milling of gold and other minerals, especially in Silver Creek Township, Burke County, N. C.," where it appears that the company is operating. It is a familiar rule, applicable to both public and private corporations, that while the grants of authority from the State to them are constructed strictly, they can nevertheless exercise not only the powers expressly (729) given and such as are fairly implied in or incident to those given, but such as it is indispensably necessary to exercise in order to the enjoyment of the privileges expressly given. In other words, the authority to use the means necessary to attain the main objects for which they are formed must be supplied by implication. 1 Morawitz, *supra,* sec. 320; 1 Spelling Pr. Corp., secs. 63, 83. A corporation has the implied right to acquire and hold not only such property, real or personal, as may be actually necessary for carrying on the business for

which it was formed, but such as may be reasonably expected to prove useful and convenient in attaining its legitimate ends. 1 Morawitz, *supra,* sec. 327. The general rule is that foreign corporations may acquire real and personal property, such as tracts of land, for the purpose of mining, as in this case, like domestic corporations, where it is necessary or convenient in carrying out the express purposes for which they were created. 2 Morawitz, *supra,* sec. 961. It is manifest that a company formed for the purpose of mining and milling would find it convenient, if not absolutely essential, to buy the land upon which it proposes to conduct its business; and where the acquisition would prove useful, in the absence of any law re-enacting the Statutes of Mortmain in this State, neither domestic nor foreign corporations are prohibited from buying land in furtherance of the objects for which they were created. *Mallett v. Simpson,* 94 N. C., 41. Where, however, it is doubtful whether the right to hold land comes within the purview of its powers, that question can be raised as against any corporation exhibiting title to realty only by a proceeding authorized by the State. *Mallett v. Simpson, supra; Bass v. Navigation Co.,* 111 N. C., 439. A private corporation, organized for the benefit of its stockholders, is not restricted by duties to the public, as is a *quasi* public corpora-
(730) tion, but is authorized to dispose of any of its property, real or personal, whenever it may find it expedient to do so in carrying out its business. 1 Morawitz Pr. Corp., sec. 335.

A conveyance of the property of a corporation, like that of an individual, may be executed "through any agent having authority to represent the company for that purpose." 1 Morawitz Pr. Corp., sec. 335. Citing *Bason v. Mining Co.,* 90 N. C., 417, and *Morris v. Keel,* 20 Minn., 531, Morawitz says (in the section last cited) that a statutory method of alienation by corporations, like that provided by statute in North Carolina (The Code, sec. 685), is not exclusive of the common-law mode of conveyance, and does "not prohibit other methods of execution by authorized agents." The rule as stated by Morawitz is founded upon the right to dispose of property, which is always incident to ownership by individuals, and also by corporations, except in so far as they are restrained by express statute or by public policy, as where they owe a duty to the public and the alienation of property may incapacitate them for its performance. 1 Beach Pr. Corp., sec. 357; *Logan v. R. R.,* 116 N. C., 940. The extraordinary powers of a corporation, such as that of selling or leasing the corporate property, where it exists, belongs primarily to the stockholders (1 Beach, *supra,* sec. 73), but may be delegated by them, as it can be by an individual, to the directors or to an agent designated in the resolution of the body, either by his official title or his name. 1 Mora-

witz, *supra,* sec. 325. The resolution of the corporation was in the nature of a power of attorney to convey land, and therefore it was proper to prove and register it in this State. The signature of the secretary, who is the proper officer to affix the seal where no special authority to do so is conferred on another, was ac- (731) knowledged by him. The resolution, certified to be a part of the minutes, is therefore *prima facie* the act of the corporation. 4 Thompson Corp., secs. 5054, 5055; *Duke v. Markham,* 18 Am. St., 889, and note; 105 N. C., 137. The law assumes that the proper officer did not exceed his authority (*Morris v. Keel, supra*), and that the certificate of the genuineness of the extract from the proceedings is true. *R. R. v. Lea,* 12 La. Ann., 388. The great seal of the State of Maine requires no proof of its genuineness (1 Greenleaf Ev., sec. 475), and the certificate of the Secretary of State that a certain paper is a record in his office, when attested by the seal, must be accepted as at least *prima facie* true, because such a public officer is presumed to act in accordance with law in assuming the custody of records. The law of disputable presumptions rests upon the experience of a connection between the existence of certain facts and the accepted opinion that in a vast majority of instances the existence of one such fact may be reasonably inferred from proof of the other. 1 Greenleaf, *supra,* sec. 33. It appearing by a genuine certificate that the paper was placed in his custody as an official record, the presumption arises that he, as a public officer, has, in assuming control of such record, done what the law required (Lawson Ev., p. 63, rule 14), and that he is therefore the proper and legal custodian of it. It was not necessary under the circumstances to offer in evidence either a certified copy, or copy purporting to have been printed by authority of the State, of the statute constituting him custodian, when that fact must be assumed from what was already proved. While such printed copies are made competent by statute in most of the States, and while, according to what is probably the more correct view of the law, they are admissible even under the common-law principles of evidence (*Watkins v. Holdman,* 16 Peters, 25), it does not follow that no con- (732) ceivable combination of facts will raise a presumption of the existence of a statute legalizing the act of a public officer and dispensing with the necessity for the production of a copy with evidence of its genuineness. The certificate is sufficient of itself to shift the burden of proof as to the custody of the record; and conceding that it is shown to be a record, the certificate of the Attorney-General constitutes a part of it and shows that he examined the certificate of organization of the corporation and decided that it was in all respects in conformity with law. It is familiar learning, for which it is need-

less to cite authority, that the certificate of the Secretary of State of North Carolina, attached to a grant of land and attested by the great seal of the State, is sufficient evidence of its official character to warrant its registration without further proof. The Code, secs. 2779, 2781.

The testimony of Cooper and the England deed tended to show a collusive combination to avoid the performance of the contract by forestalling the defendant in buying up a title and preventing him from perfecting his own, as he had a right to do. *Westall v. Austin*, 40 N. C., 1. Plaintiff could ask nothing more than the expense incurred, and this she has not done. *Kindly v. Gray*, 41 N. C., 445. The "broadside" exceptions to the judgment and to the instruction are not sufficiently specific and will not be considered. We have carefully considered such assignments of error as have any merit, and conclude that the judgment must be

Affirmed.

Cited: *Shields v. Ins. Co.*, 119 N. C., 386; *S. v. Turner, ib.*, 849; *Hampton v. R. R.*, 120 N. C., 538; *Wood v. Bartholomew*, 122 N. C., 185; *Johnson v. R. R., ib.*, 958; *Springs v. Scott*, 132 N. C., 561; *Keener v. Kelly*, 133 N. C., 786; *Card v. Finch*, 142 N. C., 146; *McAfee v. Green*, 143 N. C., 418; *Thompson v. Rospigliosi*, 162 N. C., 153, 154; *Hurst v. R. R., ib.*, 379, 380; *Power Corporation v. Power Co.*, 168 N. C., 221; *Wooten v. Cunningham*, 171 N. C., 126; *Cross v. R. R.*, 172 N. C., 123.

(733)

L. J. SCHAUL v. CITY OF CHARLOTTE

LICENSE TAX—PAWNBROKERS—CHARTER OF CITY OF CHARLOTTE.

1. The proper procedure to test the validity of a tax is to pay it and sue to recover it back.
2. The charter of the city of Charlotte, by section 37, which provides, "Taxes for city purposes shall be levied on real and personal property, trades, licenses and other subjects of taxation as provided in section 3, Article V of the State Constitution," authorizes a license tax of $250 per annum on the business of pawnbroking.
3. There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one who lends money upon personalty pledged as security.
4. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them.

ACTION tried before *Bryan, J.*, at January Term, 1896, of MECKLENBURG.

There was judgment for the defendant. Plaintiffs appealed.
The facts appear in the opinion of the Court.

Clarkson & Duls for plaintiffs.
Burwell, Walker & Cansler contra.

CLARK, J. The city of Charlotte having laid a license tax of $250 on the business of pawnbroking, in which the plaintiffs were engaged, they followed the proper course to test the validity of such tax by paying it and bringing this action to recover it back.

The plaintiff contends that the tax is invalid, because the charter of the city, ratified 10 March, 1866 (Private Laws 1866, ch. 7, sec. 19, subdiv. 13), authorizes: "On every broker or exchange office, a tax not exceeding one hundred dollars." This point, (734) however, will not avail the plaintiff, for two reasons: First, the charter granted the city of Charlotte (Private Laws 1881, ch. 40, sec. 37) expressly provides: "Taxes for city purposes shall be levied on real and personal property, trades, licenses and other subjects of taxation, as provided in section 3, Article V of the State Constitution." Section 57 of this act repeals all laws in conflict therewith. This act of 1881 confers upon the town, broadly, without restriction, the right to decide what trade and license taxes it shall levy, and necessarily repeals as to "brokers" the limit of $100 existing under the charter of 1866. There is no contention here that $250 is a license so unreasonable in amount as to call for the supervision and protection of the courts. Secondly, even if the charter of 1881 had not repealed the above limitation upon the tax to be levied upon "brokers," the plaintiff could not have claimed protection under it. "Pawnbrokers" is an entirely separate and distinct business and does not come under the generic title, "broker." The word "broker," derived from an Anglo-Saxon word signifying "to use," primarily means an *agent*. It means in law a middleman, or negotiator, between other persons, for a compensation called *brokerage*, who takes no possession of the subject-matter of negotiation, and usually contracts in the name of those employing him and not in his own name; and sometimes it means, in ordinary speech, a dealer in money, notes, bills of exchange, etc. A pawnbroker has none of the characteristics of either kind of brokers. Indeed, he is not an agent at all. He contracts in his own name, has no employer, charges no brokerage, and always takes possession of the property. Neither does he deal in money, notes and bills of exchange, like the second class of brokers above named. In short, his business

(735) is to loan money on the security of personal property pawned or left with him. The business of a pawnbroker is not in the same class with and has no resemblance to that of a broker, in either sense of the latter word. The verbal coincidence of the last two syllables of the longer word being "broker" is purely fortuitous, for a pawnbroker is not a broker at all. The two businesses constituting separate and distinct classes, it would be competent for the city authorities to lay an entirely different license tax upon "pawnbrokers" and "brokers." *Rosenbaum v. New Bern, ante,* 83.

No Error.

Cited: Dalton v. Brown, 159 N. C., 179; *Smith v. Wilkins,* 164 N. C., 140.

CARRIE E. SMITH ET AL. V. W. M. SMITH ET AL.

TRUST ESTATE—CONTINGENT REMAINDER IN LAND—APPLICATION TO SELL LAND AND REINVEST PROCEEDS—EQUITABLE JURISDICTION.

Where land is held under a deed of trust creating contingent remainders a court has no power to order its sale and a reinvestment of the proceeds, when all the interests are not represented in the proceedings, and cannot be, even by classes, because of the uncertainty of future events.

ACTION heard before *Timberlake, J.,* at September Term, 1895, of MECKLENBURG.

On 6 April, 1880, Nancy S. Smith made a conveyance of certain real estate to Carrie E. Smith, W. Mc. Smith and W. H. Bailey, in trust, for the benefit of certain individuals therein mentioned, (736) with limitations and contingent interests to numerous other persons named therein. The purpose of the present action is to induce the court to order a sale of said real estate and direct a reinvestment of the proceeds upon the same trusts and limitations.

His Honor held that the court had no power to order the sale, and plaintiffs appealed.

Clarkson & Duls for plaintiffs.
James A. Bell for defendants.

FAIRCLOTH, C. J. The plaintiffs' application is for an order to sell land and reinvest the proceeds. They show that it would promote their interest if they can do so. The deed under which they derive their interest shows an estate for life in Carrie E. Smith, with divers contingent remainders depending upon the happening of several future events.

However well the Court might be convinced of the propriety of the sale, it is powerless to grant the plaintiffs' application, for the reason that these remainder interests are not and cannot be before the Court, as they can only arise *in futuro*. Whether or when they may arise does not affect the question, as they may do so. They cannot now be represented, even by classes, because of the uncertainty of future events. This rule has been long settled, and the reasoning seems to be exhausted in the following cases cited by the defendant: *Watson v. Watson,* 56 N. C., 400; *Justice v. Guion,* 76 N. C., 442; *Young v. Young,* 97 N. C., 132.

Affirmed.

Cited: Hodges v. Lipscomb, 128 N. C., 63; *Springs v. Scott,* 132 N. C., 555.

(737)

W. G. DELLINGER v. W. A. GILLESPIE

CONTRACT—PAROL EVIDENCE OF CONTEMPORANEOUS AGREEMENT TO CHANGE WRITTEN CONTRACT—MISTAKE—FRAUD—DECEIT—WAIVER.

1. Parol evidence will not be admitted to prove a contract entirely different from that embraced in a writing, except for fraud, mutual mistake, etc.

2. The negligence of a party to a written contract in voluntarily signing, without reading, a contract, no deceit or fraud being shown, will not permit him to contradict its terms by parol evidence.

3. Where, in the trial of an action for the contract price for the erection of lightning rods upon defendant's house, defendant claimed that his signature to the written contract was procured by fraud, and that the writing did not express the correct terms of the agreement, but it appeared in evidence that before the work was commenced defendant read the contract, stated it was not correct, but did not stop the workmen from doing the work or express an intention to sue the plaintiff in damages for the alleged deceit: *Held,* that if there was fraud the defendant waived it, and equity will not permit him to accept the work and refuse to pay for it.

ACTION tried before *Bryan, J.,* at January Term, 1896, of MECKLENBURG, on appeal from a judgment of a justice of the peace.

The contract sued on was as follows:

"ORDER FOR THE ERECTION OF CONDUCTORS.

"MR. U. G. DELLINGER.

SIR:—Erect (or deliver) at your earliest convenience on my residence a system of circuit conductors (5 points and 3 rods to the ground) of the Star lightning rod, in a proper and substantial manner, in accordance with scientific rules; and I will pay for

(738) the same, on completion of work, in cash or note, due on completion, at the rate of 47½ cents per foot for the rod, $3.50 for each point, and price of five feet of rod for each galvanized brace; $5 for each horse, rooster or points of compass; $4 for each arrow and $3 for each ball.

"It is expressly understood by the signer of this order that he signs the same upon his own judgment, after due deliberation by him, without any undue influence having been used or representations made by any agent other than written or printed on this order.

"Dated 10 July, 1895. W. A. GILLESPIE."

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

McCall & Nixon for plaintiff.
C. Dowd and Jones & Tillett contra.

MONTGOMERY, J. The defendant executed the order to the plaintiff which is set out in the case on appeal. The order was signed by the defendant simultaneously with the making of the contract, whatever the contract was. The defendant could read and write, and he signed the paper, according to his own testimony, voluntarily. The plaintiff made no attempt to conceal any of its provisions, handed it to him to read, practiced no trick or surprise on him to induce him to execute it, and as a matter of fact the defendant commenced to read it. He said, as a witness for himself on the trial, that "He (plaintiff) pulled out the paper and showed it to me. * * * Then I signed the paper. I didn't hardly get the first line. I saw the figure '3' and thought it was three rods for the house. I asked if he (739) would put it up to-day, and he said he would put it up to-morrow." It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it. In *Boyden v. Clark*, 109 N. C., 669, it is said by the Court: "If a prudent person, in the exercise of ordinary care and occupying his position, would, by prosecuting his inquiries further or extending his investigations, have ascertained the truth before acting, relief would be refused on the ground of negligence." If we will apply this principle to the case before us, we will see that the defendant's negligence was inexcusable. The defendant's defense is that the plaintiff told him, just upon signing the paper, that he would put up the rods for $20, and he was allowed on the trial to testify to this conversation to show what the contract

was. This testimony was nothing but an attempt to contradict a written instrument executed by the defendant concerning the same matter. It was an attempt to prove by oral testimony a contract entirely different from that embraced in the written one. His Honor erred in admitting the testimony. But, for another reason, the defendant cannot defeat the plaintiff's action. According to his own testimony, when the workman (Uzzell) came next morning to put up the rods the defendant asked to see the paper which he had signed (Uzzell having it in his hand to collect the money after the work should be done), and upon looking at it said that the contract was not stated truly in the paper. Yet he allowed the work to go on and to be completed, in manner and style altogether different from that which he said the true contract provided for. Upon discovering that the written contract was unlike the contract which he alleged he had made with the plaintiff, he should not have allowed the work to go on. Equity will not permit him, under such circumstances, even if there was fraud in the (740) contract, to allow the plaintiff to complete the work and then refuse to pay for it. If the contract had been procured through fraud, as the defendant alleged, he ought, when he had examined it the next morning before Uzzell began the work, to have repudiated it and have forbidden the commencement of the work, or he should have made his election to abide by it, as it was written, with the explicit declaration, then made, of his intention to sue the plaintiff in damages for the deceit. *Knight v. Houghtalling,* 85 N. C., 19. It is not necessary for us to consider whether or not the answer, even after amendment, was sufficient in substance to raise the question of deceit in the contract. There was no error in the matters pointed out for which there must be a new trial.

No Error.

Cited: Boutten v. R. R., 128 N. C., 342, 344; *Cutler v. R. R., ib.,* 484, 491, 496; *Gwaltney v. Ins. Co.,* 134 N. C., 561; *Knitting Mills v. Guaranty Co.,* 137 N. C., 569; *Griffin v. Lumber Co.,* 140 N. C., 520; *Medicine Co. v. Mizell,* 148 N. C., 387; *Aderholt v. R. R.,* 152 N. C., 414; *Leonard v. Power Co.,* 155 N. C., 14; *Bank v. Redwine,* 171 N. C., 564.

ASHBY L. BAKER, EXECUTOR OF VIRGINIA BAKER, DECEASED, v. JOHN H. MCADEN, TRUSTEE, ET AL.

WILL—TRUST ESTATE—TERMINATION OF TRUST BY DEATH OF CESTUI QUE TRUST ACCOUNTING.

1. A trust will continue no longer than the legitimate purposes contemplated in its creation require.

2. A testator devised his residuary estate to his executor, "in trust for my children," with power to manage the estate for the best interest of the beneficiaries, and to sell the same, or any part thereof, at any time and on such terms as he should deem best, directing that if any of the children were dissipated they should receive only a small portion until their habits became improved, and that the portion due testator's daughters should be given to them in their own right, "free from the debts and liabilities of their husbands, at such times as my executor may deem best." There were no limitations over after the death of the children or any of them: *Held*, (1) that the trust is a personal one, which, if the trustees should die before the children, would at once be extinguished, and the estate would become absolute in the children as tenants in common; (2) that such trust would also terminate on the death of the beneficiaries during the trustee's life, in which case the estate would vest in the representatives, legatees or devisees of the children; (3) that the death of one of the daughters terminated the trust as to her share, and vested such share in her devisee, who is entitled to an accounting.

(741) ACTION heard on complaint and answer and demurrer to answer, before *Bryan, J.*, at Fall Term, 1895, of MECKLENBURG.

The plaintiff, by this suit, seeks to compel the defendant, John H. McAden, executor and trustee under the will of the late R. Y. McAden, to account with and pay over to him the share or interest of his deceased wife, Mrs. Virginia M. Baker, in the estate of her father, the testator.

The defendants answered the plaintiff's complaint, and averred that John H. McAden held the estate of his testator, R. Y. McAden, under the trust declared in his will, and that he has not paid to the plaintiff's wife, or to him, since her death, more than they have already received from said John H. McAden, as executor and trustee under said will, because in the opinion and judgment of the said John H. McAden, executor and trustee, honestly and fairly exer-
(742) cised, it was not deemed best for the interest of the beneficiaries that the said executor and trustee do so, and that under the will of the said R. Y. McAden the executor and trustee had the right and power to withhold any further payment to the plaintiff so long as he deemed it prudent and best for all parties interested in the said trust as beneficiaries to do so.

This answer was filed, not only by John H. McAden, but by the beneficiaries under the will of R. Y. McAden (other than the plaintiff).

The plaintiff, by his demurrer, insisted (1) that the trust as to Mrs. Baker terminated at her death, and the legal and equitable estates as to her share and interest merged at that time; (2) that the contention of defendants would be in restraint of alienation and would conflict with the rule against perpetuities, and (3) that no necessity exists for longer keeping the estate together.

His Honor sustained the demurrer and gave judgment for the plaintiff, adjudging him the owner and entitled to the possession of Mrs. Baker's interest in the estate, declaring the trusteeship of John H. McAden (as to such interest) ended, and directing him to account, etc. From this judgment the defendant appealed.

R. O. Burton for plaintiff.
Burwell, Walker & Cansler for defendants.

FAIRCLOTH, C. J. R. Y. McAden died in 1889, leaving a last will and testament, and appointed the defendant, John H. McAden, executor, and left him surviving his widow and several children. In the will, after some specific legacies, the testator says: "All the residue of my estate I give to my brother, John H. McAden, *in trust for my children,* he to have entire control of the same, and he is authorized to sell and dispose of the same or any part thereof at such time (743) and on such terms as he may deem best. He shall also have authority to keep in possession and manage and operate any and all such property as long as he may deem it wise to do so; that he may distribute such portion of said property, or income therefrom, at such times as may deem it prudent, for the best interest of my estate and my children." He then directs that if any of his children are dissipated they shall receive only a small income until their habits are improved, and then says: "The portion of my property due to my daughters shall be given to them in their own right, free from the debts and liabilities of their husbands, at such times as my executor may deem best."

One of the daughters (Virginia) married the plaintiff, and died in May, 1895, leaving a last will and testament, appointing her husband her executor, in which will she devised to her husband, the plaintiff, "all the rest and residue and remainder of my property, of whatever kind and wheresoever situated," and this residue includes her interest in her father's estate. The plaintiff now sues to recover his wife's share in her father's estate, now in the possession of said trustee. The plaintiff insists that by the death of Virginia the trust

became extinct as to her share, and that he is entitled to it as her devisee. This proposition is denied by the trustee.

We will put out of the way some suggestions made on the argument. This is a *personal* trust, and if the trustee should die before the children the trust would at once be extinguished and the estate would become absolute in the children as tenants in common. The court could not appoint a successor trustee, because it could not invest him with the confidence of the testator. *Young v. Young,* 97 N. C., 132. If the children should all die, the trustee still living,
(744) the trust would become extinct, because there would be no beneficiary for whose benefit it could operate, and the estate would vest absolutely in the children's representatives, legatees or devisees, as the case might be.

It is admitted that the estate has been well managed and that the trustee is worthy of the confidence reposed in him. The plaintiff does not put his claim on the ground of *mala fides* or any mismanagement.

There is nothing in the terms of the trust in restraint of the right of alienation, and nothing in violation of the law against perpetuities, which means "a life or lives in being at the testator's death and twenty-one years afterwards."

The question, then, is, does the death of Virginia terminate the trust as to her share in the estate, or does it continue until all the children are dead, if the trustee shall elect so to hold it? It will be noticed that the will declares the trust for "my children" and "for the best interest of my estate and my children." There is nothing in the will indicating a purpose on the part of the testator to mark out the course or control the property beyond the time of "my children." There is no limitation over.

It may be stated as a general rule that a trust will continue no longer than the legitimate purposes contemplated in its creation require. *Payne v. Sayle,* 22 N. C., 460. "Where a power is coupled with a trust or duty, a court of equity will enforce a proper and timely exercise of the power; but if it be given upon a trust, to be exercised in the discretion or upon the judgment of the trustee, the court will not interfere with the trustee's discretion in executing the trust, unless he has exercised his discretion *mala fide.*" *Read v. Patterson,* 44 N. J., 211. We are not aware of any case in which this Court has directly decided this question. The plaintiff's brief contains cases resembling this in some respects, but in none of them is this exact question adjudged.

(745) The case of *Young v. Young,* 68 N. C., 309, is relied upon by the defendant as sustaining his contention. There the trust was for the benefit of the trustee and the children. Here it is

only for the children, and the trustee claims no interest in the estate. There two of the children claimed their shares on arrival at twenty-one years of age. Here there is no claim made until after the death of one of the children. Note the difference. It is manifest that two motives mainly moved the testator to put his property in trust: (1) to protect it against any dissipation of his children in early life; (2) to save the portions of his daughters, "free from the debts and liabilities of their husbands." The reason as to Virginia's share has ceased, as the time when the apprehended danger could take place expired at her death.

Keeping in mind that the trust, as to the whole of the estate, would cease upon the death of all the children, and that there is no intention expressed in the will of a trust for any one except "my *children,*" what reason appears why, upon the death of one of the daughters, the trust should not cease as to her share? We are not informed as to the quantity of the property or its nature, except that it is real and personal property. Is there anything in the condition of the property tending to show that the best interest of the estate would be promoted by keeping it *in solido,* even in the judgment of the trustee, until the final termination of the trust? The answer fails to aver any such facts, and if there be any such the failure or refusal of the defendant trustee to advance them is of itself unreasonable. He does not allege or even suggest that the severance of Virginia's share would impair the value of the remaining shares or be detrimental to the survivor's interest or make it more difficult to control and manage the same for the best interest of the beneficiaries, but sim- (746) ply declines in the exercise of his discretion to pay over the share of the deceased daughter at present. The case of *Toner v. Collins,* 67 Iowa, 369, is directly in point. The estate was devised to a trustee for the benefit of three children, with power in the trustee to manage and control the property, sell and reinvest the proceeds, until the children should marry some worthy person, "with the consent of the executors." The trustee had no interest in the estate and there was no bequest over. One daughter died at twenty-two years of age, unmarried, and had never applied for consent to marry. The court held that marriage was not a condition precedent to the vesting of the title, and that the relation of trustee and *cestui que trust* terminated necessarily at the death of the daughter, and that her devisee was entitled to recover. We consider that the death of Virginia extinguished the trust, the power and discretion of the executor as to her share of her father's estate, and that the plaintiff, her devisee, is entitled to an account and to recover such share.

Affirmed.

Cited: *Dunn v. Dunn,* 137 N. C., 534; *McAfee v. Green,* 143 N. C., 417.

KEYSTONE DRILLER COMPANY v. W. E. WORTH ET AL.

EXCEPTIONS TO REFEREE'S REPORT—PRACTICE—RIGHT OF TRIAL BY JURY.

Although, in case of a compulsory reference, a party may in apt time reserve his constitutional right to a trial by jury at every stage of the proceeding, yet he may waive it by failing to set forth in his exceptions to the referee's report a specific demand for the trial of the precise issue of fact raised by the pleadings and passed upon by the referee in the finding excepted to.

(747) ACTION heard before *Bryan, J.,* at January Term, 1896, of MECKLENBURG.

The same case was before this Court at September Term, 1895, and is reported in 117 N. C., 520, and upon being remanded to the court below the defendant Worth again moved for a trial by jury upon issues tendered by him, and asked his Honor, as a matter of discretion, to grant a trial by jury upon the issues so tendered. His Honor refused the motion, holding, in conformity with the opinion of this Court, that defendant had waived his right of trial by jury, and set the case for hearing at March Term of Mecklenburg Superior Court upon the defendant's exceptions to the referee's report. From this judgment and order the defendant Worth appealed.

Burwell, Walker & Cansler and H. W. Harris for plaintiff.
Clarkson & Duls and Jones & Tillett for defendants.

AVERY, J. When this case was heard on appeal at the last term, the Court held (*Driller Co. v. Worth,* 117 N. C., 520, 521) that, though a party to an action in which a compulsory order of reference has been made may take the precaution to reserve in apt time his right of trial by jury at every previous stage of the proceeding, yet he may still waive it by omitting, when he files his exceptions to the referee's report, to set forth specifically "the points upon which he elects to demand a trial by jury." The exception, it was declared, must contain a definite and specific demand for the trial of an issue of fact raised by the pleadings and passed upon by the referee in the finding excepted to. The ruling of the court rested upon the principle that even this constitutional privilege must be asserted in such a manner as to show a due regard for the rights of others. The Con-
(748) stitution provides (Article I, section 35) that "all courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due

course of law and right, and justice administered without sale, denial *or delay*. An adversary party ought not to be delayed in the final adjudication of the controversy by the fact that the exceptions are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. Nor ought he to be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. The exception ought either to embody a formal issue arising out of the pleadings and covered by the adverse finding, or it ought plainly and unmistakably to point out the terms of the inquiry that it is proposed to submit to the jury. With such specific knowledge of the nature of the demand, the adversary party, if he see that the issue is one raised by the pleadings, can prepare to meet the question by proper proof. Had the defendant here, when he filed his exceptions to the report, indicated the specific points upon which he demanded that the jury should pass, the plaintiff would doubtless have been ready to meet him, and the trial would have been had at the time when the report of the referee first came up for consideration.

This is not the first time that counsel, apparently at least, have sought the benefit of a rehearing under the guise of asking the court to explain its ruling. If defendant's counsel had embodied the issue tendered, when the case was called for a hearing, in the exceptions to the report, in order to show the precise nature of his demand, he would have been entitled to claim a trial upon such of them as were raised by the pleadings and adversely found by the referee, as he seems to have asserted his right up to that time.

Affirmed.

Cited: Taylor v. Smith, ante, 128, 129; *S. v. Mitchell,* 119 N. C., 786; *Wilson v. Featherstone,* 120 N. C., 448; *Kerr v. Hicks,* 129 N. C., 145; *s. c.,* 133 N. C., 177; *Vanderbilt v. Roberts,* 162 N. C., 274.

(749)

ANNA C. WOOD v. J. L. MORGAN

ACTION AGAINST ADMINISTRATOR—VENUE—REMOVAL.

1. Since, under section 193 of The Code, all actions against administrators, etc., in their official capacity, must be brought in the county where the bonds were given, if the principal or any of the sureties reside therein, an action brought by plaintiffs residing in R. County against an administrator who gave bond and resides in M. County was properly removed to the latter county for trial.

2. When the only cause of action alleged in a complaint is that the defendant, as administrator, neglected and failed to discharge his duties as such, the action can be considered only as brought against him in his official capacity.

MOTION in an action pending in RUTHERFORD, at Fall Term, 1895.

As appears from the complaint filed in this cause, the plaintiffs are the widow and one of the heirs at law of P. B. Morgan, deceased, and the defendant is the administrator of the said P. B. Morgan, deceased, having administered on the estate of P. B. Morgan, in the county of McDowell, in 1886. It further appears from the complaint in this action, that the plaintiffs claim the sum of .....dollars to be due them from the defendant, by reason of his wrongful conversion of funds coming into his hand as administrator, as aforesaid, and also by reason of his negligence in failing to collect certain evidences of debt due the estate of the said P. B. Morgan, deceased.

It is admitted by the parties that the plaintiffs reside in Rutherford County, and the defendant, J. L. Morgan, administrator of the said P. B. Morgan, deceased, and his bondsmen upon his administration bond, do now reside and have since, prior to 1886, resided
(750) in McDowell, in which said county the letters of administration of the said P. B. Morgan were issued.

The defendant in apt time made his motion for the removal of this cause to the county of McDowell for trial. The motion was allowed, and *Timberlake, J.*, signed the following order:

"This cause coming on to be heard against the defendant, who is a resident of McDowell County, and upon a motion of defendant to remove the cause to McDowell County for trial, and it appearing to the court from the complaint that the proper venue in this action is in McDowell County, it is considered that the cause be removed to McDowell County for trial, and the clerk of this court will make a transcript of the papers in the case and transmit them to the Clerk of the Superior Court of McDowell County, who shall place this cause upon the civil-issue docket for trial."

It appears from the summons that the action was brought against the defendant, J. L. Morgan, in his individual capacity, and his bondsmen on his administration bond are not parties to the action.

From said order of *Timberlake, J.*, plaintiffs appealed.

McBrayer & Eaves for plaintiff.
No counsel contra.

FURCHES, J. The judgment ordering the removal of this action from Rutherford to McDowell County for trial must be sustained.

We see no reason for distinguishing it from *Stanly v. Mason,* 69 N. C., 1; *Foy v. Morehead,* 69 N. C., 512; *Bidwell v. King,* 71 N. C., 287.

But it is contended that the cases cited do not apply to this case, under section 193, which is claimed to be an amendment of section 192 of The Code of Civil Procedure, and *Clark v.* (751) *Peebles,* 100 N. C., 348, is cited as authority for this contention. It is true that *Clark v. Peebles* discusses the change of the word "fiduciary" into the word "official," but it quotes *Stanly v. Mason, Foy v. Morehead* and *Bidwell v. King, supra,* approvingly. And there is no intimation in the opinion that this slight verbal alteration has changed the law, as announced in these opinions.

If we understand the ground upon which the judgment of the Court is based in *Clark v. Peebles, supra,* it is that none of the defendants in that case lived in Northampton County. So, if that case announces a doctrine differing from the former decisions of this Court (and we do not understand it does), it does not sustain plaintiff's contention in this case. Here the administration was in McDowell County, where the defendant then and now resides.

The case states that "it appears from the summons that the action was brought against the defendant, J. L. Morgan, in his individual capacity." This must mean that the defendant alone was sued—that he is the only individual sued; but as the only ground of complaint—cause of action—alleged against him is that, as administrator, he neglected and failed to collect in the assets of the estate, and to account and pay them over, as the law required, this is certainly an action against him in his "official" capacity for not discharging the duties of his *office* as administrator according to law.

Affirmed.

Cited: Farmers' Alliance v. Murrell, 119 N. C., 126; *S. v. Snow,* 121 N. C., 673.

(752)

J. N. CALLAHAN v. JOHN WOOD, ADMINISTRATOR OF MRS. E. M. CORBETT, ET AL.

CLAIM AGAINST DECEDENT'S ESTATE—SERVICES OF RELATIVE—"POSTMORTEM" CLAIMANT.

1. Although when work is done for another the law implies a promise to pay for it, such presumption may be rebutted by the relations of the parties implying mutual interdependence.

2. The law does not regard with favor claims set up, after death, against the decedent's estate, in the absence of any agreement or intention between the parties prior to the death.

3. Where a son-in-law, with his family and mother-in-law, lived together "as one family" for fourteen years at the house of the mother-in-law, where plaintiff's five chilrden were born, and there was no agreement for payment for services on either side, and no payment was made, except in mutual services: *Held,* that there was no implied promise on the part of the mother-in-law to pay for the services of plaintiff and his wife, and recovery cannot be had against decedent's estate.

ACTION heard before *Timberlake, J.,* at Fall Term, 1895, of RUTHERFORD, on exceptions to referee's report.

The action was brought by the plaintiff (a son-in-law of the intestate of defendant) against the defendant for the value of the services of himself and wife to defendant's intestate, which he placed at $1,000, over and above all set-offs and counterclaims.

The plaintiff filed exceptions to the report, which were
(756) sustained by his Honor, and from the judgment rendered for plaintiff the defendants appealed.

McBrayer & Durham and M. H. Justice for plaintiff.
Webb & Webb for defendants.

FAIRCLOTH, C. J. The plaintiff sues for the value of services rendered his mother-in-law prior to her death. The referee finds in substance that the mother-in-law had property sufficient for her
(757) support, and that the plaintiff married her daughter at and he and his wife lived in the house of her mother for fourteen years before and until the death of the latter. He also finds that "Mrs. Corbet and plaintiff's family lived together as one family during the time," in the house of the mother-in-law, and that plaintiff's five children were born under her roof, all the parties rendering assistance to each other during that time. There was no agreement to pay either way, and nothing was paid, except in such mutual services.

Does the law imply a promise to pay the plaintiff for the services of himself and wife under these circumstances? We think it does not. The general rule is that when work is done for another the law implies a promise to pay for it, and it is based on the presumption arising out of the ordinary dealings among men. But this presumption may be rebutted by the *relations* of the parties. The cases of father and child, stepfather and child, grandafther and child, have been held to be exceptions to the rule in which they were not in the relation of strangers. Is there any reason more favorable to a son-in-law, under the situation in the present case, where the relation of "one family" was established and recognized by the parties until death, without any fact found or evidence tending to show that there was any in-

tention on the one part to pay for the services or on the other part to charge for the same? The law does not look favorably upon such after-death charges, in the absence of any intention between the parties prior to death.

We do not put our decision entirely on the kinship relation, but also on the "one-family" relation established and maintained by the parties and the entire absence of any intention to the contrary on the part of either party. We approve of the language of *Ruffin, J.*, in *Williams v. Barnes*, 14 N. C., 348, saying: "Such claims (758) ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence sow jealousies in families." *Hudson v. Lutz*, 50 N. C., 217; *Young v. Hermon*, 97 N. C., 280.

Reversed.

Cited: *Avitt v. Smith*, 120 N. C., 394; *Lipe v. Houck*, 128 N. C., 118; *Hicks v. Barnes*, 132 N. C., 150; *Stallings v. Ellis*, 136 N. C., 72; *Whitaker v. Whitaker*, 138 N. C., 206; *Dunn v. Currie*, 141 N. C., 127; *Winkler v. Killian, ib.*, 580.

PIEDMONT WAGON COMPANY v. JOHN BOSTIC ET AL.

CONTINUANCE—DISCRETION OF TRIAL JUDGE—APPEAL.

The matter of granting or refusing a continuance of a cause for trial rests in the discretion of the trial judge, and the exercise of such discretion is not reviewable on appeal, in the absence of gross abuse.

ACTION tried by *Timberlake, J.*, and a jury, at Fall Term, 1895, of RUTHERFORD, upon complaint, answer and issue.

When the case was called for trial plaintiff announced its readiness, and defendants asked for a continuance and offered an affidavit of John Bostic and certificate of Frank Bright, M. D. *Contra*, it appeared that the affidavit of defendants failed to state that the facts upon which their application was grounded came to his knowledge too late to allow them to apply for a continuance, as provided. (Section 401, Clark's Code, 227 C. C. P.; The Code, sec. 401.) Further, that the action was on two notes, the execution of which defendants admitted in their answer, and the defendants, by letters written plaintiff, had recognized their liability therefor. Further, (759) that this was the third term at which the cause had been at issue, and that plaintiff's secretary, Mr. Dixon, had attended three terms of this court as a witness in the case. It further appeared that

John Bostic, one of the defendants, was present in court, and that he had personal knowledge of all the facts which they proposed to prove by the absent parties, and that their testimony would only be corroborative. The court first found on the evidence that the ends of justice did not demand a continuance, and refused the motion of defendants, and defendants excepted and appealed. The court here stated that if defendants would pay all costs of the case and include in it the expenses of plaintiff's secretary (Mr. Dixon's) attendance at this term, he would continue the case for them. Defendants declined to accept these terms, and the court proceeded to trial. There was a verdict and judgment for plaintiff. Defendants moved to set aside the verdict, upon the grounds that the court erred in the exercise of its discretion in forcing defendants to trial, which was the only exception made during the trial. Motion denied. Defendants appealed.

McBrayer & Eaves for defendants.
No counsel contra.

CLARK, J. Continuances are not favored by the law. One of the immortal provisions of *Magna Charta* is that justice shall neither be delayed nor denied, and these are coupled together, for a delay of justice is often a denial of justice. Still there are cases in which a continuance should be granted in the interest of justice. The Code, sec. 401, prescribes that the application, if possible, shall always be made thirty days before the trial term, and that "the appli-
(760) cant shall in all cases pay the cost of the application." The next section (402), permitting a continuance to be granted at term, prescribes, among other requisites, that unless the affidavit shall set out that the grounds for a continuance arose or came to the knowledge of the applicant too late to apply before the term, as prescribed in section 401, "and that the application was made as soon as it reasonably could be after knowledge of such facts," the continuance "shall not be granted, except on the terms of the payment of the cost in the action for the term." These sections, in the judgment of the Legislature, not being sufficient to protect litigants against the "law's delay," which the dramatist enumerates as one of the great ills which "flesh is heir to," the act of 1885 (chapter 384) was passed, permitting counter-affidavits to be offered and prohibiting the judge to allow any continuance, "unless he shall be satisfied, after thorough examination of the evidence, as aforesaid, that the ends of justice demand it." If left in doubt, he must refuse the continuance. It has often been held that the matter of granting or refusing a continuance was not appealable. See cases cited in Clark's Code (2d Ed.), 368. Certainly it

must be a very gross abuse which would authorize an appeal in such cases. Here, not only was there no abuse of power, but in the light of the above statutes his Honor ought not to have granted the continuance.

Appeal Dismissed.

Cited: Walters v. Starnes, post, 843.

(761)

R. H. SIMMONS ET AL. v. ALEXANDER ALLISON ET AL.

RECEIVERS—CONTROL OF PROPERTY—DISCRETION OF COURT.

The custody of a receiver is the custody of the law; and the court, having power to instruct such receiver as to the exercise of his duties, may in its sound discretion direct to whom the property in the receiver's hands shall be rented. Unless grossly abused, the exercise of such discretion is not reviewable.

PETITION of defendants to rehear case, in which a *per curiam* judgment (without written opinion) was rendered at February Term, 1895, of the Supreme Court, affirming the judgment of *Winston, J.*, at October Term, 1894, of MECKLENBURG.

Clarkson & Duls and J. W. Keerans for petitioner.
Burwell, Walker & Cansler and George E. Wilson contra.

CLARK, J. This is a petition to rehear the former decision of this Court as to the receivership in this case. The custody of a receiver is the custody of the law, and the judge had power to instruct the receiver as to the exercise of his duties. He was under the supervision and control of the court. The property in his hands being a church, it was eminently proper that it should not be rented out for any other purpose nor to any other denomination; also, in renting it out, it was within the discretion of the court to direct it to be rented, if possible, in accordance with the wishes of the larger part of the congregation. His Honor might inform himself to his own satisfaction as to that particular, by personal inquiry or by affidavits or (762) by taking the sense of the congregation by ballot, or in any other mode he might think proper. The result of the inquiry, thus made or however made, was not binding on the court, which might disregard the report made to it by the receiver as to the wishes of the congregation and direct a renting to any other person. In fact, on the report made as to the preferences of the congregation in regard to a

renter, as thus ascertained, the court heard exceptions and numerous affidavits, and finally made its decision and directed the receiver to whom to rent. Such supervision and instruction of the receiver as to the renting of the property in his hands necessarily rest in the sound discretion of the judge, and there is nothing to show that it was abused on this occasion. The receiver was directed to require a reasonable rent and security for its payment. While the contestants had different preferences as to a renter, the choice of renter could in nowise affect or prejudice the legal rights of either party. The possession of the renter would be the possession of the receiver, *i. e.*, the possession of the court. Before the litigation began, the parties, describing themselves as "trustees of the African Methodist Episcopal Zion Church," by agreement, placed the church in the possession of the sheriff, Z. T. Smith, and the judge, after litigation begun, very considerately and properly appointed the same person the receiver. The former judgment of this Court is affirmed and the petition to rehear is dismissed.

Petition Dismissed.

(763)

R. H. SIMMONS ET AL., AS TRUSTEES OF THE AFRICAN METHODIST EPISCOPAL ZION CHURCH, v. ALEXANDER ALLISON ET AL.

ACTION, NATURE OF, DETERMINED BY BODY OF COMPLAINT, NOT BY PRAYER—RELIGIOUS SOCIETIES—RIGHT TO CHURCH PROPERTY—ACTION BY TRUSTEES—DEED—MISNOMER OF GRANTEE—LATENT AMBIGUITY.

1. The nature of an action is not determined by the prayer, but by the body of the complaint, a party being entitled to receive any relief which the *allegata* and *probata* entitle him to ask for.

2. Where a complaint alleges that plaintiffs are the lawful trustees of a church and entitled to the use and management of the church property; that defendants claim possession of the church as trustees and withhold its control from the plaintiffs, and pray that the plaintiffs, as the lawful trustees, be let into possession of the property and be protected in its management, and that the defendants be restrained from interfering with the plaintiffs in the discharge of their official duties as trustees; and it further appears that neither set of trustees is in exclusive possession, but that the property is, by agreement, in the hands of a stakeholder: *Held*, that such complaint must be considered, not as a complaint in an action of ejectment, but as an application for an injunction to determine the rights of the parties as trustees and to restrain an unauthorized body from interfering in the discharge of certain duties. (FAIRCLOTH, C. J., dissents.)

3. In an action to determine the rights of the plaintiffs as trustees of a church (Clinton Chapel) it appeared that the church had been organized as a branch of the African Methodist Episcopal Zion Church, and for twenty-eight years had sent delegates to and had received ministers appointed by

the conference of that connection, had conformed to its discipline and had paid the charges assessed by the conference, and the minutes of the district and annual conferences of the African Methodist Episcopal Zion Church showed that Clinton Chapel, the church in question, had been continuously represented and its name borne on the conference roll since its organization: Held, that Clinton Chapel must be considered as belonging to the African Methodist Episcopal Zion Church, and trustees elected in the manner prescribed by the discipline of that connection are the lawful trustees of Clinton Chapel and entitled to manage its property and affairs.

4. A deed to a corporation is valid, though there is a mistake or omission in the title, if it can be shown what corporation was intended. *Hence,*

5. Where a deed to the original trustees of a church was to the "trustees of the African Methodist Church," and it is shown that they were in fact members of the "African Methodist Episcopal Zion Church," that there is no such organization as the "African Methodist Church," and that the property conveyed by the deed had been used, known and recognized for twenty-eight years by the bishop, conference and congregation as the property of the African Methodist Episcopal Zion Church: *Held,* that in the trial of an action by the trustees of the African Methodist Episcopal Zion Church to obtain control and management of the property it was competent to explain the latent ambiguity and to show that the trustees of the African Methodist Episcopal Zion Church were the intended grantees.

PETITION by defendants to rehear case between same (764) parties, decided at February Term, 1895, of the Supreme Court, by a *per curian* judgment, without written opinion, affirming the judgment rendered for the plaintiff by *Graham, J.*, at March Term, 1895, of MECKLENBURG.

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

Maxwell & Keerans and Clarkson & Duls for petitioners.
Burwell, Walker & Cansler and George E. Wilson contra.

CLARK, J. This is a petition to rehear a former decision of this Court in this case, which is a controversy between the trustees of a church, the plaintiffs complaining that they constitute the majority of the lawful trustees, the minority of the lawful trustees having illegally associated the other defendants with them. The defendants contend that they are the lawful trustees. Each board claims that its pastor should officiate.

Some confusion of ideas has been brought about on the (765) argument by an effort to treat this as an ordinary action of ejectment, and to give the parties, who are accidentally defendants (made so for the purpose of having them restrained from interfering with the pastor and board of trustees previously officiating), the bene-

fit of not having to prove title and to throw that burden on the plaintiffs. A careful examination of the pleadings will show that there is not a single feature of an action of ejectment in the case. It is in every respect an injunction proceeding, to restrain an unauthorized body from interfering in the discharge of certain duties. Both parties are admittedly members of the congregation; neither pleads that it is an exclusive possession. Both admit that at the time the action was brought the church was in the exclusive possession of neither, but by agreement was in the hands of a stakeholder, "to hold as the agent of all the parties" until the rights of these contending parties to control and manage the property for the whole congregation and to recognize the pastor could be passed upon. An agreement was made on 10 September, 1894, and signed by both parties, as follows: "Whereas a difficulty has arisen between certain of the trustees of the African Methodist Episcopal Zion Church in regard to the possession of the property, now it is agreed that Z. T. Smith, as sheriff, as the agent of all parties concerned, shall take possession of the property and hold the same, as the agent of all the parties, until Thursday, 13 September, 1894, and such other or further time as may be agreed upon hereafter, without prejudice to the rights of any of the parties contending therefor." On 13 September all the parties again signed an agreement: "The above agreement, by consent, is continued in force until the matter is settled by the civil courts." This action
(766) was begun on 15 September, 1894, five days after the signing of the first-named agreement. At that time both parties were in possession, through their common agent, neither side more than the other, and both sides agreeing that the controversy was between them, as "trustees of the African Methodist Episcopal Zion Church," and that Z. T. Smith should hold it for all of them as such trustees. In the answer filed by the defendants on 29 September they again recognize and reaffirm this agreement, asking in their prayer for relief that the property remain in the possession of Sheriff Smith, "according to the aforesaid agreement," which is set forth as "Exhibit C," and in an exception taken to the order of the judge confirming a report of Sheriff Smith, who had been appointed receiver by the court, the defendants again refer to this agreement of 10 September and rely on it. Nor do the plaintiffs in their complaint set out a cause of action in ejectment. The complaint alleges the organization of the church at Clinton Chapel in 1866, and its membership in the organization known as the African Methodist Episcopal Zion Church, which is divided into episcopal districts, etc., and its receiving its pastors ever since its organization from said African Methodist Episcopal Zion Church, and its representation by delegates in all the church conferences of that

church; that on 8 September, 1894, just before this action was brought, the defendants, claiming to be trustees, forcibly withheld the use of the church from the pastor previously recognized, R. H. Simmons, and that by reason of such unlawful conduct of the plaintiffs the lawful trustees cannot "perform their duties as trustees to said congregation in respects to said property and have it in proper condition and readiness for religious worship"; that the defendants claim the possession of the church, as trustees, and withhold its control from the plaintiffs, who are the lawful trustees; that the alleged election of the defendants as trustees was illegal, except as to two of them, and that the defendants are "interfering with the (767) plaintiffs in their proper and regular discharge of their duties, to the great injury and scandal of the said church and its congregation." The prayer is that the plaintiffs, as lawful trustees, be let into possession of the property of said congregation and protected in their management of it, and that the defendants be restrained from interfering with the plaintiffs in the discharge of their official duties as trustees, and from attempting themselves to act as trustees, and for a receiver, if deemed necessary. The nature of an action is not determined by the prayer, but by the body of the complaint. A party may demand the remedy which the *allegata* and *probata* entitled him to ask for. Judged by that criterion, this is not an action for possession, notwithstanding the prayer for such relief. *Harris v. Sneeden,* 104 N. C., 369; *Jones v. Mial,* 82 N. C., 252. The answer denies that Clinton Chapel was ever an integral part of the African Methodist Episcopal Zion Church, and avers that on 8 September, 1894, the pastor, Simmons, with some others, undertook to take charge of the church and prevent the defendants, the lawful trustees from exercising their duties, they being in control as officers of said congregation; that legal proceedings being imminent, the agreement of 10 September, above set out, was entered into by both parties, by which Z. T. Smith was put into possession, and the prayer is that the plaintiffs be restrained from interfering with the defendants in the discharge of their duties or the congregation in its enjoyment of its rights and privileges.

It will thus be seen, as has been said, that there is no element of the action of ejectment in the case, neither in fact nor technically. The controversy is, as the agreement between the parties sets it out, "a controversy between the trustees." The complaint (768) does not allege possession in the defendants nor ask that they be put out. The answer admits the agreement, set up in the complaint, that the possession of the property is in Z. T. Smith, holding for all parties. The plaintiffs and defendants all agree in their pleadings that the *cestui que trust* are the congregation of Clinton Chapel, and

there is no dispute as to who are the congregation. It is one and the same body. The controversy is not over the title and possession, which are admittedly in the congregation, and no ejectment from the premises is sought. The trustees on both sides are admittedly members of the congregation. The true controversy is that the plaintiffs say they are the regularly elected trustees, to act on behalf of the congregation and to recognize the pastor sent them by the African Methodist Episcopal Zion Church, with which organization the church has associated for twenty-eight years, from its organization up to this difficulty, and they ask that the defendants be not put out, but enjoined from interfering with the plaintiffs in the discharge of their functions as agents and trustees of the congregation. The defendants aver that they are the lawfully selected trustees and agents for said congregation; that though Clinton Chapel has acted with the African Methodist Episcopal Zion Church the years stated, it was not an obligatory and binding membership, but a voluntary connection, which could be discontinued at will, and in their turn they ask that the plaintiffs be restrained from interfering with them in the discharge of their official functions. It will thus be seen that possession of the property is not in controversy, as that is admitted to be in the congregation and by agreement temporarily in the mutual agent of the two boards to be held for such congregation. Nor is the title in controversy, as both sides claim under the same congregation, each board claiming to act as the agents
(769) or trustees of said congregation. The collateral question of title raised is not the title to the property in either the plaintiffs or the defendants, but the plaintiffs claim that Clinton Chapel, being an integral part of the large connectional system known as the African Methodist Episcopal Zion Church, they could not be deposed from their trusteeship in the irregular manner in which the defendants claimed election. The latter, in their agreement of 10 September, had admitted that this congregation was a part of the said African Methodist Episcopal Zion Church, and thrice subsequently refer to and rely on the agreement containing that admission; but, pressed by the charge of irregular election, they set up a new plea, that the congregation and church of Clinton Chapel were only tacitly, not legally, a constituent part of the African Methodist Episcopal Zion Church, and that it had a right, as a sovereign, independent body, to secede and assert its rights, to elect the defendants trustees and refuse longer to receive the pastor sent it by the African Methodist Episcopal Zion Church.

This is the meat of the controversy, and it would be malpractice to apply the technical rule of an action of ejectment to this cause,

which the parties themselves correctly set out as a "controversy between the trustees of the African Methodist Episcopal Zion Church." The subsequent change of front by the answer of the defendants, alleging in effect the reserved sovereignty of the Clinton Chapel congregation and its right to secede from the African Methodist Episcopal Zion Church, in nowise affected the title, for both the plaintiffs and defendants claim under the same source of title, to-wit, election by the congregation of Clinton Chapel. Without the new plea, the defendants were estopped to deny the right of the plaintiff, Simmons (sent to that congregation by the bishops of the African Methodist Episcopal Zion Church) to officiate. If they could make good their newly asserted claim of the reserved sovereignty and right of (770) secession in the Clinton Chapel congregation, then if in addition they could also prove their regular election by that congregation, they could maintain their right, acting for such independent congregation, to reject the pastor sent them by the bishops of the African Methodist Episcopal Zion Church.

Thus the controversy is not one of title or possession between plaintiffs and defendants, but as to the regularity of the election of the two contending boards, both claiming to represent the identical congregation, and whether such congregation was an integral part of the large connectional system known as the African Methodist Episcopal Zion Church and subject to its discipline, or had been all along an independent body, recognized and known as such, but voluntarily and temporarily acting with the larger body, with a reserved right to withdraw at any time. This is the clear-cut controversy between the two boards, each admitting the ownership and possession of the same congregation, and each claiming to be its representative, and asking against the other, not an ejectment, but a restraining order against interference by the other in discharge of their official duties.

Under the congregational system of church government each congregation is independent, and a majority governs. But the connectional system is equally recognized by the law. In that system each congregation is simply a constituent part of a larger association, to which the individual church or congregation bears about the same relation as the township does to the State. If a faction in one of such congregations can take possession of a church building and, assimilating itself to the condition in ejectment, have imputed to itself, by virtue of its trespass, a perfect title, and put upon their former cotenants in the congregation or the former trustees the burden of proving title out of the State, and all the other incidents of an action for title and possession, it would be subversive of the first (771)

principles of justice and an encouragement to violence to get the vast advantage thus imputed to temporary possession and destructive of the connectional system of church government. In probably a majority of cases church deeds are taken by humble and illiterate men when the church is first beginning, and these deeds are often technically defective (as in the present case) or are never recorded. The true controversy, in cases like this, between fellow-members or cotenants of the same church, is not that of title or possession; for if the plaintiffs have it not, neither have the defendants. Both claim under the same title, for both claim under the possession and title of the same congregation. The true question is not one of title and possession, but which party represents the congregation. In the congregational system that is settled by a vote of the particular congregation. In the connectional system the question is, which is the set of trustees elected under the rules of the denomination? But in neither case is the title and possession to be tried upon the principles of an action of ejectment, with the presumptions in favor of the side nimble enough to get in possession. In the present case neither side is in possession or out of possession, and each is seeking to restrain the other. The plaintiffs, elected on the nomination of the pastor of the African Methodist Episcopal Zion Church, as required by its discipline and as all previous boards had been, claim to be the regular official trustees. They also show that for twenty-eight years continuously the congregation had recognized itself as being a part of the connectional system of the African Methodist Episcopal Zion Church. The defendants, while not denying the fact of association with the African Methodist Episcopal Zion Church insist that their evidence shows that this association with the African Methodist Episcopal Zion Church was volun-
(772) tary and to be dissolved at the will of the congregation. They also show that the deed in 1866 was made to the "African Methodist Church." The plaintiffs reply by evidence that there was not then and is not now any "African Methodist" Church in existence; that the African Methodist Episcopal Zion Church was sometimes so called, and, the trustees in said deed having been at the time of the execution of the deed members of the African Methodist Episcopal Zion Church, that this and all the other evidence, with the conduct of the congregation for twenty-eight years, show that the grantee in the deed was intended to be and was the "African Methodist Episcopal Zion Church." This real point of controversy was thoroughly illuminated by the evidence and could not have been misunderstood by the jury, who found the issues for the plaintiffs. In all this controversy there is nothing which

calls for the application of the principles and presumptions of an action for ejectment for real estate, and the exceptions based on that view of the case are out of place.

This is a proceeding invoking the equity jurisdiction of the court to restrain interference by the opposite party with the discharge of official duties. As evidence which party is the lawful board of trustees, and therefore entitled to the prayer for injunctive relief, and especially whether the board, whichever is the lawful one, must recognize the pastor sent to Clinton Chapel by the African Methodist Episcopal Zion Church the principal fact for inquiry is whether Clinton Chapel is an integral part of the general organization known as the African Methodist Episcopal Zion Church or is an independent, sovereign church which has been temporarily acting with the larger organization. On this disputed question of fact the contest was made. The evidence tends strongly to show that Clinton Chapel had always been an integral part of the African Methodist Episcopal Zion Church, and the jury so found the fact to be. The evidence for the plaintiffs was that the congregation was first organized in 1866, by Edward Hill, a preacher sent by the African Methodist (773) Episcopal Zion Church, and that it was organized as a part of that connection, and from that date down to the beginning of this litigation all the pastors have been ministers of the African Methodist Episcopal Zion Church and annually sent by the conferences of that church, all of them being received without suggestion of opposition, and three of these pastors have been since elected bishops of that organization. The minutes of the district and annual conferences of the African Methodist Episcopal Zion Church were in evidence, and corroborated the statements of the bishops and ministers of that church, who testified as to the unbroken succession of ministers, giving their names and years of service, sent by the African Methodist Episcopal Zion Church to Clinton Chapel, and that the latter had been continuously represented by delegates in the conferences of the African Methodist Episcopal Zion Church and its name borne on the conference roll regularly since its organization in 1865 or 1866. During these years Clinton Chapel was regularly assessed for its proportion for bishops' salaries and other connectional charges, for which purpose collections were regularly taken up, as in all other churches of the same denomination. It was also shown that all the original trustees were members of the African Methodist Episcopal Zion Church, and all others, down to and including these parties, were on the membership book of Clinton Chapel, which was headed "African Methodist Episcopal Zion Church," and the discipline and hymn book of that

connection had been regularly used. It was also in evidence in the discipline the church was sometimes referred to by its full title as the "African Methodist Episcopal Zion Church," and sometimes as the "African Methodist Church," for short, but that there was no organization in the United States styled legally the "African Methodist,"
though the African Methodist Episcopal Zion Church was
(774) sometimes (as in the discipline) referred to as the "African
Methodist"; that this Clinton Chapel Church building was dedicated in 1872 as a church of the African Methodist Episcopal Zion Church by one of its bishops and with the ceremonial of that church, it being presented by the trustees in the regular form, and there was no dissent by any member of the congregation; that the trustees were uniformly, during the years from 1866 to 1894, elected by the congregation, on the nomination of the pastor sent to the church by the African Methodist Episcopal Zion Church, according to the requirements of the discipline of that organization; that the lettering over the door of Clinton Chapel had been for many years past "A. M. E. Z. Church." These bishops and pastors and other witnesses testified that there had never been any suggestion that Clinton Chapel was an independent congregation, or was not in full fellowship with the African Methodist Episcopal Zion Church, till after this trouble began, in 1894; that the pastors sent by that church had always been received without objection, and that since this litigation in a collateral proceeding as to a receiver the church membership of Clinton Chapel had been consulted, by order of the judge, as to what pastor they would prefer the church rented, pending litigation, and 251 had indicated a preference for the pastor who had been sent by the African Methodist Episcopal Zion Church and 73 a preference for the "independent" pastor, and the judge had found as a fact that this was a correct result of the ballot he had caused to be taken for his enlightenment as to the wishes of the congregation. It was also in evidence that when Clinton Chapel was first organized (by a preacher of the African Methodist Episcopal Zion Church) services were held in a brush arbor till a church was built, the greater part of the funds for which building was procured from the Freedman's Bureau, through Bishop Hood,
of the African Methodist Episcopal Zion Church, the balance
(775) being raised by church collections and festivals held under the
pastorship of ministers sent to the congregation by the African Methodist Episcopal Zion Church. The evidence is much more detailed, but this is the substance of it. The evidence offered by the defendants did not controvert much of the above evidence at all, and as to the rest of it the weight of evidence was for the jury, who found for the plaintiffs, and cannot be considered by us.

The defendants rested their case largely upon the ground that the deed for the church lot, executed in 1866, described the trustees as "Trustees of the African Methodist Church." The plaintiffs contended that this was a mere latent ambiguity, and that they had shown that neither in 1866 nor since had there been an "African Methodist Church" in Charlotte or in the United States, but that the African Methodist Episcopal Zion Church was sometimes colloquially and, indeed, its book of discipline was casually referred to as the "African Methodist." The plaintiffs also insisted, as explaining the ambiguity and the true meaning of the deed, upon the evidence showing that the trustees named in this deed of 1866 were in fact members of the African Methodist Episcopal Zion Church, that all the trustees since had been members of that church and elected on the nomination of the pastor sent by that church, and that the defendants in the agreement of 10 September, 1894, after this controversy begun, had described themselves as "Trustees of the African Methodist Episcopal Zion Church," and had referred to and ratified that agreement by insisting on it in their answer in this action, and that the church building, in 1872 had, in the presence and with the assent of the congregation, been presented to the bishop of the African Methodist Episcopal Zion Church for dedication, and that for twenty-eight years from 1866 till 1894, Clinton Chapel had been, without a suggestion of independency, in every way recognized by itself and by the connection as an integral part of the African Methodist Epis- (776) copal Zion Church. This evidence was competent, and that point of view was correctly submitted to the jury and passed on by the verdict.

A deed to a corporation is valid, though there is a mistake or omission in the title, if it can be shown what corporation was intended. *Asheville v. Aston,* 92 N. C., 578. There the deed was made to "Asheville Division, No. 15," when the true name of the bargainee was "Asheville Division, No. 15, of the Sons of Temperance." The Court held that the ambiguity was a latent one and could be explained. A misnomer of a corporate body, when the party intended the corporation by its proper name, is not material, and its proper name may be proved by parol. *Ryan v. Martin,* 91 N. C., 464. Where a testator bequeathed a legacy to the "Deaf and Dumb Institute," and no person of that corporate name could be found, but persons were found by the corporate name of "President and Directors of the North Carolina Institute for the Education of the Deaf and Dumb," who were familiarly known by the former name, it was held that the misnomer was a latent ambiguity, and the bargainee, being identified by evidence, was entitled to the bequest. *Institute v. Norwood,* 45 N. C., 65.

Where a deed is made to a partnership it was held to be good, and that parol testimony could be introduced to show who was intended as the grantee (*Murray v. Blackledge,* 71 N. C., 492), and the Court say in this case that "there is a latent ambiguity in the deed which can be explained." See, also, *Hogan v. Page,* 2 Wall., 605. The rule is that as long as the interested party can be identified any mistake in the name is not fatal to the deed. 5 Am. and Eng. Enc., 432; *Andrews v. Dyer,* 16 Atl., 405. It was competent in the present
(777) case to show that there was a misnomer in the deed, and to explain that latent ambiguity. *Asheville v. Aston, supra.*

The case was fairly presented to the jury by the court, and was doubtless ably argued there by counsel, as it was in this Court, and the jury found for the plaintiffs. Many exceptions were taken by the defendants to the charge, but they are without merit, and it would be a needless consumption of time to go over them in detail, as they are based on the incorrect assumption that this was an action of ejectment; and we have shown that it was not, but a mere equitable proceeding for an injunction, each board contending that the other was interfering with its proper control of the church, and the real question of fact being whether Clinton Chapel was a part of the greater organization known as the African Methodist Episcopal Zion Church or was an independent, sovereign body of itself. This the jury found for the plaintiffs, and thereupon they were entitled to the injunction as prayed for.

His Honor might well have put the issue in that or some similar form. The responses to the second, fourth and fifth issues, which were submitted by both parties, dispose of the controversy. That the judge also submitted the first and third issues, which would suit rather an action of ejectment, was an inadvertence calculated to prejudice rather the plaintiffs than the defendants. But at any rate the first issue was not objected to on that ground, and the third was submitted by consent, and the contest having been fought out on the real issue of fact formulated by the pleadings, and this appearing from the whole tenor of the evidence and the charge, the defendants cannot complain of the submission of irrelevant issues, since they did not except on that ground in the court below. *McDonald v. Carson,* 94 N. C., 497; *Culbertson v. Ins. Co.,* 96 N. C., 480; *Cumming v. Barber,* 99 N. C., 332. Indeed, the form of issues is of little importance if the
(778) material facts in controversy, as they appear in the pleadings, are clearly presented by them and will allow the parties to present to the jury every material view of the law and the facts. *Paper Co. v. Chronicle Co.,* 115 N. C., 147; *Allen v. Allen,* 114 N. C., 121; *Fleming v. R. R.,* 115 N. C., 676. This judgment below has here-

tofore been affirmed by this Court; but as counsel for the appellant have earnestly argued for a rehearing, upon the ground that technically error was committed, treating this as an action of ejectment, we have taken some pains to point out that the pleadings, neither in the complaint nor answer, make it an action of ejectment, and that the true controversy was as to the question whether Clinton Chapel was an independent body or a member of the African Methodist Episcopal Zion Church, and upon the determination of that fact depended whether the prayer of the plaintiffs for an injunction against the defendants or the prayer of the defendant for an injunction against the plaintiff should be granted. This was the only substantial prayer for relief made by either or justified by the pleadings. On the whole case we still think, after a second and more complete investigation, that substantial justice has been done, and that the verdict and judgment below are in accordance with the law and the evidence.

Judgment Affirmed.

FAIRCLOTH, C. J., dissenting: I am unable to agree with the majority of the Court as to the nature of this action. The complaint, after reciting certain church regulations, alleges that the defendants "entered forcibly into said church or chapel and took possession thereof, and that said parties have forcibly withheld possession thereof ever since." Their prayer is, among other things, (779) "that they be let into possession of the property," and "that the defendants be restrained and enjoined from interfering in any way with the plaintiff's possession and use of said property." The defendants deny the material allegations of the complaint. Much evidence was introduced, including the Carson deed to certain trustees, in trust for "the religious congregation known as the African Methodist Church, in the city aforesaid (Charlotte), exclusively."

The first issue submitted was, "Are the plaintiffs, as trustees of the African Methodist Episcopal Zion Church, the legal owners and entitled to the possession of the premises described in the complaint?" After verdict, the judgment was "that plaintiffs are the legal owners and lawfully entitled to the possession of the premises in dispute," and a writ of possession to put plaintiffs in possession is ordered to issue, and judgment against defendants for cost and damages.

I am persuaded that this is an action of ejectment, and that the purpose of the parties was to try the title of the church lot under the Carson deed. After unfriendly and bitter feelings arose between the parties, it was agreed by them and their counsel that, in the interest of peace and orderly proceeding, the sheriff of the county should take possession, pending litigation. This in no way affects the gist of action.

I think errors were committed in the course of the trial, materially affecting the verdict of the jury, and that a new trial ought to be granted. I deem it unnecessary to discuss the merits of the controversy in its present complicated condition, as no new trial is granted by the Court.

Cited: Holden v. Warren, ante, 327; *Simmons v. Allison,* 119 N. C., 563; *Sams v. Price, ib.,* 574; *Keith v. Scales,* 124 N. C., 508; *Collins v. Pettitt, ib.,* 736; *Grabbs v. Ins. Co.,* 125 N. C., 394; *Walker v. Miller,* 139 N. C., 456; *Thornton v. Harris,* 140 N. C., 499; *Kerr v. Hicks,* 154 N. C., 271; *Conference v. Allen,* 156 N. C., 526; *Daniels v. R. R.,* 158 N. C., 427; *McLeod v. Jones,* 159 N. C., 76; *Mining Co. v. Lumber Co.,* 170 N. C., 277; *Shannonhouse v. White,* 171 N. C., 18.

(780)

H. CLINE v. M. J. BAKER ET AL.

ACTION FOR DAMAGES—MILLDAM—OBSTRUCTIONS OF STREAM—INSTRUCTIONS—EVIDENCE.

1. Damages may be recovered for injury to land resulting proximately from the maintenance by defendant of a dam, though such injury was aggravated by other causes not within defendant's control.

2. Where, in the trial of an action for damages caused by a milldam, the sole issue was whether defendant's dam injured plaintiff's land, through which a creek passed before emptying into the pond above the dam, it was not error to instruct the jury that if the injury resulted from the filling-up of the creek with sand between plaintiff's land and the pond, by the washing of the hillsides, the falling of leaves and branches, and the failure to clean out the channel, plaintiff could not recover, provided those obstructions did not result from the maintenance of the dam.

3. On the trial of an issue as to whether certain land was injured by the maintenance of a certain dam or by accumulations of sand in a creek passing through the land, evidence as to the tendency of streams generally in the county within the last few years in reference to filling up with sand was properly excluded as being too broad and general and leading to an endless inquiry, calculated to confuse and mislead the minds of the jury.

ACTION for damages to plaintiff's land by defendant's dam and mill pond tried before *Timberlake, J.,* and a jury, at Fall Term, 1895, of CLEVELAND.

There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed, assigning as error the instructions of his Honor and the exclusion of evidence, as referred to in the opinion of the Chief Justice.

Jones & Tillett for defendants.
No counsel contra.

FAIRCLOTH, C. J. The following issue was submitted: (781) "Does the defendant's milldam damage the land of the plaintiff, as alleged in complaint?" Answer: "Yes." A creek passing through plaintiff's land empties into defendant's mill pond, a mile or more above the dam, and plaintiff alleges that the sand washing into the creek is prevented from flowing out by the mill-pond water, and that shoals of sand are produced in the creek, which throws back the creek water on his lands, to his damage. The defendant avers that the nonflow of the sand is caused by rafts and obstructions in the creek and the want of proper ditching.

Numerous witnesses were examined as to the dam, the pond and the condition of the creek, now and at former periods.

His Honor instructed the jury as follows: "The question, and the sole question, for your determination is, is the plaintiff's land injured by defendant's dam? If it is, then he is entitled to recover. If the damage results from any other cause whatsoever, and not from the dam, he is not entitled to recover. So that, if the jury believe that the injury to the plaintiff's land was caused by the filing up of the creek with sand between his line and the mill pond, and that this accumulation of sand in the creek was caused by the washing of the hillsides, the lodging of trees and brush and the failure of the landowners properly to clean out the channel of the creek, and not by the dam or pond, you should answer the first issue 'No,' provided you further find that these obstructions, in the way of accumulations of sand and other things, do not result from the maintenance of the dam or pond. If the jury believe the damage to the land of plaintiff complained of was caused by obstructions in the creek above the head of the mill pond on the land of defendant Baker or other landowners (782) on the creek, or on the land of all of them, and not by the dam, then they should find the first issue 'No,' provided these obstructions do not result from the dam or pond and would not go along out if the dam was removed; but if they would not go along out if dam was removed from the mill, still answer the first issue 'No.'"

The instruction fully covered the contention of the parties, in plain language, and was in no way prejudicial to the defendant, and answered the merits of the defendant's prayers for instructions. Certainly, if the damage resulted from causes over which the defendant had no control, he could not be held responsible. If, however, the dam and pond were the direct cause of the damage, although aggra-

vated by other causes over which the defendant had no control, he would still be liable. *State v. Holman,* 104 N. C., 861.

The only material exception of the defendant as to the evidence was the exclusion of this question: "What has been the tendency of the streams in Cleveland County in reference to the filling up with sand in the last few years?" We think that this question was too broad and general, and was calculated to mislead or prejudice the minds of the jury. The questions presented by the issue pointed to the facts and actual condition of *this* creek and pond. It was therefore irrelevant, and it would have been error to submit it to the jury for that reason. The question, under cross-examination and redirect, concerning the different streams in the county, in different localities and in different soils, and other natural conditions, would have led to an endless inquiry and almost necessarily confused the minds of the jury. The question was properly excluded.

No Error.

Cited: Rice v. R. R., 130 N. C., 380; *Land Co. v. Traction Co.,* 162 N. C., 507.

(783)

COMMERCIAL NATIONAL BANK OF CHARLOTTE v. FIRST NATIONAL BANK OF GASTONIA ET AL.

BANKS—NEGOTIABLE INSTRUMENTS—BANK CHECKS.

1. The holder of a check cannot maintain an action against the bank upon which it is drawn until after its acceptance by the bank.

2. A stipulation stamped on the face of a check, that it will positively not be paid to a certain company or its agents, is a valid restriction and binding on the holder.

3. Such stipulation on a check is not an unreasonable restraint upon trade, and, when made for the purpose of preventing business rivals from ascertaining the extent and nature of the drawer's transactions, is not a boycott or conspiracy against the inhibited collector.

4. The drawer of such a check cannot be sued thereon until the check has been presented to the drawee by some agency other than the inhibited one and payment refused.

ACTION heard before *Starbuck, J.,* at Spring Term, 1896, of GASTON, on a case agreed, as follows:

1. That the plaintiff and defendant banks are both national banks, duly incorporated and engaged in the general banking business, the former being located in the city of Charlotte, N. C., and the latter in

the town of Gastonia, and were so engaged at the times hereinafter mentioned.

2. That at the times hereinafter mentioned the defendants Costner, Jones & Co. were a copartnership, located in the town of Gastonia and engaged in the general mercantile business; also, that the Gastonia Banking Company was at said times a copartnership, engaged in the general banking business, in the said town of Gastonia, as private bankers.

3. That the individual members of the firm known as the (784) Gastonia Banking Company were at said times also engaged in the general mercantile business in Gastonia, under the firm name of John F. Love & Co., and were rivals and competitors with the defendants Costner, Jones & Co. for the trade in the said town and surrounding country.

4. That before 1 October, 1895, the defendants Costner, Jones & Co., being desirous that their rivals in business should not know of or handle the checks drawn by them on the defendant bank (with which they kept their banking account), approached the officers of said bank and requested that some means be devised by which the Gastonia Banking Company might be prevented from handling or collecting the checks drawn by said copartnership on said defendant bank, whereupon the officers of the defendant bank suggested to its codefendants that if the latter would stamp across the face of their checks that such checks would not be honored if presented for collection by the Gastonia Banking Company or its agents such endorsement would prevent said checks from being collected through its rival, the Gastonia Banking Company.

5. That a number of the customers and other depositors with the defendant bank made like requests at and before said time, some of whom were rivals in business with the firm of John F. Love & Co., and some not.

6. That thereupon, and at the request of its customers, the defendant bank had rubber stamps prepared, in conformity with the foregoing suggestions, and furnished same to such of its customers and depositors as desired them; and in fact a great many of its said customers did secure and use said stamps in issuing checks upon said bank, many of whom, however, were merchants in rivalry with the firm of John F. Love & Co., but some were not.

7. That on 2 October, 1895, the defendants Costner, Jones (785) & Co., being indebted to the Charlotte Hardware Company, of Charlotte, N. C., in the sum of $134.41, drew and transmitted to the said hardware company in payment of said debt their check, in the following words and figures:

This check positively will not be paid to the Gastonia Cotton Manufacturing Co., the Gastonia Banking Co., or any of their agents.

COSTNER, JONES & CO.,
SUCCESSORS TO J. D. MOORE & CO.,
GENERAL MERCHANTS AND COTTON BUYERS.

GASTONIA, N. C., Oct. 2, 1895.

Pay to the order of the Charlotte Hardware Company .....$134.41.

(Signed) COSTNER, JONES & CO.

To the First National Bank, Gastonia, N. C.

8. That the Charlotte Hardware Company, upon receipt of the said check, by proper endorsement, assigned and transferred said check to the plaintiff bank for full value, and the plaintiffs thereupon transmitted the said check to the Gastonia Banking Company (its regular correspondent at Gastonia) for collection.

9. That upon receipt of said check the Gastonia Banking Company immediately presented the same to the defendant bank for payment, during legal banking hours, which payment was refused; whereupon, at the request of the Gastonia Banking Company, B. G. Bradley, a notary public in and for said county and State, did, on 4 October, 1895, again present the said check to the defendant bank for payment, during legal banking hours, which payment was again refused, when the said notary duly protested the same for nonpayment and duly notified the drawers and endorsers of said check of its nonpayment.

(786) 10. That at the time of the drawing of said check, and at all times thereafter up till and including the protesting thereof, the drawers, Costner, Jones & Co., had funds on general deposit in the defendant bank, subject to check, more than sufficient to pay said check, which funds at said time were not liable to any lien of said bank or otherwise encumbered, and that said bank refused to honor and pay said check because it was presented through the said Gastonia Banking Company, contrary to the provision of the endorsement on said check.

11. That at the times aforesaid the defendant bank and the Gastonia Banking Company were the only institutions or individuals engaged in the banking business in the town of Gastonia, and after the said check was protested it was returned to the plaintiff, and thereafter this action was instituted against the defendants for a recovery thereon.

12. That the defendant bank never required any of its customers

to stamp their checks with the regular stamp mentioned as a condition of payment, and in point of fact some of its customers did not use said stamp, and these last-named checks were promptly paid by the defendant bank whenever presented.

His Honor gave judgment for plaintiff, and defendants appealed.

Burwell, Walker & Cansler for plaintiff.
Jones & Tillett for defendants.

CLARK, J. The holder of a check cannot maintain an action against the bank upon which the check is drawn until after the acceptance of the check by the bank. *Bank v. Mallard,* 10 Wallace, 153; *Hawes v. Blackwell,* 107 N. C., 196; *Marriner v. Lumber Co.,* 113 N. C., 52. This is the uniform line of decisions in the Federal courts and our own, and it is sustained by the overwhelming weight of (787) authority in other courts, though there are a few decisions in other States to the contrary. The bank is the agent of the drawer; till acceptance of the check, it has assumed no liability to the payee; its liability, if any, is to the drawer whose checks it has agreed to pay, if it has the drawer's funds in hand, and for breach of that contract it is liable to the drawer, not to the payee. "To its own master it must stand or fall." A check is simply an order given by the principal upon his agent, and it is always open to the principal to countermand an order to its agent before it is executed, and there are occasions when it is important, to prevent imposition, that the drawer should have power to stop the payment of his check without casting any liability upon the drawee. If the principal, the drawer, die before a check is presented, it becomes invalid, which could not be the case if the mere drawing the check created any liability in the drawee.

But the more important point, since it is now presented to us for the first time, is the validity of the stipulation stamped on the face of the check: "This check will positively not be paid to the Gastonia Banking Company or its agents." It appears that the check has never been presented to the drawee, the defendant bank, except by an agent of the Gastonia Banking Company. Consequently, if this restriction is valid, the holder cannot maintain this action against the drawer till the check has been presented to the drawee by some other agency and payment refused. In England the system of "crossed checks" has long been recognized as valid. 2 Daniel Neg. Inst., sec. 1585a; *Smith v. Bank,* 10 L. R. (O. B.), which was affirmed on appeal, and is reported 1 L. R., 2 B. Div., 31. By that system there is stamped across the face of the check the name of a certain (788) banker, through whom it must be presented for payment, and

if presented by anyone else it will not be honored. This does not destroy its negotiability in anywise. The present case does not go that far, but merely stipulates that the check will not be honored if presented through one agency named. This cannot be deemed an unreasonable restriction of trade, nor is it a boycott. There is no evidence of a conspiracy to injure the agency named, but it is agreed as a fact that it was an effort on the part of the drawer firm to prevent its transactions and the nature and extent of its business becoming known to a rival house by its checks passing through that channel. Besides, if it were a boycott, the parties to it are the drawer and the payee who accepted the check with that restriction stamped on it; and if it was an illegal transaction the check itself, and not merely the stipulation, which is part of it, would be void. *Ex mala causa non oritur actio.* The restriction is a part of the check (Tiedeman Com. Paper, secs. 41, 42; *Benedict v. Cowen,* 49 N. Y., 396), and if it is invalid the court could not separate the good from the bad (*Saratoga v. King,* 44 N. Y., 87), but it would all be bad and the holder could not recover. In analogy, a conveyance of property, real or personal, with a condition not to alien to a certain person or class of persons, or for a certain time, is valid. *Cowell v. Springs,* 100 U. S., 57; *Gray v. Blanchard,* 8 Pick., 288; Sheppard's Touchstone, 129, 131; Coke on Littleton, 223.

In *Smith v. Lawrence,* 2 N. C., 200, this Court held that a note could be limited so as to be payable to the payee only. But it is not necessary to consider here the principle maintained in that case, that the drawee can by stipulation therein make the check not assignable,

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for this is not attempted here, but there is simply a stipulation that it shall not be paid if presented through the agency named. *Wilcoxon v. Logan,* 91 N. C., 449, holds merely that where a note is made payable to A. B., without the addition of the words "or order," or "bearer," the holder thereof can maintain an action thereon, being the party in interest. There can be no question raised as to the validity of an express stipulation that the note could not be assigned at all, or would not be honored if presented by a particular party, as in this case, nor by any party except one named, as in the case of the English "cross checks." These questions could not arise, for there was in that case no stipulation to either effect. On the facts agreed, judgment should have been entered for the defendants.

Reversed.

Cited: Perry v. Bank, 131 N. C., 118; *Trust Co. v. Bank,* 166 N. N., 120.

MARTHA BURRIS ET AL. v. JOHN BROOKS

TRUSTEE—LIABILITY TO CESTUIS QUE TRUST.

Where plaintiffs' father delivered to defendant a note to be collected and the proceeds to be paid over to plaintiffs when they should become of age, and on the father's death the note was allotted to the widow as a part of her year's allowance, and in compliance with the written order of a justice of the peace, acting with the commissioners who laid off such allowance, the defendant delivered the note to the widow, who collected the same and retained it: *Held*, that the defendant is liable to the plaintiffs for the amount of the note and interest, he being a trustee thereof, and the order of the justice of the peace, who had no jurisdiction over him or the fund, was no justification for the breach of trust.

ACTION tried before *Bryan, J.*, and a jury, at Fall Term, (790) 1895, of STANLEY.

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

The defendant testified as follows: "Hinson requested me to take the notes, and at proper time to collect and keep the money until the two girls came of age and pay over to them. I told him I would take the notes and do the best I could with them. He died in a short while. Shortly after his death A. A. Morton came to get the notes; said they were laid off to the widow in her year's allowance. I told him I wouldn't give up the notes without a written notice from the justice of the peace that laid off the allowance. He came back and brought a written notice that I must give them up. I did so."

The defendant contended (1) that under the evidence there was a bailment of the notes in question, and hence the relation of bailor and bailee, and principles of law applicable thereto, existed; (2) that as the bailment was solely for the benefit of the bailor and for his accommodation, the defendant could be held liable only for gross negligence; (3) that as the defendant took charge of said notes simply as an act of kindness and accommodation, he could be liable for gross negligence only.

His Honor instructed the jury that, upon his own showing, the defendant was liable in damages; that the only matter for them to consider was the amount due, and in their deliberations the pleas and evidence bearing upon the caution, prudence and good faith of defendant should not be taken into consideration. There was a verdict for the plaintiffs, and the defendant appealed from the judgment thereon.

Austin & Price for plaintiffs.
J. Milton Brown for defendant.

(791) MONTGOMERY, J. It would be an idle discussion to go into the question as to whether the defendant was a trustee or whether he was a bailee. His conduct in reference to the trust committed to him was so imprudent that no excuse or palliation can be made for it.

There was placed in his hands by the father of the plaintiffs, who was the holder and owner thereof, a collectible note against J. S. Hinson, to be collected by the defendant and the proceeds paid over to the plaintiffs when they should arrive at the age of twenty-one years. Upon the death of the father, his widow had her year's provisions laid off to her, according to the forms of law, and the commissioners allotted this note, then in the defendant's hands, to her as a part of her year's support. The justice of the peace who acted with the commissioners, in writing, ordered the defendant to turn over the note to one Morton for the widow, and he complied with the order. The widow collected the money due on the note. The order of the justice was an absolute nullity. He had no jurisdiction over the defendant's person, for he was not a party to the proceeding to allot the year's provisions, and if he had been a party the order of the justice would still have been void. A justice of the peace could exercise no jurisdiction over such a subject-matter as was involved in the order to the defendant. The note, or the proceeds of it when collected, was the subject-matter of a trust, the defendant being trustee and the plaintiffs *cestuis que trust;* and the justice could have no jurisdiciton over such a matter. There was no error in any of the rulings of his Honor, and the judgment is

Affirmed.

Cited: Norman v. Hallsey, 132 N. C., 8; *Rousseau v. Call,* 169 N. C., 176.

(792)

TOWN OF SHELBY v. J. F. TIDDY, ASSIGNEE OF FLACK & CO.

TAXATION—TAXES ON PERSONAL PROPERTY—NO LIEN UNTIL LEVY—ASSIGNMENT OF PERSONAL PROPERTY BEFORE LEVY FOR TAXES.

1. Although a tax list, when placed in the hands of a sheriff for collection, has the force of a docketed judgment and execution as to real estate, it creates no lien on personal property, until levied, as against *bona fide* purchasers for value from the taxpayer's assignee for benefit of creditors.

2. Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors.

SHELBY *v.* TIDDY.

ACTION heard before *Timberlake, J.*, at Fall Term, 1895, of CLEVELAND, on a case agreed, as follows:

1. That the town of Shelby is a corporation, with full powers to levy and collect taxes upon all species of property.

2. That J. M. Flack & Sons, on 1 June, 1894, were merchants and doing business in the town of Shelby, and on that day had in their stock $6,331 worth of goods, wares, merchandise, etc., which, on said first day of June, they listed on the tax list for the town of Shelby; that the said J. M. Flack & Sons had other property, such as household and kitchen furniture, which they listed at the same time.

3. That the town levy for 1894 was 73 cents on the $100 worth of property, and that the town tax on the said $6,331 for the said year of 1894 amounted to $46.23, which was entered upon the tax lists of the town of Shelby and said lists placed in the hands (793) of the town constable at the time prescribed by law.

4. That the said J. M. Flack & Sons made an assignment of their said stock of goods, wares and merchandise, on 19 November, 1894, to J. F. Tiddy, as assignee, for the benefit of their creditors, and the said J. F. Tiddy at once took possession of the same; said stock of goods assigned being the said property listed by the said J. M. Flack & Sons, as above, on 1 June, 1894. A copy of said deed of assignment is hereto attached, marked "A" and made a part of this agreement.

5. That the taxes on said stock of goods listed for taxation on 1 June, 1894, and assigned to J. F. Tiddy on the day aforesaid, have not been paid and the same are still due and owing.

6. That the assignee sold said stock of goods in lump, a few days after said assignment, for the sum of $5,000, and transferred the same to the purchaser; and while a part of the purchase money of said goods was in the hands of said J. F. Tiddy, as assignee aforesaid, he was served with garnishment for said taxes by the town of Shelby and the constable of said town, and the same was heard before H. Cabiness, justice of the peace, and judgment entered against the said J. F. Tiddy, as assignee aforesaid, for the sum of $46.23 and cost of garnishment, from which said judgment the said Tiddy appealed to the Superior Court.

7. That the said J. M. Flack & Sons reserved their personal property exemptions and had them at the institution of this action.

Upon the foregoing statement of facts, if the court should be of the opinion that the plaintiffs are entitled to recover the aforesaid tax from the assignee aforesaid, then it is agreed that judgment may be entered accordingly; otherwise, judgment may be (794) entered against the plaintiffs for the cost of this action.

His Honor held that the plaintiff was not entitled to recover and gave judgment for defendant, and from this judgment the plaintiff appealed.

M. H. Justice for plaintiff.
R. L. Ryburn for defendant.

FURCHES, J. The judgment of the court below must be affirmed.

A tax is said to be an enforced liability or indebtedness for the support of government. But this is a personal liability, and of itself creates no lien on the property of the taxpayer. A lien may be created by law for the payment of this liability, as well as other indebtedness. When taxes are assessed and placed in the hands of the tax collector for collection, this is equivalent to a docketed judgment and execution thereon placed in the hands of the sheriff. A docketed judgment creates a lien on the real estate of the defendant. The Code, sec. 435. But it creates no lien on personal property, until levied, as against a *bona fide* purchaser. The Code, sec. 448 (1). It cannot be contended that tax lists in the hands of the tax collector have a greater force than an execution in the hands of the sheriff. And as it is admitted that there was no levy made on the goods of Flack & Co., assigned to defendant for the benefit of creditors, and that defendant had sold them and collected the purchase money before the commencement of this action, it is clear that plaintiff had no lien on these goods for the payment of this tax; and if it had no lien, it had no claim of any kind against them, as there is nothing in the case to create an equity.

This being so, plaintiff, not being able to levy on the goods,
(795) proceeded by attachment against the defendant, who still had a part of the proceeds of the sale of this property in his hands and which plaintiff alleges is liable for this tax. In this proceeding the plaintiff must fail, for two reasons: First, for the reason that the money, still in the hands of defendant, arising from the sale of the goods assigned to him, does not belong to Flack & Co., the tax debtors, but to their creditors, under the terms of the deed of assignment; therefore the defendant owes Flack & Co. nothing; and, second, for the reason that it is admitted, in the case agreed, that the tax debtors, Flack & Co., asked, in addition to the homestead reserved, and took the personal property exemption of $500 allowed them by law out of the partnership effects assigned to defendants, and they still had this on hand at the commencement of this proceeding.

This property was not exempt from the payment of this tax, and neither the plaintiff nor the tax collector could proceed by attachment

and garnishment until this proprety was exhausted, had defendant been indebted to Flack & Co. Laws 1895, ch. 119, sec. 1; Laws 1893, ch. 296, sec. 1.

There is no error, and the judgment is

Affirmed.

Cited: Alexander v. Farrow, 151 N. C., 322.

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(796)

W. H. ALEXANDER ET AL. v. N. GIBBON ET AL.

PARTITION PROCEEDINGS—FORM OF PETITION—PLEA OF SOLE SEIZIN—ADVERSE POSSESSION—EJECTMENT—RULES OF PROOF AND ESTOPPEL PECULIAR TO ACTIONS OF EJECTMENT—JUDGE'S CHARGE—THE CODE, SECS. 136, 137, 1892, 1903.

1. The effect of a plea of sole seizin set up in a proceeding for partition is practically to convert the case into an action of ejectment and to bring into operation the rules of proof and estoppel which obtain in that action.

2. The various methods of making out a *prima facie* case for the plaintiff in ejectment pointed out.

3. When one who is made a defendant in a proceeding for partition, because he is the husband of one of the alleged cotenants, pleads sole seizin, it is competent to show that he entered and held possession as tenant of the alleged cotenant.

4. The rule that a tenant is estopped to deny the title of his landlord is honorable alike for its antiquity and its usefulness. It is one of the most valuable rules of practice and evidence. To hold that it does not apply when sole seizin is pleaded in a proceeding for partition would be to destroy all reasoning by analogy and the logic of the law.

5. The rule of estoppel based upon a common source of title, that where both sides in an action of ejectment claim under A. both are estopped to deny his title, is not simply an arbitrary fiction of the law; it is based on reasoning and logical deduction.

6. Possession of the tenant is that of the landlord, and in making out title by occupancy for a given length of time the period covered by the possession of the tenant is to be added to that covered by the possession of the landlord in person.

7. An instruction to the jury which is so complicated, involved and confusing as to leave the jury in doubt whether an adverse possession sufficient to establish title in the possessor must be thirty or fifty years necessitates a *venire de novo.*

8. In computing the number of years of an adverse possession the periods of occupancy by the ancestor and the heir, respectively, should be added together.

9. The law presumes possession unexplained to be adverse possession.

10. Section 136 and 137 of The Code being repealed by chapter 113, Laws 1891, the time between 20 May, 1861, and 1 January, 1870, is no longer to be omitted in computing time, as regards statutes of limitation, except in actions commenced prior to 1 January, 1893.

11. There is no statute or judicial ruling in this State which makes an allegation of possession vitally essential to a petition for partition, except the decision in *Alsbrook v. Reid,* 89 N. C., 151, which case is overruled on that point.

AVERY, J., concurs in the conclusion, but not in the opinion.

(797) ACTION tried before *Bryan, J.,* at January Term, 1896, of MECKLENBURG.

The facts appear in the opinion.

Clarkson & Duls for plaintiffs.
Burwell, Walker & Cansler for defendants.

FURCHES, J. This is a proceeding commenced in the Superior Court of Mecklenburg (before the clerk) by a part of the children and heirs at law of Joseph M. Alexander against the other children and heirs at law of said Alexander and the husbands of the *feme* defendants for sale and partition of land. All the heirs so made defendants answer and admit the tenancy in common, except Harriet, who is the wife of the defendant N. Gibbon. She files no answer, and thereby admits the allegations of the complaint and the tenancy in common. The defendant N. Gibbon, who is not a child and heir at law of Joseph M. Alexander, alone answers the complaint, which consists of six paragraphs, as follows:

"The defendant N. Gibbon answers the petition and says that the land mentioned and described in said petition is not the property of the persons named as the tenants in common thereof, but
(798) that he is sole seized of said land and is in possession of it in his own right."

It is admitted, as claimed by defendant, that when sole seizin is pleaded in a proceeding among tenants in common for partition it becomes substantially an action of ejectment (*Honeycutt v. Brooks,* 116 N. C., 788), and it then becomes subject to the rules of law applicable to trials in actions of ejectment, that plaintiffs must recover by the strength of their own title, and not on the weakness of defendant's title. This is the doctrine enunciated in *Honeycutt v. Brooks, supra.*

And while this case and this line of authorities puts the burden of proof in actions of ejectment on the plaintiffs, it also puts upon the defendant the burden of the rules pertaining to such trials.

Plaintiffs, then, may establish their title in any way they might do if this had originally been commenced as an action of ejectment—by showing an unbroken line of conveyances from the State to them, or to Joseph M. Alexander, their father, and that he is dead, or by showing possession in Joseph M. Alexander and those under whom he claimed to the time of his death, and the possession of his heirs at law since his death, for a sufficient length of time to establish or to ripen their title into a perfect title, or, by way of estoppel, by showing that the defendant claims title from the same source as plaintiff, or by showing that he entered and sustains the relation of tenant to plaintiffs. *Conwell v. Mann,* 100 N. C., 234.

These are the general rules applicable to all actions of ejectment, and must apply to actions for partition, where sole seizin is pleaded, and the action becomes substantially an action of ejectment, but in this case they are peculiarly applicable and illustrate the wisdom of their application. The plaintiffs allege that, as the heirs at law of Joseph M. Alexander, they and the other heirs at law (799) of said Alexander, as such heirs, are tenants in common of the land described in the complaint. All the heirs answer and admit these allegations, except Harriet, who files no answer, and in this way admits the allegations of the complaint. But the defendant N. Gibbon, not an heir of J. M. Alexander, but who happened to be the husband of Harriet, and in that way made a defendant, answers and says it is not true that the plaintiffs and defendants, who are the heirs of J. M. Alexander, are the owners of this land, but that he is the owner. And when plaintiffs offered evidence to show that defendant Gibbon entered as the tenant of the heirs and was to pay the taxes and was to look after and take care of the land for the heirs, he objected to the evidence and the court ruled it out. In this there was error. The authorities are so numerous and uniform that defendant admits that this evidence would have been competent if the heirs had brought an action of ejectment against him; but he says, as they brought an action for partition, which he has turned into an action of ejectment, it is incompetent. This cannot be so. To sustain this ruling of the court would be to destroy one of the most valuable rules of practice and evidence, a rule honorable alike for its age and for its usefulness. To sustain such rulings would be to destroy all reasoning by analogy and the logic of the law.

This rule of estoppel, based upon a common source, is not simply an arbitrary fiction of the law; it is based on sound reasoning and logical deduction. If two parties claim title from A., it must be conceded by them that A. had the title, or they would not claim under him.

This being so, it is not necessary to consume time in proving what is admitted to be true—that A. had the title.

(800) Then A. is made the starting point, and it is only left to determine who has A.'s title or the title derived from A.

In a case of tenancy in common, where the parties claim as heirs at law, under the canons of descent the establishment of the common course determines the rights of the parties. As in this case all the heirs at law of J. M. Alexander claim that he was the owner of this land at the time of his death, this establishes as to them the legal title to this land, and they are forever estopped to deny this, just as any other parties of record are estopped by the judgment of a court of competent jurisdiction. So we see that the operation and effect of this rule of estoppel is to establish the title in the plaintiffs. And the rule that the plaintiff must recover by the strength of his own title, and not by the weakness of the defendant's title, is preserved.

When this case was argued, and when first considered, it was treated by us as if the plaintiffs were proposing to prove the declarations and admissions of one of the heirs at law of Joseph M. Alexander.

But upon further consideration we find this is not the case. Had this been so, we would have held that this evidence was competent as tending to show that the heir at law of said Alexander claimed title under the common ancestor and disprove the plea of sole seizin. *Nelson v. Whitfield,* 82 N. C., 46; *Graybeal v. Davis,* 95 N. C., 508; *Conwell v. Mann,* 100 N. C., 234; *Clifton v. Fort,* 98 N. C., 173, and that line of cases.

But it was clearly admissible to show that the defendant N. Gibbon entered under a contract and agreement with the heirs of J. M. Alexander to pay the taxes and to look after and take care of the property for the heirs, which constitutes, as between him and the heirs, the relation of landlord and tenant, and that he was thereby

(801) estopped to deny the title of the heirs. *Cooper v. Axley,* 114 N. C., 621; *Conwell v. Mann,* 100 N. C., 234.

It was also admissible to establish the fact of tenancy, as effecting the question of title by occupancy. As it is a well-established principle of law that possession by a tenant is the possession of the landlord, and whenever it is established that N. Gibbon was the tenant of the heirs of J. M. Alexander, then the time that he has been in possession is to be added to the possession of J. M. Alexander and his tenants as evidence going to make out title by occupancy or possession.

Defendant N. Gibbon asked for special instructions, which were given by the court, as asked. Each of these instructions were excepted to by plaintiffs, and each exception must be sustained. The instructions are as follows:

1. "That in order to show title in themselves plaintiffs must satisfy the jury, by preponderance of evidence, that there has been open, notorious and adverse possession of the land for thirty years by J. M. Alexander (this is necessary to show title out of the State); that plaintiffs must also show an open, notorious, adverse and continuous possession for twenty years in J. M. Alexander, in order to vest the title in them as his heirs.

2. "That this possession must be open and notorious and continuous. If there was an interval of several years, during which J. M. Alexander had no such possession, the possession would not be continuous. The possession must also be adverse, and the mere fact that J. M. Alexander actually occupied the land or had possession of it would not be sufficient to show an adverse possession, because the plaintiffs must show, not only a possession, but must go further and show affirmatively that this possession was adverse, as the law does not infer from the mere fact of the possession that it was adverse.

4. "That in ascertaining the length of the possession of (802) J. M. Alexander the time from 20 May, 1861, to 1 January, 1870, must be excluded from the count.

5. "That plaintiffs must not only show an open, notorious, adverse and continuous possession for twenty years, but the said possession, in order to confer a title good against the defendant N. Gibbon, must have been under known and visible lines or boundaries."

The first instruction is erroneous, for the reason that it is complicated, involved and confusing. It at least leaves the jury in doubt as to whether the thirty years' adverse possession is sufficient to establish title in the plaintiffs, or whether it requires both thirty years and twenty years, making fifty, to do so. It is also erroneous in that it limits the time in which plaintiffs may make out their title by adverse possession to the death of J. M. Alexander; whereas the plaintiffs, the heirs, should have been allowed to show possession in themselves since the death of their father, if they could do so.

The second prayer and instruction is erroneous, in that it holds that possession or occupation of itself is not sufficient to constitute *adverse* possession. "But that plaintiffs must go further and show *affirmatively* that this possession was adverse, as the law does not infer from the mere fact of the possession that it was adverse."

To sustain this ruling would be to overrule *Bryan v. Spivey*, 109 N. C., 57, which expressly holds that the law presumes possession unexplained to be adverse possession.

The fourth prayer and instruction are erroneous. Sections 136 and 137 of The Code, which suspended the running of the statute of limitations and the presumptions of time, were repealed by chapter

113, Laws 1891, but not to apply to actions commenced prior
(803) to 1 January, 1893, and, of course, apply to all actions commenced after that time. This action was commenced 31 May, 1895. *Nunnery v. Averitt,* 111 N. C., 394.

But the learned counsel for the defendant N. Gibbon, in his argument, said, if there were errors in the prayers for instructions which were given by the court—and he did not think there were—that they should not avail the plaintiffs, for the reason that they had failed to allege in their complaint that they were in possession of the land described in the complaint.

We have seen that one of the heirs at law of J. M. Alexander (Mrs. Gibbon) was living on the land, and if the defendant N. Gibbon is the tenant of the heirs, as they allege he is, they are in possession through him. The possession of one tenant in common is the possession of all. The law presumes the possession to be in the owner, where there is no adverse possession (*Thomas v. Garvan,* 15 N. C., 223); and the possession of N. Gibbon cannot be adverse if he entered as plaintiff's tenant. So it is seen that, at the most, this would have been but a formal statement in this case. It was not made below, or it would in all probability have been amended, and for this reason we would dislike to feel compelled to sustain this objection.

The defendants' counsel cites *Alsbrook v. Reid,* 89 N. C., 151, which seems to sustain him. But upon examination we find that sections 1892 and 1903 do not sustain this objection. Section 1892 provides for partition, in the following language: "The Superior Court, on petition of one or more persons *claiming* real estate as tenants in common." And section 1903 of The Code provides for partition "by one or more of the parties *interested* therein." And while it seems clear that these sections, which provide for the partition of
(804) land among tenants in common, do not require any such averment in the complaint, we would still hesitate to overrule what seems to be held to be the construction in *Alsbrook v. Reid* upon this authority alone. But *Alsbrook v. Reid* cites two cases as authority for this ruling, and upon examination we find that neither one of them sustains this ruling, and *Thomas v. Garvan,* 15 N. C., 223, one of the cases cited, is directly to the contrary, holding that the law presumes possession unless there has been an actual ouster; and the other case cited as authority for the ruling in *Alsbrook v. Reid* is *Ledbetter v. Gash,* 30 N. C., 462, and this case does not even discuss the question.

Upon these authorities we feel justified in overruling that part of *Alsbrook v. Reid* which requires it to be alleged in the petition or complaint that the tenants in common are in possession of the land they ask to have partitioned, and which makes this allegation a jurisdic-

tional question. This had, in effect, been done in *Epley v. Epley,* 111 N. C., 505.

If an action is wrongfully brought for partition, this may be taken advantage of by answer.

There is error, as pointed out in this opinion, for which the plaintiffs are entitled to a

New Trial.

AVERY, J., concurring: Where the plaintiff in a controversy involving the ownership to land offers evidence tracing the defendant's claim to the same source from which he shows the older and better right in himself, *Chief Justice Pearson* said, both in *Newlin v. Osborne,* 47 N. C., 154, and *Frey v. Ramsour,* 66 N. C., at p. 472, that the defendant was precluded from denying plaintiff's right without first showing a title superior to that of the common source (805) and connecting himself therewith, not because an estoppel arose out of such evidence, but by a rule of evidence established for convenience in the trial of actions of ejectment. On the other hand, a tenant is estopped from denying the right of his landlord to the possession until he either voluntarily surrenders it or is evicted by superior title. So rigidly is this rule of good faith enforced, as an estoppel, that persons who were not *sui juris,* such as slaves and infants, when the relation began, are nevertheless as effectually precluded from denying its existence as though they have been parties to an agreement to demise. But it must be admitted that in some other opinions of this Court the rule relating to tracing title to a common source has been said to operate as an estoppel; and conceding that *Chief Justice Pearson* was in error in either aspect of the question, the fact remains that the evidence is offered to show title, not the right to possession. B brings an action against C, in which he claims title to, and possession of a tract of land, and offers an unbroken chain of conveyance from A to both of them, but it appears that the older and better title derived from A is in B; this is *prima facie* evidence of title; but B cannot recover, still, unless he goes further and proves that C is in possession and wrongfully withholds the possession of the land from him.

The Constitution, Art. IV, sec. 27, provides that justices of the peace shall have jurisdiction "of civil actions founded on contract, wherein the sum shall not exceed $200 and wherein the title to real estate shall not be in controversy." The sum demanded may determine the jurisdiction of money demands; but if the testimony develops the fact that title to land is in dispute it is declared to be the duty of the justice, though the plaintiff claims in the pleadings that the defendant is his tenant, to forthwith desist from attempting to

try. *Hahn v. Guilford,* 87 N. C., 172. On the other hand,
(806) where the plaintiff proposes to show that the defendant is a tenant, unlawfully holding over, the justice may try the issue of tenancy, because that involves only the right to the possession, if nothing more appears upon the trial to be involved in the dispute. *Hahn v. Guilford, supra; Foster v. Penry,* 77 N. C., 160; *Parker v. Allen,* 84 N. C., 466. If A dies before the expiration of the term of his lessee, C, and the land descends to his heir at law, B, it is familiar learning that the estoppel growing out of the tenancy operates in favor of A's privy in blood, B (1 Wood L. and T., sec. 231); and if C holds over, B has the same summary remedy to evict him that his ancestor had. Yet if evidence of the descent and the tenancy shows a common source of title, it is undeniable that it raises the question of title and ousts the jurisdiction of the justice. It is inaccurate, therefore, to say that a rule, whether of practice or estoppel (which *Chief Justice Pearson* says was "adopted by the courts for the purpose of aiding the administration of justice by dispensing with the necessity of requiring the plaintiff to prove the original grant and *mesne* conveyances by proof that the defendant claimed under the same person"), is applicable merely because the reversion of a lessor descends to the heir during the term. It is well settled by all courts where the common law is administered that the lessor who holds the fee, as well as his heir and grantee, are, as privies, estopped from denying his right to dispose of the possession, when he made the demise, and, on the other hand, that the mutual estoppel, which precludes the original lessee from denying the title of the lessor and his privies in estate, operates upon his sublessee or assignee. 1 Wood Landlord and Tenant, secs. 231, 232; *Lunsford v. Alexander,* 20 N. C., 166; *Farmer v. Pickens,* 83 N. C., 549; *Pate v. Turner,* 94 N. C., 47.

When a plaintiff brought an action of ejectment, under the
(807) old practice, and proved that he or his grantor or ancestor demised to the defendant or his assignor, the defendant was estopped from denying his landlord's title, whatever interest the latter claimed, and the plaintiff recovered possession upon the idea that his lessee and those in privity with him were precluded from denying the claim of ownership by virtue of which the demise was made. *Clarke v. Diggs,* 28 N. C., 159. And after the forms of actions were abolished and the action for possession could be brought, so as to involve and become conclusive as to the ownership of land, it was held that "the allegation of title in fee imported *such title actual and probable* by deed, or *such* against defendant by estoppel." *Farmer v. Pickens,* 83 N. C., at p. 551. It was held, also, in the last-named case that there was no want of *probata* corresponding with the *allegata,* because

though the estoppel of the tenancy only concluded the tenant in all cases as to the right of possession, in the absence of other proof it was also *prima facie* evidence of the title claimed as in the old action of ejectment. The issue of sole seizin having been raised in this case, the effect of establishing the fact that the defendant Gibbon entered as the tenant of the ancestor of the plaintiff was, under the rulings in the cases last cited, to estop him completely from claiming the possession, and to show *prima facie* only that the plaintiff had title as well as the right to possession. But while the defendant's mouth was closed against setting up a claim to the tenancy until evicted, it was competent for him to have offered evidence tending to show title in himself in order to have escaped the bar of estoppel as to title in a future action, and for this purpose he might have offered a grant from the State bearing date subsequent to that of the lease under which he entered, even though compelled to yield the possession as a tenant to his landlord. The ruling in *Conwell v. Mann,* 100 N. C., 334, and in *Mobley v. Griffin,* 104 N. C., 112, settles nothing except that proof of the right to possession by estoppel carries with it *prima facie* evidence of title. But while it is decided in *Heyer v. Beatty,* 76 N. C., 28, and many other cases passed upon by the Court when *Chief Justice Pearson* presided and concurred, he still adhered, in *Frey v. Ramsour, supra,* to the opinion that the rule in reference to showing a claim of title from a common source was not founded on the doctrine of estoppel. If the principle which precluded a party from denying a tenancy was an illustration of the doctrine of estoppel, while the other was not, then the two rules were not the same.

(808)

I concur in the conclusion of the Court, but not in the opinion for the reasons given.

PER CURIAM. New Trial.

Cited: Faggart v. Bost, 122 N. C., 523; *Cox v. Lumber Co.,* 124 N. C., 80; *Brown v. Morisey, ib.,* 296; *Shannon v. Lamb,* 126 N. C., 47; *Graves v. Barrett, ib.,* 270; *Hatcher v. Hatcher,* 127 N. C., 201; *Bullock v. Bullock,* 131 N. C., 30; *Parker v. Taylor,* 133 N. C., 104; *Atwell v. Shook, ib.,* 391; *Edwards v. Lemmond,* 136 N. C., 331; *Jennings v. White,* 139 N. C., 28; *Campbell v. Everhart, ib.,* 513; *Woody v. Fountain,* 143 N. C., 69; *Johnston v. Lumber Co.,* 144 N. C., 719; *Barrett v. Brewer,* 153 N. C., 550; *Sipe v. Herman,* 161 N. C., 109; *Land Co. v. Floyd,* 167 N. C., 687; *Graves v. Causey,* 170 N. C., 176.

DURHAM FERTILIZER COMPANY v. L. M. LITTLE & CO.

CONTRACTS—TRUSTS—BREACH OF TRUST—ARREST AND BAIL—FRAUDULENT CONVEYANCE—INTENT—THE CODE, SECS. 291 (2), (5), 3765 (6).

1. A contract of sale containing provisions for the vendee's paying in cash for such of the property as he sells for cash and turning over to the vendor the notes, etc., taken for such of the property as is sold on credit constitutes the relation of trustor and trustee between the parties to it, as has been often decided by this Court.

2. One who fraudulently conveys property held by him as trustee can be legally arrested, under The Code, Sec. 291.

3. One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested, under The Code, Sec. 291 (5).

4. The intent with which a trustee commits a breach of trust is immaterial. The misappropriation carries with it a fraudulent purpose and intent as a matter of law. The law turns a deaf ear to one who would excuse himself for an act, which *per se* amounts to a breach of trust, by saying that he did not mean to do wrong.

(809) ACTION tried before *Timberlake, J.*, at August Term, 1895, of UNION.

The affidavit upon which defendants were arrested is as follows: James Hayes, being duly sworn, says:

"1. That he is the agent of Durham Fertilizer Company, a corporation created under the laws of the State of North Carolina and doing business at Durham, North Carolina.

"2. That on 5 February, 1894, the defendants L. M. Little & Co., composed of the defendants L. M. Little and J. W. Hasty, entered into a contract with the plaintiff (a copy of which is hereto attached as a part of this affidavit), under and by virtue of which the plaintiff shipped to the defendants, at Beaver Dam, N. C., seventy tons of fertilizers for the agreed price of $1,355.50 which said fertilizers were accepted by the defendants, under the terms and upon the trusts mentioned in said contract, thereby becoming indebted to the plaintiff in the sum of $1,355.50, for which the defendants executed, on 1 May, 1894, two notes, each for the sum of $677.75, and due, respectively, on 1 and 15 November, 1895, and payable at the People's Bank, of Monroe, N. C., as provided in said contract.

"3. That the defendants sold and delivered the said fertilizers to divers and sundry persons (except about four or five tons,
(810) still in their possession, worth about $75), and received therefor cash money, notes, liens and other evidences of indebtedness, some of which were made payable to the plaintiff and others to

the defendants; and that defendants wrongfully and fraudulently have detained, misappropriated, misapplied and converted to their own use the cash received from the sale of said fertilizers, and have failed and refused to account for and turn over to the plaintiff the cash, notes, liens and other evidences of indebtedness of farmers or others for said fertilizers sold by them; that the defendants have wrongfully and fraudulently collected and appropriated to their own use a much larger amount of cash on account of their sales than they have paid to the plaintiff, and refuse to pay over the amount collected to plaintiff; and on or about 28 December, 1894, the said L. M. Little and J. W. Hasty made an assignment of their partnership goods, merchandise, accounts and evidences of debts due them to E. E. Marsh, one of their clerks, in which assignment plaintiff is not mentioned as a creditor, and have turned over to him and placed in his possession the debts due by purchasers of said fertilizers, as well as those payable to L. M. Little & Co. as those payable to the Durham Fertilizer Company, and refuse and fail to deliver the same to the plaintiff, although demand so to do has been made; that in all these transactions the defendants were acting in a fiduciary capacity as to the said fertilizers and cash and evidences of debt taken therefor.

"4. That on or about 25 December, 1894, the defendant L. M. Little, being the owner of real estate in Anson and Union counties, worth a large amount, viz., $4,000 or $5,000, executed a deed for the same to two or three different persons, who have lived with him in his immediate family, and over whom he exercises a large influence, and some, if not all, of whom have been apprentices (811) to him, in which said lands he reserved a homestead, for a consideration therein named which affiant verily believes was not paid, with the intent to defraud the creditors of the said L. M. Little and L. M. Little & Co. Reference to said deeds, as registered, is hereby made as a part of this affidavit.

"5. That the defendants still owe a second note, given on..... May, 1894, for $677.75, and due 15 November, 1894; the first note for a like amount, due 1 November, 1894, having been paid about 10 December, 1894.

"6. That the defendant L. M. Little took and fraudulently appropriated to his own use, of said fertilizers, in addition to those sold, several sacks thereof, of the value of $71, and fraudulently refuses to account and pay for the same to the plaintiff.

"JAMES HAYES."

"Sworn to and subscribed before me, 2 January, 1895.

"F. H. WOLFE,
"Clerk Superior Court."

The contract referred to in the foregoing affidavit is as follows:

"BEAVER DAM, 5 February, 1894.

To MESSRS. L. M. LITTLE & CO., *Beaver Dam, N. C.*

"We will furnish you with—

"Ten tons Durham Ammoniated Fertilizer, at $22.50 per ton, f. o. b. Beaver Dam.

"Ten tons Farmers' Alliance Official Fertilizer, at $24.35 per ton, f. o. b. Beaver Dam.

"Ten tons All Acid Phosphate, at $15.20 per ton, f. o. b. Beaver Dam.

"Ten tons D. B. Acid, at $14.25 per ton, f. o. b. Beaver Dam—

or as much as may hereafter be mutually agreed upon, at
(812) prices mentioned above. You hereby agree to order out this fertilizer by 1 May, 1894; settlement to be made on or before 1 May, 1894, in the following manner, viz.: In cash 1 May for all cash sales, and your notes, payable 1 and 15 November, 1894, for all time sales.

"For any time purchases you are to deposit with us the farmers' notes, liens and accounts, arising from the sale of the above named goods, and the same shall be held as collateral security for the payment of the notes provided for in this contract, and the proceeds of such collaterals must first be applied to the payment of your notes, whether they shall have matured or not. It is also agreed that any fertilizer shipped you under this contract is the property of this company until your notes or accounts are fully paid; and it is further agreed that the notes, liens and accounts arising from sale of said fertilizer is and shall be the property of said Durham Fertilizer Company until your notes or accounts with said company are fully paid, whether said evidence of farmers' indebtedness for the said fertilizer shall have been sent to said Durham Fertilizer Company as collateral or is still in your hands. Collaterals will be returned to you in ample time for collection. In sending same to us, please ship by express or registered letter, placing a nominal value of $25 on the packages.

"It is also further understood that the Durham Fertilizer Company has the right to call notes to cover time payments at any time after shipment of the goods.

"For the Durham Fertilizer Company,

"L. A. CARR."

(813) "[*Duplicate.*]

"We accept above contract.

(Signed in duplicate.) "L. M. LITTLE & CO."

Defendant Hasty answers:

1. That he, as managing partner of the firm of L. M. Little & Co., executed to the plaintiff two notes for fertilizers purchased by said firm from the plaintiff, one of which he paid; but this defendant at this time does not recollect the exact amount of the unpaid note or the exact date at which it was executed, and he has no knowledge or information sufficient to form a belief that the alleged copy contained in paragraph 1 of complaint is a true copy of said note.

2. That on or about 2 January, 1895, one James Hayes, the alleged agent of the plaintiff, filed in this action his affidavit, sworn to before F. H. Wolfe, Clerk of the Superior Court of Union County, wherein he made sundry averments of fraud against the defendants L. M. Little and J. W. Hasty, partners, composing the firm of L. M. Little & Co., and after filing an undertaking in the sum of $100, moved, before said F. H. Wolfe, clerk as aforesaid, for an order of arrest against the defendants L. M. Little and J. W. Hasty; that thereupon F. H. Wolfe, clerk of the Superior Court, as aforesaid, issued to the Sheriff of Union County, N. C., an order commanding him to forthwith arrest the said defendants and to hold them to bail in the sum of $1,000 each, to the effect that each of them shall at all times render himself amenable to the process of the court, etc.; that thereafter the defendants L. M. Little and J. W. Hasty were arrested by the Sheriff of Union County, by virtue of said order, and that each of them gave bail in the sum of $1,000, as required (814) by said order, and are at this time under bond for the performance of said order.

3. That this defendant hereby denies, all and singular, the averments of fraud imputed to or charged against him in the affidavits of the said James Hayes; that they are wholly untrue, and that he has done no act which would justify or authorize his arrest in this action or in his being held to bail in the sum of $1,000 or any other sum.

4. That the amount of said bail is excessive and unjust, wholly unauthorized by the facts in the case, and entirely disproportionate to the amount of the undertaking fixed for the plaintiff in procuring the order, which is $100.

Wherefore this defendant asks:

1. That the issues of fraud raised by the affidavits of said James Hayes, the agent of the plaintiff, and this denial, be submitted to a jury before any judgment is rendered in this action, and to be tried as all other actions are tried before a jury.

2. That the order of arrest heretofore issued in this action be set aside and the bail be discharged.

3. That if cause be found for the arrest of defendants, said bail be reduced in amount.

The answer of the defendant Little was substantially the same as Hasty's.

The following issues were submitted by the court:

1. "Are the defendants indebted to plaintiff, as alleged in the complaint?" Answer: "Yes."

2. "Have the defendants, or either of them, and if so which one, appropriated to their own use property held by them in trust for plaintiff, or held by them as agents for plaintiff, under the con-
(815) tract between the plaintiffs and the defendants and applicable to plaintiff's debt?" Answer: "'Yes,' as to Hasty; 'No,' as to Little."

3. "Have the defendants, or either of them, and if so which one, assigned or disposed of their property with intent by such assignment or disposal to defraud his creditor?" Answer: "'No,' as to Hasty; 'Yes,' as to Little."

The defendants tendered this issue, which the court refused to submit, and the defendants excepted:

"Have the defendants, or either of them, and if so which one, appropriated to their own use property held by them in trust for plaintiff or held by them as agents for plaintiff, under the contract between the plaintiff and the defendants, *with intent by such appropriation to hinder, delay and defraud their creditors?*"

At the conclusion of the evidence in the case counsel for the defendants submitted to his Honor a written prayer for instructions, of which the following is a copy, viz.:

"1. A debtor unable to pay his indebtedness in full has a right to prefer creditors if he makes no reservation for his own benefit, to the injury of creditors unprovided for; and reservation by a debtor of a homestead which creditors could not sell is not such a benefit reserved as can be said to be to the injury of creditors.

"2. That the deed of assignment from L. M. Little & Co. to E. E. Marsh, the record of which was introduced by the plaintiff, does not upon its face convey any accounts, notes, goods or other property belonging to the plaintiffs and held in trust by defendants for the plaintiff.

"3. Fraudulent intent is a question of fact for the jury and not for the court, and is never presumable when fairly reconcilable with honesty; and the relation of master and servant is not such a one as will raise a presumption of fraud in a conveyance from master
(816) to servant, the master being insolvent; but the conveyance being fair and square upon its face, the intent must be proved *aliunde.*"

The court refused to give these instructions, and defendants excepted.

Upon the pleadings and evidence the court directed a verdict for plaintiffs and rendered the following judgment:

"The jury having found the issues in favor of plaintiff, viz., that the defendants are indebted to the plaintiff, as alleged in the complaint; that the defendant J. W. Hasty has appropriated to his own use property held by him in trust for the plaintiff and held by them as agents of the plaintiff, under a contract between the plaintiff and the defendants, and applicable to plaintiff's debt, and that the defendant L. M. Little has assigned and disposed of his property with intent by said assignment or disposal to defraud his creditors; it is, on motion of A. Burwell and H. B. Adams, attorneys for the plaintiff, adjudged that the plaintiff do recover from the defendants J. W. Hasty and L. M. Little, individually and as partners, the sum of $708.70, with interest on $677.75 from 19 August, 1895, till paid, and the costs of this action, to be taxed by the clerk; and it is further adjudged that the motion of the defendants to set aside the order of arrest heretofore issued and served on the defendants in this action be disallowed. It is further adjudged that execution issue against the property of the defendants for the payment of said judgment; and if property sufficient to satisfy said judgment cannot be (817) found, that execution issue against the person of said defendants, according to law."

The evidence was quite voluminous, but it is unnecessary to set it out. Defendants appealed.

Burwell, Walker & Cansler for plaintiff.

F. I. Osborne and Battle & Mordecai for defendants.

MONTGOMERY, J. This action was commenced by the plaintiffs against the defendants, as partners, to recover the amount due on a promissory note. No denial of the debt was made, and a judgment for the indebtedness claimed was entered up in favor of the plaintiffs against the defendants, without objection. The appeals by both defendants in the case are not from the judgment declaring the debt, but from the order made in reference to the ancillary remedy of arrest and bail, which the plaintiffs had availed themselves of to better secure the fruits of their recovery. The order of arrest was issued upon affidavit made by the plaintiffs' agent under subsection 2 of section 291 of The Code, and, it would seem, under subsection 5 also. This Court has declared in repeated decisions that the vendees in contracts of sale which contained provisions similar to the ones executed

between the parties to this suit occupy a fiduciary relation—a relation of trust and confidence—to the vendors in respect to the property in the possession of the vendees for the benefit of the vendors, and that such agent and trustees are subject to arrest if they commit a breach of the trust by converting to their own use the property so held by them. *Travers v. Deaton,* 107 N. C., 500; *Boykin v. Maddrey,* 114 N. C., 89; *Guano Co. v. Bryan, ante,* 576. Upon the trial of the issue of fraud the jury found that the defendant Little had assigned and disposed of his property with intent by such assignment to de-
(818) fraud his creditors. Upon this finding his Honor continued the order of arrest from which Little appealed, and we will first take up and dispose of his appeal.

The affidavit of the plaintiff charges Little with conveying his real estate, of considerable value, to some persons who had formerly been his apprentices, with intent to defraud his creditors, individual and partnership. There was no allegation that he had removed or disposed of his personal property with intent to defraud his creditors, nor was there fraud alleged in the contraction of the debt. The testimony tended to prove that the defendant had made fraudulent conveyances of his real estate, and his Honor instructed the jury to find the issue of fraud against him, if they believed all the testimony. There was no error in the instruction of the court. The conveyance of real estate by a debtor to defraud his creditors does subject him to arrest. Subsection 5 of section 291 of The Code applies to real as well as personal property. The Code, sec. 3765 (6). We are not inadvertent to the case of *Bridgers v. Taylor,* 102 N. C., 86; but the decision there, made before subsection 2 of section 291 of The Code was amended, was upon the meaning of the words "taking, detaining and converting property," the Court deciding that they embraced personal prperty only. The words "removed or disposed of," used in subsection 5 of the same section, are words different and of broader meaning from those used in subsection 2, and are broad enough to comprehend real estate.

The affidavit upon which the order of arrest was issued contained allegations of fraudulent misappropriation, by both of the defendants, of the goods and money and notes of the plaintiff which the defendants had in their possession. The law presumes that Little
(819) had knowledge of the contract and, as a consequence, of the fiduciary relation which it created between both of the defendants and the plaintiff as to the property the defendants had in their hands for the plaintiff's benefit, although Little did not sign it or know of its execution. If he had known or connived at the misappropriation of the property, which the jury found Hasty had been

guilty of, such knowledge or connivance would have made Hasty's act his act as well, although in fact he did not execute the contract with Hasty. Of course, if Little had had knowledge at the time he executed with Hasty the assignment to Marsh that the latter was to receive the property which belonged to the plaintiff, and to apply it to other creditors than the plaintiffs, he subjected himself to arrest for the fraud. On the trial the defendant testified: "I am a farmer; was lately engaged in business at Beaver Dam, under the style of L. M. Little & Co.; live four miles from there; was a partner, but had nothing to do with its management; Hasty was managing partner. I did not sign contract or know anything about it till I was arrested; knew nothing of the condition of the concern; thought it was in good condition. The understanding was that it should be run on a cash basis; knew nothing of its bad condition until I returned from Statesville, about December, 1894; knew nothing of books, nor made entries, nor examined books; bought no goods, made no orders; was not present at taking of stock; knew they were selling guano, but did not know what disposition was made; I handled none of the proceeds of it. The firm made an assignment; Hasty and I signed the assignment; at the date of this I had no knowledge of debts held in trust by the firm, nor of guano held in trust by the firm. I bought guano as any other customer. I ginned cotton for the firm sufficient to pay for the guano. I don't recollect having a conversation with Hayes; don't think I ever saw Hayes before yesterday." There was no tes- (820) timony introduced contradictory or inconsistent with that of the defendant.

Defendant Hasty's Appeal.—The order of arrest, so far as the defendant Hasty is concerned, ought to have been continued, for the reason that his counter-affidavit, purporting to meet the facts alleged against him in the affidavit of the plaintiff's agent, upon which the order of arrest was issued, did not contain a denial of the facts and charges set out against him in the plaintiff's affidavit. Section 3 of defendants' affidavit and answer is a confession that the facts stated in the affidavit of the plaintiff's agent were true. The defendants' denial, such as it was, was simply a legal construction, by himself, of the meaning and effect of the acts charged against him. The facts alleged in the affidavit of the plaintiff's agent were sufficient, if true, to warrant the issuing and continuation of the order of arrest, and the construction as to the legal effect of these acts and charges put upon them by the defendant was an erroneous one. *Guano Co. v. Bryan, ante,* 576. However, no motion was made by the plaintiff to dismiss the motion of the defendant to set aside the order of arrest, and the parties went to a trial of the issue of fraud. The plaintiff

tendered the following issues (with others not necessary in this connection to mention): "Have the defendants, or either of them, and if so which one, appropriated to their own use property held by them in trust for the plaintiff or held by them as agents for the plaintiff, under the contract between the plaintiffs and the defendants, and applicable to the plaintiff's debts?" The defendants tendered an issue in the same language as the one offered by the plaintiff, except with the words "with intent by such appropriation to hinder, delay and defraud their creditors" substituted for the words in plaintiff's issue, "and applicable to the plaintiff's debts." The issue tendered
(821) by the defendant was rejected and the one tendered by the plaintiff accepted. The defendants excepted. The jury rendered their verdict in favor of the plaintiff, and thereupon his Honor continued in force the order of arrest, and the defendant appealed.

His Honor committed no error in submitting the issue tendered by the plaintiff and in rejecting the one tendered by the defendants. In *Boykin v. Maddrey, supra,* it is held that the intent with which the trustee or agent commits a breach of trust is immaterial to be proved. A misappropriation carries with it a fraudulent purpose and intent, as a matter of law. The learned judge who delivered the opinion of the Court in that case said: "The law gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail, that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness, and it 'turns a deaf ear' to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was a breach of the trust reposed in him. * * * Good intentions do not at all lessen the wrongfulness of a breach of trust, or, rather, the law will not allow one to say that he violated its plain precepts with good intentions." The defendant did not introduce a particle of evidence calculated to show any cause or reason for vacating the order of arrest. The testimony of the plaintiff, none of which was objected to by the defendant Hasty, all tended to show that he had committed a breach of the trust reposed in him by the plaintiff by wrongfully misappropriating and converting to his own use, as their agent and trustee, the plaintiff's property. The defendants asked the court to instruct the jury that the deed of
(822) assignment from the defendants to Marsh did not upon its face convey the property of the plaintiff held in trust by the defendants for the plaintiff. His Honor refused to give the instruction, and the defendants excepted. There was no error in the ruling of the court. Whether or not the deed of trust conveyed the property of the plaintiff upon its face, as a matter of law, is immaterial, so

far as the investigation before the court was concerned. As a matter of fact, undisputed, the defendant Hasty actually turned over to Marsh the notes and guano which belonged to the plaintiff. There was no error in his Honor's continuing and keeping in force the order of arrest as to both defendants.

No Error.

AVERY, J. I dissent from so much of the opinion as holds the defendant Little to be liable to arrest. *Bridgers v. Taylor*, 102 N. C., 86.

Cited: Gregory Co. v. Davis, 132 N. C., 98; *Organ Co. v. Snyder*, 147 N. C., 272.

JULIA E. WOODCOCK v. J. B. BOSTIC

MORTGAGOR AND MORTGAGEE—PURCHASERS OF EQUITY OF REDEMPTION—ACTION ON AGREEMENT OF PURCHASER OF MORTGAGED LAND TO PAY THE MORTGAGE DEBT WHEN ASSIGNED TO STRANGER—PARTIES NOT PRIVY TO CONTRACT.

1. The purchaser of land subject to mortgage, who assumes the payment of the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor (mortgagor) as between the parties is that of surety.

2. In equity a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the relation of a surety for others holds for his indemnity, and hence the assignee of a mortgage debt which has been assumed by the purchaser of the equity of redemption may, in foreclosure proceedings, have a deficiency judgment against such purchaser by praying for the equitable relief of subrogation.

3. The written assumption of the mortgage debt by the purchaser of the equity of redemption in land, and his agreement with the mortgagor and mortgagee to pay the same, are entirely personal to such mortgagor and mortgagee, and cannot be assigned to the purchaser of the mortgage debt, so as to enable him to maintain an independent action at law upon it.

ACTION heard on complaint and demurrer, before *Graham*, (823) *J.*, at March Term, 1895, of BUNCOMBE.

The complaint, after alleging the execution of a note for $5,500 by defendant D. D. Suttle to the defendant, J. B. Bostic, secured by deed of trust, its assignment for value to the plaintiff, and its nonpayment, further set out:

3. That on 6 February, 1892, the defendant J. M. Ray contracted in writing with the defendant J. B. Bostic, for a valuable consideration, to pay the said note to the plaintiff, and to protect and save the defendants Bostic and Suttle from any and all liability by reason of

and arising out of the same, which said contract was transferred and delivered to the plaintiff by the defendants J. B. Bostic and D. D. Suttle, and is in words and figures as follows, to-wit:

"This contract, made and entered into this 6 February, 1892, by and between J. M. Ray, of the county and State aforesaid, and J. B. Bostic, of said county and State:

"Witnesseth, that whereas the said J. B. Bostic and D. D. Suttle are indebted to Mrs. J. E. Woodcock in the sum of $5,500, which said sum is secured by a deed of trust upon the land conveyed by E. H. Wright and wife to said J. M. Ray by deed bearing date the
(824) .....day of....., 1892; and whereas the said Ray has purchased said land, subject to said deed of trust, and assumes and agrees to pay the said debt: Now, therefore, for and in consideration of the sum of $10 to him in hand paid by the said J. B. Bostic, the said J. M. Ray does hereby assume and agree to pay the aforesaid debt of Mrs. Julia E. Woodcock, and further agrees to protect and save the said J. B. Bostic and D. D. Suttle from any and all liability by reason of or from the same.

"In testimony whereof, the said J. M. Ray has hereto set his hand, this day and date first above written.

"JAMES M. RAY."

That the said defendants Bostic and Suttle, having failed to pay the interest upon the said note as the same became due and payable, at and before the commencement of this action, the said note and every part thereof became due, and the said defendant James M. Ray, by virtue of his said contract, became indebted to the plaintiff the amount of said note, to-wit, the sum of $5,500, with interest on the same from 2 February, 1893, no part of the said note having been paid, save and except the interest on said note from 2 August, 1890, up to 2 February, 1893.

"Wherefore the plaintiff prays judgment for the sum of $5,500, with interest on said sum at 8 per cent from 2 February, 1893, and interest on the sum of $220 from 2 August, 1892, until paid, and the costs of this action."

The demurrer was as follows:

The said complaint does not state facts sufficient to constitute a cause of action against the said James M. Ray, in that:

(825) 1. The cause of action therein undertaken to be alleged is founded upon an alleged contract which was executed between this defendant and his codefendant, J. B. Bostic, only, to which the plaintiff was not a party and under which she could not claim anything.

2. No contract is alleged to have been entered into between the plaintiff and this defendant or to which the plaintiff and this defendant were both parties.

3. No consideration is alleged to have passed from the plaintiff to this defendant as the foundation of any contract between them or to which they were both parties, and no contract under seal is alleged to have been executed between them or to which they were both parties.

4. The contract alleged in said complaint, upon which this defendant is sought to be charged, is therein stated to have been entered into only between this defendant and his codefendant, J. B. Bostic, and D. D. Suttle and plaintiff were not parties.

5. That the contract alleged in the complaint aforesaid is not one which could be assigned to the plaintiff.

6. That the contract alleged in the complaint, aforesaid, as having been entered into between the defendant and his codefendant, J. B. Bostic, is a contract of indemnity or guaranty to his said codefendants, and could not be assigned to the plaintiff.

7. That no cause of action is stated in said complaint in behalf of the plaintiff against this defendant, in that it is simply in said complaint alleged against this defendant, upon the contract charged to have been executed by him, that this contract was one entered into between this defendant and his codefendant, J. B. Bostic, only, for the purpose of indemnifying, guaranteeing and saving harmless said J. B. Bostic and D. D. Suttle from any liability to the plaintiff on another and previous contract or other and previous (826) contracts alleged to have been entered into between the plaintiff and said J. B. Bostic and D. D. Suttle, to which this defendant was not a party.

His Honor overruled the demurrer, and defendant J. M. Ray appealed.

Jones & Barnard for plaintiff.
F. A. Sondley for defendant J. M. Ray.

MONTGOMERY, J. On 2 August, 1890, J. B. Bostic conveyed to D. D. Suttle a tract of land for the price of $5,500, Suttle at the same time executing his bond for the purchase money and securing the same by a deed of trust on the land. Bostic assigned the bond to the plaintiff, Julia E. Woodcock, for value. Afterwards the defendant Ray became the purchaser of the land from Suttle, or his grantee, and entered into a written agreement with Bostic and Suttle, in which he, after reciting the indebtedness of Bostic and Suttle to the plaintiff, and declaring that it was secured by a deed of trust upon the land in

which he had bought, subject to the same, assumed and agreed with Bostic and Suttle to pay the aforesaid debt of Julia E. Woodcock, and also to protect and save Bostic and Suttle from any and all liability by reason of or from the same. Bostic and Suttle assigned and transferred this assumption and guaranty to the plaintiff.

This action was commenced by the plaintiff against the defendant upon his assumption and guaranty. It is in form an action *ex contractu.* The bond of Suttle to Bostic, which Bostic assigned to the plaintiff, is only mentioned in the complaint as a recital to explain what was the exact amount of defendant's assumption and that the debt was still due. The trustee named in the deed which secured the bond is not a party to the action, nor is there any prayer for a
(287) foreclosure of the trust and for a personal judgment against the defendant Ray for any deficiency; neither is there any equitable subrogation invoked, by which the assumption of the defendant might be subjected to the satisfaction of the bond. This action is under the old form of *assumpsit,* and is against the defendant on his promise made to Bostic and Suttle under their assignment of the same to the plaintiff. The plaintiff insists that she can recover both on the assignment of Bostic and Suttle to her of the defendant's assumption, and on the broad ground that the defendant is liable to her directly, even if the assignment of the assumption of the defendant had not been made to her by Bostic and Suttle, because of the promise made by the defendant to Bostic and Suttle to pay her debt. We will discuss the last proposition first.

The proposition is that, at law, a third person may maintain an action upon the promise of one person to another for the advantage and benefit of the third. There is conflict of judicial opinion on the question. The affirmative is held in many of the States, including New York. *Burr v. Beers,* 24 N. Y., 178. In others of the States, including North Carolina, the contrary is held. *Peacock v. Williams,* 98 N. C., 324; *Morehead v. Wriston,* 73 N. C., 398. But the plaintiff insists, further, that Suttle ought to be considered a mortgagor and the defendant Ray a vendee who has purchased and agreed to pay the mortgage debt to Bostic, the latter to be considered a mortgagee; and that between them Bostic has become the surety and Ray the principal debtor, and that the plaintiff stands in the shoes of Bostic by virtue of his assignment of his bond to her, and that therefore she ought to be subrogated to the rights of Bostic and have the assumption of Ray subjected to the payment of the plaintiff's debt. This is a sound principle of equity. In New Jersey and Massachu-
(828) setts it has been held that the liability of the grantee of a mortgagor who has promised and assumed to pay the mort-

gage debt can be enforced in equity by the mortgagee or his assignee by the application of the principle of equitable subrogation. *Hayden v. Snow,* 14 Fed., 70. In the case of *Keller v. Ashford,* 133 U. S., 610, the same principle is declared, and *Mr. Justice Gray,* who delivered the opinion, quoted with approval from *Cromwell v. Hospital* (N. J. Court of Errors), as follows: "The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor does not rest upon any contract of the grantee with him or with the mortgagor for his benefit." The purchaser of land subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor as between the parties is that of surety. In equity a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the relation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers who have assumed the payment of the mortgage debt and thereby become principal debtors as between themselves and their grantors. But the plaintiff here has not brought her action in this form and with this end in view. Her action is not for equitable subrogation to get the benefit of a security held by her debtor, Bostic. She alleges in her complaint that she owns the assumption and promise made by Ray to Bostic and Suttle, and seeks to enforce it against Ray in her own right at law, without any prayer for equitable relief or stating any element of equity in her complaint. She cannot therefore have equitable relief, because she has prayed for none. (829)

We will now take up and discuss the proposition of the plaintiff, that she can recover upon assignment of the assumption and guaranty of the defendant made to Bostic and Suttle and by them transferred to her. The question for decision then is, is the assumption and guaranty assignable? If it is, then the plaintiff can maintain her action; if it is not, she must fail. Section 55, C. C. P., which is section 177 of The Code, with a slight alteration, was almost a literal transcript of sections 111 and 112 of the New York Code when our Code of Civil Procedure was adopted. Those sections of the New York Code produced so much litigation and involved the courts in so great perplexities in their attempts to arrive at some uniformity of decision in construing them that the Legislature of that State, to declare with some degree of certainty what things might be the subject of assignment, repealed them and enacted in their place (now section 1910 of the New York Code) the following provision: "Any claim or demand can be transferred, except in one of the following cases: 1. When it

is to recover damages for personal injury or for a breach of promise to marry. 2. When it is founded on a grant which is made void by a statute of the State, or upon a claim to or interest in real property, a grant of which by the transfer would be void by such a statute. 3. Where a transfer thereof is expressly prohibited by a statute of the State or of the United States or would contravene public policy." In New York it might be that under their statute an agreement and assumption like the one sued on in this action would be the subject of assignment, but in North Carolina we have no such statute. Section 177 of the Code contains the law by which we are to be governed in
(830) arriving at a conclusion. We have no decisions of this Court upon that section of The Code bearing directly on the particular point raised in this case, nor any general rule of construction of this statute by which we might be aided in our investigations. In *Petty v. Rousseau,* 94 N. C., 355, it would seem that something like a general rule had been laid down, but *Ashe, J.,* who wrote the opinion in that case, was inadvertent to the change which had been made in the New York Code by the repeal of sections 111 and 112 thereof and the adoption of section 1910, which we have quoted in full above, in their places, and quoted section 1910 in full as being the annotations of Mr. Bliss upon sections 111 and 112. He quoted by mistake the amended law of New York, instead of, as he supposed, the construction which Mr. Bliss put upon sections 111 and 112, which had been repealed. So the opinion in that case does not aid us, for it was really based on the then statutory law of New York. Upon a merely cursory examination into the matter it will appear that many inconsistencies and incongruities must attend the assignment of an agreement like the one before us. If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts would not and could not entertain a suit at the hands of an assignee, because of the uselessness to him in any event of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, even though based on contract, could be assigned if it could not possibly be of use to the assignee. The law means, when it says that a thing is assignable, that the assignment carries with it rights of property, and that those rights can be enforced in the courts. It would seem to be clear, too, that a thing, to be assignable, must be the subject of assignment generally, to every one, and not be
(831) confined in its application to particular persons. It cannot be that the same subject-matter of assignment can be assigned to one person and not to another person. It is difficult to understand how the subject of assignment can be limited in its transference to particular persons—good if assigned to some persons, and of no avail

if assigned to others. Now, what use could a stranger make of the agreement sued on in this case if it had been assigned to him instead of to the plaintiff? Suppose a stranger was the owner by assignment of this agreement, and had brought suit upon it, what would his complaint be and what kind of a judgment would he pray for? The complaint would have to state that the defendant had promised to pay a note due, not to himself, but to Mrs. Woodcock, and that he was the owner by assignment from Bostic and Suttle of the defendant's promise to do so. He could not demand judgment that the money be paid to him, because his complaint stated that it was due to Mrs. Woodcock. He could not ask that the money be paid to Mrs. Woodcock, for he could not prosecute an action in her name nor have any judgment pronounced for or against her in a suit where she was not a party. In truth, the court could give no judgment. So, looking at the matter in all its bearings, we are constrained to say that the assumption and promise sued on in this action is entirely personal to Bostic and Suttle, with whom it was made, and is not assignable, although it would pass to the personal representative of Bostic in case of his death, and that the plaintiff cannot maintain this action upon it. His Honor erred in overruling the demurrer of the defendant.

Error.

Cited: James v. R. R., 121 N. C., 527; *Woodcock v. Bostic*, 128 N. C., 244; *Gastonia v. Engineering Co.*, 131 N. C., 369; *Voorhees v. Porter*, 134 N. C., 596; *Wood v. Kincaid*, 144 N. C., 395; *Baber v. Hanie*, 163 N. C., 593; *Bryan v. Canady*, 169 N. C., 582.

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(832)

A. M. GUDGER v. A. M. PENLAND AND WIFE

EXECUTION SALE—ALLOTMENT OF HOMESTEAD—APPRAISEMENT—APPRAISERS' RETURN—AMENDMENT—TRIAL—EVIDENCE.

1. The unregistered allotment of a homestead is competent evidence, unless objected to in apt time.

2. A return to an appraisement of a homestead which states that the appraisers were summoned by the sheriff and sworn, and to which the appraisers signed their names, under seal, witnessed by the sheriff, is properly executed.

3. In the trial of an action to recover land purchased at execution sale, evidence is not admissible to attack the return of the homestead appraisers which on its face appears sufficient.

4. It is allowable for appraisers of a homestead to amend their return before it has been filed.

GUDGER *v.* PENLAND.

ACTION for the recovery of land, tried before *Graham, J.,* and a jury, at March Term, 1895, of BUNCOMBE.

At the conclusion of the evidence his Honor intimated that the plaintiff could not recover, and thereupon the plaintiff submitted to a nonsuit and appealed.

The material points in the case are stated by *Associate Justice Furches.*

W. W. Jones and J. M. Gudger, Jr., for plaintiff.
W. J. Peele and Locke Craig for defendants.

FURCHES, J. This is an action of ejectment by a purchaser at execution sale against the defendant in the execution, in which the court, at the close of the evidence, intimated the opinion that the plaintiff could not recover, and thereupon the plaintiff submitted to a nonsuit and appealed.

(833) The court below does not state upon what reason this opinion was founded, but the reason assigned in the argument here to support the judgment of the court below was that the defects in the assignment of defendant's homestead rendered it void, and, this being so, the sale at which plaintiff bought was void and he got no title.

Defendants' counsel assigned several grounds upon which he contended that the judgment of the court should be sustained. The first was that the homestead allotment had not been registered, as provided by law, and therefore could not be offered in evidence; but upon an examination of the record we find that it was put in evidence by plaintiff, without objection, and was therefore made competent, just as a deed which had not been registered may be introduced on a trial if there is no objection, and it then becomes competent. So it is not necessary to decide how it might have been if the objection had been made, as this point is not raised.

Another objection to the appraisers' return is that it does not appear that the appraisers were sworn and signed the same, as the law provides; but we think a fair interpretation of this paper shows that it was. It states that they were summoned by the sheriff and sworn. To this they signed their names, under seal, and this is attested by the sheriff. So it would seem from the paper itself that it was properly executed.

It is further contended by defendant that, without the survey attached, the return is defective in its description. But counsel admitted that with this, taken as a part of the return, it is a sufficient description of the homestead allotted the defendant, and of the excess.

The return of the appraisers includes this survey, which they attach to the paper they sign as a part of their return; and this makes it in effect the same as if they had incorporated it in the body of their return; and this makes the return, on its face, complete (834) and sufficient in law to authorize the sale under which plaintiff purchased. But defendant contended that when the return was first drawn and signed by the appraisers this survey was not attached and made a part of the return, but afterwards it was amended, or a new report drawn and signed by them, making the survey a part of their report. And defendant was allowed by the court, under the objection and exception of plaintiff, to introduce evidence to show this fact. In this there was error. The only object of this evidence was to attack the return of the appraisers, which appeared to be sufficient on its face by collateral evidence. This cannot be done. *Welch v. Welch,* 101 N. C., 565; *Burton v. Spiers,* 87 N. C., 87; *Spoon v. Reid,* 78 N. C., 244. But this amendment seems, from this evidence (even had it been competent to attack it collaterally), to have been made before the report was filed—while it was yet *in fieri*—and, this being so, they had the right to make it. *Pate v. Harper,* 94 N. C., 23. There is error, and the judgment of the court below must be set aside and the case restored to the docket for trial.

Error.

(835)

J. E. SLUDER AND WIFE v. J. R. GRAHAM ET AL.

SETTING ASIDE JUDGMENT AFTER LAPSE OF ONE YEAR—SECTION 274 OF THE CODE—NOTICE.

Plaintiff and defendants, who have been served with process in an action, are deemed to have legal notice of all proceedings in the action at the regular term of the court, and cannot, after lapse of a year from the entry of a judgment, have it set aside, under section 274 of The Code.

MOTION made by Sarah A. Sluder, one of the plaintiffs in the action above named, at December Term, 1894, of BUNCOMBE, to vacate the judgment entered in said action at August Term, 1893, of said court. The motion was made and heard before *Boykin, J.,* on Saturday, the last day of said December term of said court, but no motion nor notice of motion had been made or given by said Sarah A. Sluder previous to said last-mentioned date.

Defendants resisted the motion, upon the ground that the same had not been interposed until more than a year after the rendition of the judgment in the action, at August Term, 1893, which, being a final judgment, could be assailed and vacated only by an independent

action. His Honor, upon the affidavit of the said plaintiff, granted her motion and made the order vacating the said judgment of August Term, 1893, and granting the said plaintiff leave to amend her complaint.

The defendants excepted to said ruling and order, and appealed.

Moore & Moore for plaintiffs.
J. H. Merrimon for defendants.

FURCHES, J. This is a motion, made at December Term,
(836) 1894, to set aside a judgment of the Superior Court taken at August Term, 1893. The motion being made more than a year after the judgment was rendered, it cannot be set aside for excusable neglect, under section 274 of The Code, unless the party making it has had no notice of the existence of the judgment until within one year prior to the time of making the motion. The *feme* plaintiff, in her affidavit in support of her motion to set aside the judgment as to her, says that she did not know, until about "four months before making the motion, that her husband had attempted to settle the case or to have the same dismissed." By this we understand that she had no actual notice of the judgment until about four months before making the motion.

The opinions of this Court have not always been uniform as to this matter of notice. But in *McLean v. McLean,* 84 N. C., 366, where a summary of the decisions on the subject is made, it is held that *plaintiffs* and defendants who have had personal service of process have *legal notice* of any judgment entered at a regular term of the court in their actions, and that only such defendants as are not affected by such personal service of process, duly made, may avail themselves of a want of notice to enable them to make this motion after the lapse of one year from the date of the judgment. According to this rule which now seems to be settled as the law governing motions made under section 274, the court had no power to make the order appealed from, and there is error. The order made at December Term, 1894, must be vacated and the judgment at August Term, 1893, allowed to stand as the judgment of the Court.

Error.

(837)

MORRISTOWN MILLS COMPANY v. W. M. LYTLE ET AL.

WITNESS FEES—CONSOLIDATION OF ACTIONS—COSTS—RETAXATION OF COSTS—APPEAL.

1. Where several actions pending in a court were consolidated into one at the return term, and at a subsequent term there was an entry of "judgment against both parties, plaintiffs and defendants, for their costs in each case," the witnesses summoned were entitled to prove but one attendance and in one action, and but one bill of costs could be taxed.

2. An appeal lies from an order retaxing costs and continuing a former judgment.

MOTION to retax bills of costs, heard before *Robinson, J.*, at August Term, 1895, of BUNCOMBE.

The motion was allowed, and the witnesses who had been allowed to prove attendance and mileage in several cases consolidated into one, and whom the order restricted to the privilege of proving but one attendance and mileage in one case, appealed.

J. C. Martin for plaintiffs.
Charles A. Webb for defendants.

CLARK, J. There were eight actions against the same defendants. At the return term all of said actions were consolidated into one. This was admitted below, though the order of consolidation could not be found. At a subsequent term (August, 1893) the minutes show the following entry (naming these cases): "Judgment against both parties, plaintiffs and defendants, for their costs in each case." Under this the clerk taxed eight several bills of cost, permitting, it would seem, the same witnesses to prove attendances in all eight cases. This was a motion made at August Term, 1895, to set (838) aside the judgment as irregular and void, and to retax the costs. The court properly adjudged that witnesses in said consolidated actions were entitled, after the order of consolidation, to prove but one attendance and in one action. This was the object of the order of consolidation. This is not the case of a creditor's bill, where a witness may be summoned to testify in behalf of several different parties as to entirely different matters, nor is it the case of a witness attending court at the same term to testify in several different cases. But after the consolidation of these actions, at the return term, there was thenceforward but one single action, and a witness could prove his attendance only in that case, for there was but one, and only one bill of cost could be taxed. So much of the judgment as modified the pre-

vious judgment was improvidently made. The bill of costs should simply be retaxed, in accordance with the judgment at August Term, 1895. This is not an appeal from a judgment for costs, after the subject-matter of an action has been disposed of. Such appeals the Court will not entertain. But this is an appeal from an order retaxing costs and construing a former judgment, and is reviewable. It is an additional instance to those given in *Elliott v. Tyson,* 117 N. C., 114.

Modified and Affirmed.

Cited: S. v. Horne, 119 N. C., 854.

(839)

MILTON HARDING ET AL. v. JOHN HART ET AL.

INTERLOCUTORY ORDER—PRACTICE—PREMATURE APPEAL.

Upon a reference, under The Code, the parties agreed that the referees should determine the case as arbitrators, but before the close of the evidence, and before the award was made, the defendants served notice, in writing, revoking the agreement to arbitrate. The referees, nevertheless, ignoring the notice, made their award, to which defendants excepted. The court set aside the award, and plaintiffs appealed: *Held,* that the order was only interlocutory and the appeal was premature; the plaintiffs should have excepted and had their exceptions noted on the record, so that the whole matter might be brought up on appeal from the final judgment.

MOTION to set aside an award of arbitrators, before *Robinson, J.,* at December Term, 1895, of BUNCOMBE.

His Honor granted the motion, and plaintiffs appealed.

W. W. Jones and V. S. Lusk for plaintiffs.
Moore & Moore and Shepherd & Busbee for defendants.

MONTGOMERY, J. The agreement to submit to arbitration was made before the referees, who had been appointed by the court, for the purpose of stating an account between the parties. Before the testimony had been concluded, the defendants served a notice upon the arbitrators appointed by themselves—the same persons who had been appointed referees by the court—in which notice they said that they "do now and hereby revoke and annul the agreement and submission heretofore made to arbitrate the matters in dispute in this
(840) case between them and the plaintiffs, and ask that the matter be determined by you under the order of court, as referees." The report was made to the court, and the same was set aside and the

matters rereferred. An order was also made for new parties and the taking of additional testimony. The plaintiffs appealed.

The appeal is premature. The order of the court was only interlocutory. Plaintiffs should have assigned errors and exceptions and had the same noted in the record, so that the whole might be brought up by an appeal from the final judgment. *Hailey v. Gray,* 93 N. C., 195; *Blackwell v. McCaine,* 105 N. C., 460; *Warren v. Stancil,* 117 N. C., 112.

Appeal Dismissed.

STATE ON THE RELATION OF S. C. WILSON v. CLARA M. FEATHERSTONE ET AL.

DOWER, REALLOTMENT OF—DISCRETION OF TRIAL JUDGE.

The trial judge, in the exercise of a sound discretion, is the judge of how often, for just cause, the court will order a reallotment of dower, and such discretion is not reviewable, where it appears that the court below, after full argument from both sides on all the papers, including conflicting affidavits as to value, confirmed the order of the clerk directing a reallotment.

PETITION for dower, heard on appeal from an order of the Clerk of BUNCOMBE, directing a reallotment, before *Timberlake, J.,* at chambers, in Asheville.

His Honor, after hearing full argument and considering (841) conflicting affidavits as to value, etc., affirmed the order of the clerk, and defendants appealed.

J. H. Merrimon and C. M. Stedman for plaintiffs.
W. W. Jones for defendants.

MONTGOMERY, J. In this case the clerk ordered a reallotment of the dower, assigning as his reason therefor that the petitioner did not receive notice of the day and time when the jury would meet to allot it, and that section 2114 of The Code required that such notice should have been given her.

It is not necessary for us to decide this question in this case, for it appears from the order of the judge, made in chambers, on the appeal of the defendants, that he heard the case on argument by brief of counsel on both sides on the whole papers in the case, including conflicting affidavits concerning values, and in his discretion adjudged that the clerk's order be affirmed. The Judge had the discretion to set aside the allotment and to order another. In *Wellfare v. Wellfare,*

108 N. C., 273, this Court decided that "the court below, in the exercise of a sound discretion, must be the judge of how often, for just cause, it will direct a reallotment."

Affirmed.

Cited: Featherstone v. Wilson, 123 N. C., 625.

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(842)

R. WALTERS & SONS v. JESSE R. STARNES

ACTION ON NOTE—PRACTICE—FRIVOLOUS ANSWER—PREMATURE APPEAL FROM REFUSAL TO STRIKE OUT.

1. An appeal does not lie from a refusal to strike out an answer as frivolous.

2. Where an answer in an action on a note alleged that defendant had transferred to plaintiffs a fire-insurance policy to enable them to collect and apply the proceeds to payment of the note, but that plaintiffs, by their delay and negligence, permitted other creditors to attach and appropriate the amount due on the policies: *Held,* that the answer presents no serious defense and is frivolous.

AVERY, J., dissents.

MOTION of plaintiffs to strike out defendant's answer as frivolous and for judgment, heard before *Robinson, J.,* at December Term, 1895, of BUNCOMBE.

James H. Merrimon for plaintiffs.
No counsel contra.

CLARK, J. On the refusal of the court to hold the answer frivolous no appeal lay, but the plaintiffs should have had their exception noted in the record; and if they should lose the case at the trial term, this exception would then come up, or they could likewise raise it at that term, after an adverse verdict, by a motion *non obstante veredicto. Cui bono* appeal, when the injury to the plaintiffs is merely a delay till the next term, and that delay cannot be avoided, but may be increased by an appeal? To refuse to hold an answer or demurrer frivolous, if it is clearly such, is error, of course, and subject to review, but the injury is one which can be cured by an appeal from the final judgment, and therefore no appeal lies in this fragmentary
(843) manner. Indeed, this is somewhat like the erroneous granting of a continuance from which no appeal lies, because the judgment on appeal cannot cure the wrong which is the postponement of the judgment. Cases cited in Clark's Code, p. 561; *Wagon Co. v.*

Bostic, ante, 758. It is argued, however, that it would save the expense of a trial on the merits if an appeal is allowed in such cases, and the court on the appeal should hold the answer or demurrer frivolous. This point might have weight if on such appeal the answer or demurrer would necessarily be held frivolous, but the presumption on the contrary is in favor of the correctness of the ruling below. Exactly the same argument was used to sustain the proposition that an appeal should lie from the refusal to dismiss an action, but this Court has uniformly and repeatedly held that no appeal lies from a refusal to dismiss. See cases collected in Clark's Code, pp. 559, 560, and supplement to same, p. 838. To permit such fragmentary appeals would overwhelm this Court with business properly belonging in the Superior Court, would protract litigation and would bring up many appeals which would become unnecessary by the final result being in favor of the party who might desire to bring up the interlocutory judgment for review.

Besides, the very point herein presented has been already virtually decided three times in this Court. In *Hull v. Carter,* 83 N. C., 249, *Dillard, J.,* in speaking of the "right to appeal from the refusal of the court below to hold an answer frivolous" (though it was not necessary to pass upon the point directly, as the answer was held not frivolous), says the Court has "a strong impression that such refusal is not appealable." This intimation was cited and approved in *Turlington v. Williams,* 84 N. C., 125. To the same purport is the intimation of *Ashe, J.,* in *Brogden v. Henry,* 83 N. C., 274. These (844) cases seem to have been taken as settling the law, as no appeal until the present has since come up questioning the correctness of the ruling in those cases.

Though for the reasons given the appeal must be dismissed, the Court may pass on the point presented, as it has sometimes (though rarely) done if circumstances justify it. *Hinton v. Ins. Co.,* 116 N. C., 22, citing *Milling Co. v. Finlay,* 110 N. C., 411; *State v. Wylde, ib.,* 500. In the present case the answer admits the indebtedness sued on, but alleges that the defendant turned over to the plaintiffs an insurance policy on a stock of goods, which had been destroyed by fire, to collect and pay the indebtedness due plaintiffs, and that the plaintiffs so negligently delayed to collect that the amount due on the policy was attached by another creditor of the defendant and applied to a debt due such other creditor by the defendant. This presents no serious defense, and the answer should properly have been held frivolous, under The Code, sec. 388. *Weil v. Uzzell,* 92 N. C., 515; *Bell v. Howerton,* 111 N. C., 69. Because in this case there was error in refusing to hold the answer frivolous is no reason, however, to depart

from the settled practice that an appeal does not lie from such refusal.

Appeal Dismissed.

Cited: Thurber v. Loan Assn., ante, 131; *Abbott v. Hancock,* 123 N. C., 90; *Morgan v. Harris,* 141 N. C., 360; *Parker v. R. R.,* 150 N. C., 435.

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(845)

M. E. HILLIARD ET AL. v. CITY OF ASHEVILLE*

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—TAXATION—UNIFORMITY—DUE PROCESS OF LAW—INJUNCTION.

1. Where the charter of a city provides that each street or portion of a street improved shall be a taxing district, by requiring the total cost of improvement on each street or portion of street improved to be ascertained and one-third thereof assessed on the property abutting on each side of the street, according to the frontage of each lot, and also provides methods whereby each lot owner may contest the assessment: *Held,* that such charter is not in violation of section 9 of Article VII, requiring all taxes to be uniform, or of section 3 of Article V, requiring a uniform rule of taxing real estate according to its true value in money.

2. Under such charter provisions the question of eminent domain, or taking private property for public use, does not arise; and, since ample notice of the assessment is provided for, with opportunity for the lot owner to be heard, it does not deprive the owner of his property without "due process of law." (Section 1 of Fourteenth Amendment to Constitution of United States, and section 17 of Article I of the Constitution of North Carolina.)

3. Such charter, in requiring that the cost of the total improvement in such "taxing district" shall be ascertained and one-third thereof assessed upon property abutting on each side of the street within such district, and that the city shall pay one-third of such cost, "the abutting land on each side assuming the liability hereinbefore created," cannot be considered as limiting the liability of the property on each side of the street to one-sixth of the cost, the meaning plainly being that such liability of each abutting owner is one-third of such total cost.

4. Where a city charter prescribes special methods for contesting the validity and regularity of assessments for street improvements upon the land of each abutting owner, and provides for the payment of such assessments in annual installments, an injunction will not lie to prevent the collection of the assessment, for it is in the power of the owner to pay an installment and bring an action for its recovery.

(846) MOTION in a civil action pending in BUNCOMBE for an injunction to restrain the city of Asheville from collecting from the plaintiffs certain assessments upon them, as owners of property

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

abutting on Main Street, in Asheville, heard before *Robinson, J.*, at chambers, in Asheville, on 31 August, 1895.

The charter sections relating to the improvement of streets are as follows:

"Sec. 5. To equalize the assessments on real estate for the purpose described in section 4, next above, the said mayor and board of aldermen shall assess a (the) total cost of such improvement made throughout the entire length of such work and improvement, and shall then prorate the cost thereof on the real estate abutting thereon, according to the frontage on the street or portion of the street so improved, and charge to such real estate on each side of the street upon which such work is done its *pro rata* share of one-third the cost of such street improvement made under the provisions of this act: *Provided, however,* that in order to avoid embarrassing landowners in subdividing and selling their property, by reason of the liens thereby created upon the same, they be subdivided in any manner as they see fit, and shall furnish the city engineer with a plat of the same; the lots fronting on the streets to be so paved and improved to be of any desired frontage, but not less than one hundred feet in depth; and the assessment made and lien created by virtue of this act for sidewalk or street improvement, or both, shall be made upon such front lots only; and where any such cases of frontage is (are) subdivided into lots, each of said lots shall be charged with its ratable proportion of said assessment and lien according to its frontage; and when the board of aldermen shall order paving or other improvements to any street, they shall have the same accurately surveyed and a permanent grade thereof established and accurate map made of the various lots and properties abutting upon said street, showing the exact frontage of each lot, and (847) also of the subdivisions, if any, of the frontage of each; and the said map shall be filed, together with a tracing of the same, in the office of the clerk of the city, to be subject to public inspection. When the assessment and liens herein provided shall have been made upon the various lots and properties on the streets, the said clerk shall write in ink upon said map the amount assessed upon the same, and he shall keep a record book showing such assessments and liens, and the date and amount of all payments made upon any of said assessments and liens.

"Sec. 6. The amount of assessment for such street's improvement, and for sidewalks, exclusive of curbing, and for roadways, as hereinbefore provided, on each piece of real estate, being estimated as above directed, shall be a lien on such real estate, and the said mayor and aldermen shall cause the city engineer to make a survey and a report of the amount of work done (and) the cost thereof, upon which street

and sidewalk, the name of each abutting owner thereon, the number of feet on each lot, and the *pro rata* share of such cost of such street and sidewalk improvement to be assessed against such real estate; and upon the adoption of said report the said lien shall become complete and operative, which said report shall be transcribed upon the minutes of said board of aldermen, and the amount of said lien and of said assessment against all property abutting on said street, as aforesaid, shall become due as follows: one-sixth in six months and the balance in five equal-amount installments. The adoption of said report of said surveyor by such board of aldermen shall constitute the said lien for the amount therein stated against each of the
(848) separate pieces of real estate therein described, and the same shall become due and payable as aforesaid; and in case of failure to pay either of the said assessments in thirty days after its maturity, then all shall become due at once, and an execution shall issue by the clerk of said board of aldermen directly to the marshal of said city, who shall advertise the land upon which said defaulting assessments are made, as aforesaid, or (as) required by law for sale of land for taxation under the provisions of the charter of said city, and shall sell the same and give to the purchaser a receipt, stating the time the land was advertised, the day of sale, the purchaser, the price paid, the assessment due thereon, the cost of sale, the name of the owner of the land and the description of the lands sold; and the owner of the land sold shall have twelve months within which to redeem said land, by paying to the purchaser the amount he paid and twenty per centum additional; but if the land is bid off for the city or for said sinking fund, then the owner, in order to redeem the same, must pay the assessment due on said land, the cost of the sale and twenty per centum on said assessment. If the land is not redeemed within twelve months, then the marshal shall make to the purchaser a deed for said land, and the same shall operate to convey to the purchaser the title to said land, and the proceeds of said sale shall be applied, first, to the payment of all that then may remain unpaid upon said assessment and liens, together with the cost of such sale, which costs shall be the usual fees allowed the marshal for selling land for taxation; the balance, if any, of such proceeds shall be paid to the owner of said land at the time of said sale: *Provided, however,* that any owner of said land may have the privilege of paying off all of said assessment before due, and upon such payment the said lien shall be released and discharged *pro tanto: Provided further,* that
(849) any owner of land upon which said lien for such assessment exists shall have the right to file before the mayor and board of aldermen of said city (an) affidavit denying the whole or any part

of the amount, if any he admits, to be due, which amount so admitted to be due he shall pay or tender, accompanying his affidavit with it and before it shall be received, and then the said affidavit shall be received only for the balance, and all such affidavits so received shall be returned to the Superior Court of Buncombe County for trial, and it shall be considered that the issue as to the amount then due is raised upon reception of each affidavit and without any plea upon the part of the city of Asheville, but this shall not be construed to prevent the said city of Asheville from filing an answer or any other defense to which it may be entitled under the laws of North Carolina; and upon such trial, if the issues be all found in favor of the affiant, then the lien shall be discharged; if, however, the issues shall be found in favor of the city of Asheville to any amount, and if it be thereby ascertained that the affiant is due to said city any amount by virtue of the matters therein referred to, then the said amount so found, together with eight per centum interest thereon from the date of its maturity, and together with the costs thereon accrued, which costs shall be assessed as costs in other civil actions, shall be and continue a lien against the property upon which the original assessment was placed, and shall be collected by an execution issuing from said Superior Court, directed to the marshal of said city, which shall be collected by him, by the sale of said land, as hereinbefore provided, in case of execution issuing from the clerk of said city.

"Sec. 7. The said mayor and the board of aldermen of said city, by its proper officers, shall have the exclusive control and management of said work upon the sidewalk and streets for (850) all the work and improvements thereon herein contemplated, and shall complete the same, and the whole of the cost thereof shall be paid for out of the proceeds of the sale of the bonds hereinbefore in this act authorized to be issued and sold, the said city itself being liable for the costs of curbing, and for one-third (1-3) of the street or roadway between the curbing, and the abutting land on each side assuming the liability hereinbefore created: *Provided, however*, that whatever of the cost of street improvements which may be paid by or assessed against any street railway hereinafter provided for shall be deducted from the proportion of the costs thereof for which the said city is liable, as aforesaid: *Provided,* that in case the said city may not have on hand at any time sufficient funds arising from the sale of said bonds to meet the amount then due for the work aforesaid, the mayor and board of aldermen are directed hereby to advance the same from the general revenues of said city, but such amount so advanced shall be refunded out of the funds arising from said bonds as soon as it is realized."

Plaintiffs contended that the act under which defendant was proceeding to collect from them special assessments for street improvements was unconstitutional, because it violates the Constitution of North Carolina, Art. VII, sec. 9, requiring all taxes to be uniform, in that the rule of unformity is not observed, the abutting land receives no benefit over and above that of citizens generally, and because "there is a want of power, and the method adopted for the assessments of the benefits is so clearly inequitable as to offend some constitutional principle," viz., the principle "that no person can be deprived of his property without just compensation and due process of law" [*ib.*, Art. I, sec. 17; Const. U. S. (Amend. 14) sec. 1]; that it also violates the Constitution of North Carolina, Art. V, sec. 3, requiring a
(851) "uniform rule for taxing real estate according to its true value in money"; that it also violates the Fourteenth Amendment to the Constitution of the United States (section 1), in that no remedy is provided for relief under the act, unless by admitting and tendering some part of the assessment claimed to be due.

His Honor granted the injunction, and defendant appealed.

James H. Merrimon, Moore & Moore and John P. Arthur for plaintiffs.

Julius C. Martin and W. W. Jones for defendant.

CLARK, J. The principal points in this case are decided in *Raleigh v. Peace*, 110 N. C., 32, and adversely to the plaintiffs. Indeed, chapter 125, Laws 1891 (the charter of Asheville), is less open to objection than the act construed in *Raleigh v. Peace*. It makes each street or portion of a street improved a taxing district (Cooley Const. Lim., 624, 6th Ed.) by requiring the cost of the total improvement on each street or portion of a street improved to be ascertained and one-third thereof assessed upon the property abutting on each side of the street, proportioned according to the "frontage" of each owner, and provides means whereby each property owner may contest his assessment by proceedings begun before the board of aldermen, with the right of appeal. The act is uniform in the method of assessment. The will of the Legislature is clearly expressed, and the courts have no power to interfere unless an act is plainly unconstitutional. If the unconstitutionality of an act is not beyond reasonable doubt, the courts will uphold it. *King v. R. R.*, 66 N. C., 297. It is not a question in anywise of eminent domain, or taking private property for public
(852) use (*White v. Bloomington*, 94 Ill., 604), and there is due process of law, as ample notice of the assessment, with opportunity to be heard, is given the property holder. *Davidson v. New*

Orleans, 96 U. S., 97. While other modes of assessment are valid, that of assessing by the front foot is not only sustained by the numerous cases cited in *Raleigh v. Peace, supra,* and numerous other cases, among them *Chicago v. Joliet,* 39 N. E., 1077; *McKeesport v. Busch,* 33 N. E., 49, and cases cited in Cooley on Taxation, 644, but the "frontage" rule is essentially equitable. By that rule the owner of unimproved property, who has contributed nothing to the prosperity of the city, but who is benefited by all improvement, pays his just share towards the enhanced value of his property, whereas, under an assessment upon the basis of the value of each lot, the buildings, which have no value added to them by the improvements, contribute. The added value being to the land, the front-foot rule, regardless whether the property is improved or unimproved, is ordinarily the most just. There may be cases in which the length of the taxing district and the diversity of values may make the assessment grossly lacking in uniformity. If that is so in this case, that objection can be raised in proceedings regularly brought under the act of 1891 (chapter 135).

While a local assessment is not a tax within the purport of constitutional limitation upon taxation (*Raleigh v. Peace, supra*), yet, as the plaintiffs might have made their annual payment (one-twentieth), and have had their action at law to recover it back, they were not entitled to the equitable relief by injunction. There was no irreparable damages threatened, the cost being divided into twenty annual payments, with twelve months' right to redeem in event of a sale for nonpayment of an assessment. At any rate, the act itself prescribed a special method (section 6) by which the validity and regularity of such assessments can be contested, and the plaintiffs, having (853) that remedy, cannot proceed by injunction. *McIntyre v. R. R.,* 67 N. C., 278. This remedy is also adequate as to the culvert and all other points of detail excepted to.

As to the point, which was much pressed, that the act contemplated charging the property on each side with only one-sixth of the cost of the improvement, it seems to us that it is clear, beyond ambiguity, that one-third of the cost is to be assessed on the real estate on each side of the street. The language of section 4 provides that "the mayor and board of aldermen shall assess one-third of the cost of grading, paving, etc., on the real estate abutting on *each* side of the street so improved or repaired." Section 5 provided that the mayor and board of aldermen shall "charge to such real estate on each side of the street upon which work is done one-third of the cost of such improvement." If this could possibly, by any reasonable method of construction, be held to admit of a doubt that the property on each side of the street should pay one-third of the cost, and consequently that the property on the

two sides should pay two-thirds of the cost, the matter is placed beyond controversy by the further provision in section 7, that the city itself should pay one-third, "the abutting land on each side assuming the liability hereinbefore created," *i. e.*, two-thirds. Thus the whole cost is provided for—one-third by the city and one-third by the property on each side of the street improved. The act being constitutional, whether any particular lot is overassessed or improperly assessed is a matter which must be litigated in the manner and by the proceeding provided for that purpose by the act itself. Whether the plaintiffs or any of them are estopped by their conduct from insisting upon their objections to the assessment upon their property is a matter
(854) which will come up in such proceeding and need not be considered here. The injunction was improvidently granted and must be dissolved.

Error.

Cited: Broadfoot v. Fayetteville, 121 N. C., 423; *Wilson v. Green,* 135 N. C., 351; *Teeter v. Wallace,* 138 N. C., 268; *Asheville v. Trust Co.,* 143 N. C., 373; *Kinston v. Loftin,* 149 N. C., 256; *Kinston v. Wooten,* 150 N. C., 298; *Schank v. Asheville,* 154 N. C., 41; *Tarboro v. Staton,* 156 N. C., 506; *Lewis v. Pilot Mountain,* 170 N. C., 110.

STATE ON RELATION OF R. H. BATTLE AND WALTER CLARK, EXECUTORS OF ELEANOR SWAIN, v. E. BAIRD, ADMINISTRATOR OF E. W. HERNDON, ET AL.*

ACTION ON OFFICIAL BOND—EVIDENCE—PRESUMPTION AS TO VALIDITY OF OFFICIAL BONDS—PROOF—CONSTRUCTION—ALIAS SUMMONS—ACCEPTANCE OF SERVICE—SERVICE OF SUMMONS BY CORONER WHEN SHERIFF IS PARTY—JUDGMENT BY DEFAULT.

1. The clerk of the Superior Court being required to give a bond for the discharge of the duties of his office, etc., (section 72 of The Code), it will be presumed, in the trial of an action on such bond, that he did so, and any such bond found in the keeping of the proper custodian will be presumed to have been properly given and accepted as such.

2. Such bond may be proved, as at common law, without being subjected to the strict rules of evidence, and if there is a subscribing witness it may be proved by other witnesses, as if there was no subscribing witness.

3. Inasmuch as the duly certified copy of the record of any instrument required to be registered is admissible as full and sufficient evidence of such instrument (The Code, sec. 1251), and as the register of deeds is required to register and keep the bond of the Superior Court clerk, a duly certified copy of the record of such bond is competent evidence of its provisions.

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

4. Where an official bond, given by the clerk of the Superior Court elected for a term of four years, beginning in 1884, recites that the term was for four years, "from and after 1 August, 1878," the error, being clearly clerical and inadvertent, does not invalidate the bond, but will be treated as surplusage.

5. Where a summons, intended but not ordered to be issued as an *alias* summons was issued, returnable to a future term, at which an amended complaint was filed, naming a party as defendant: *Held* to be sufficient against such party, though no connecting summonses were issued.

6. Where a party accepts service of a summons, he is precluded from afterwards objecting to the summons on the ground that it was not directed to the proper officer.

7. In an action wherein the sheriff is a party defendant it is proper that a summons issued against a codefendant should be addressed to and served by the coroner. (The Code, sec. 658.)

8. In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be *final*, since the action is not for the breach of an express or implied contract to pay a definite sum of money fixed by the terms of the bond or ascertainable therefrom (section 385 of The Code), but must be "by default and inquiry." (Section 386 of The Code.)

ACTION begun by summons, issued 27 February, 1888, re- (855) turnable to the March Term of BUNCOMBE, in favor of the plaintiffs against the defendants S. Baird, administrator of E. W. Herndon, deceased; H. M. Herndon, Robert P. Vance, J. R. Jones, F. Sluder, R. L. Luther, J. R. Rich, W. J. Worley and F. A. Lance, tried before *Robinson, J.*, and a jury, at August Term, 1895, of said court.

The defendant R. L. Luther excepted to the judgment. (859)

Davidson & Jones, Battle & Mordecai and J. B. Batchelor for plaintiffs.

Moore & Moore for defendants.

FURCHES, J. This is an action on the official bond of E. (860) W. Herndon, Clerk of the Superior Court of Buncombe County. At the trial plaintiffs offered in evidence the register's books of Buncombe County, containing what purported to be the official bond of said Herndon, as clerk, signed by himself and the other defendants, as his sureties. This was objected to and ruled out by the court, and plaintiffs excepted. Plaintiffs then produced the original and proved the signatures of each of the defendants, and then offered this in evidence. But this was also objected to by defendants and excluded by the court, and plaintiffs again excepted, submitted to a nonsuit and appealed.

This constitutes the case on plaintiffs' appeal. There are no reasons assigned in the record of this appeal for the objections to the introduction of this evidence, nor why it was ruled out, and after a thorough examination we find no authority for the ruling of the court.

A clerk of the Superior Court holds a high and responsible public office, and one that he cannot hold without entering into bond, as required by law. The Code, sec. 72. This being so, it will be presumed that he did so, and any such bond found in the keeping of the proper custodian will be presumed to have been properly given and accepted as such (*Kello v. Maget,* 18 N. C., 414); and, if necessary, it may be proved, as at common law, without even being subject to the strict rules of evidence. Where there is a subscribing witness, it may be proved by other witnesses, as if there was no subscribing witness. *Short v. Currie,* 53 N. C., 42. This is allowed upon the grounds of public policy. But it is not necessary that we should pursue this line of proof further, as it was clearly admissible as a registered bond. The register of deeds was authorized to take the acknowledgment of this bond and to register the same. The Code, sec. 73. It being of such public importance that official bonds should be preserved,
(861) the Legislature provided for and required that they should be registered as an additional means of preserving this evidence, in which the public was interested. And as this was the clerk's bond, he could not pass on the same and admit it to probate, being a party interested. *White v. Connelly,* 105 N. C., 65; *Turner v. Connelly, ib.,* 74. So the Legislature authorized the register of deeds and *ex officio* clerk of the board of commissioners, whose duty it was to pass upon and accept the clerk's bond, to take the acknowledgment and probate, and register the same. The Code, sec. 73, *supra.*

The bond being authorized to be registered, the "registry," or register's books containing this registered bond, was competent evidence and should have been admitted. The Code, sec. 1251.

Having considered the plaintiffs' appeal, we come to the consideration of defendant Luther's appeal. He contends that he was not in court, and therefore no judgment could be taken against him; that the summons against him purports to be an *alias* summons, when in fact it was not, and there had been no *alias* ordered at the June term of the court; that this broke the connection with the original order of *alias* summons. This is true, that it broke the connection, and it could not relate back beyond its date. *Etheridge v. Woodley,* 83 N. C., 11. But still it was a summons, returnable to August term, upon which he acknowledged service more than ten days before that term. It has been several times held by this Court that the only purpose of the summons is to bring the party into court—to notify him that there

will be a complaint filed against him at the return term. The summons, under The Code, in no way indicates the cause of action. That is to be learned from the complaint. In this it differs from the writ, under the old practice, which did to some extent indi- (862) cate the plaintiff's cause of action. The defendant Luther, according to all the authorities that we know of, must be held to have been brought into court at August term, 1888, and at this term an amended complaint was filed in the action, by leave of court, in which he is named as one of the defendants.

Another objection of this defendant to his being in court is that this summons was issued to the coroner and not to the sheriff of Buncombe County. There is more than one reason why this objection cannot be sustained. The first is that it is a summons—a notice to this defendant—to be at court at August term; that the plainiff will file a complaint against him at that time. And he accepts this notice. The coroner has nothing to do with it. By his own act he puts himself in court. But another reason is that the law requires the coroner to act when the sheriff is a party. The Code, sec. 658. The coroner having the right to act, it will be presumed that he acted properly, until the contrary is shown, if he had served the summons. But in this case it appears from the affidavit of defendant Luther that one of the defendants (W. J. Worley) was Sheriff of Buncombe County, and the first summons, as well as this, was issued to the coroner. It must therefore be held that defendant Luther was in court from and after August term, 1895.

But he filed no answer, for the reason, as he says, that he had a conversation with his codefendants and agreed to bear his part of counsel fees to defend the action; that they agreed to attend to the employment of attorneys, and he thought they had done so, and for that reason he gave the matter no further attention. This would seem to be somewhat inconsistent with his other defense, that he was not even in court. But to give him the full benefit of the statements contained in his own affidavit, as the court did not find the facts, as we think it should have done if defendant requested it, in- (863) stead of making the affidavits a part of the case on appeal, still it cannot benefit the defendant. *Bank v. Foote,* 77 N. C., 131. And while we cannot allow the defendant to have the judgment set aside upon the ground of inexcusable neglect, we feel bound to set it aside upon the ground of its being irregularly taken, contrary to the statute and the practice of the court. It is not such a final judgment as is provided for in section 385 of The Code, but could only be a judgment by default and inquiry, under section 386, which cannot be executed until the next term.

It therefore follows, from what has been said, that the judgment of nonsuit must be set aside and a new trial had, and that the judgment against the defendant Luther must be set aside and the case proceeded with according to law against all the defendants in court.

It was suggested on the argument here that the bond declared on did not cover the demand in plaintiffs' complaint, for the reason that it said from and after "1 August, 1878." This question was not and could not have been before the court below for judicial determination, as the court held that the bond was incompetent evidence, and did not allow it to come before the court, and therefore could not judicially construe a bond which was not before the court for construction; nor does it appear from the record that the court did so; nor can we say that the record presents this question for our determination; but as it was called to our attention and argued, and as the same question may be presented on a new trial, we think it proper for us to intimate our opinion now. Therefore, if it shall appear on the new trial that Herndon was elected clerk in 1884, gave this bond and was
(864) inducted into office and served as clerk, he and his sureties would be liable. This would show that this expression, after "1 August, 1878," was an inadvertence or that it was an attempted fraud on the public, neither of which will be allowed to defeat public justice. We suppose it was an inadvertence, caused from copying from a bond of a former date. If Herndon is shown to have been elected and inducted into office in 1884, this explains the bond, and this inadvertence may be treated as stricken out, or as surplusage, and the bond be good. *Sprinkle v. Martin,* 69 N. C., 175; *Kello v. Maget, supra.* There is

Error.

Cited: Cowles v. Cowles, 121 N. C., 276; *Junge v. MacKnight,* 135 N. C., 109; *Scott v. Life Assn.,* 137 N. C., 522, 527; *Lumber Co. v. Coffey,* 144 N. C., 561; *Currie v. Mining Co.,* 157 N. C., 220.

FLORENCE S. VANCE v. CHARLES N. VANCE ET AL.

SPECIAL PROCEEDINGS—EQUITABLE DEFENSES—EQUITY JURISDICTION OF CLERK—DOWER.

1. The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered.

2. There is no necessity for filing a reply when an equitable defense is set up in the answer in a special proceeding.

3. A purchased land upon which there were mortgages, and assumed the payment of the mortgage debts. Thereafter A sold land belonging to his children, under a power of attorney from them, and paid off the mortgages with the proceeds. The deed to A for the land was in fee and duly registered. These facts appeared in a proceeding for dower, and the heirs insisted that a trust resulted to them in the land, and that petitioner was not entitled to dower therein. There being no allegation that the deed to A was taken by mistake, accident or fraud, a judgment for dower was proper.

PROCEEDING commenced by the plaintiff before the Clerk (865) of MECKLENBURG for the purpose of having her dower allotted to her in the real estate of her husband, the late Hon. Z. B. Vance. The plaintiff filed her petition before the clerk, and the defendants answered the same. Issues having been raised by the pleadings, the clerk ordered the cause to be transferred to the Superior Court for trial, and the same was tried before *Bryan, J.*, at January Term, 1896, of MECKLENBURG.

Defendants appealed. (867)

Burwell, Walker & Cansler for plaintiff.
C. Dowd and Brevard Nixon for defendants.

MONTGOMERY, J. The defendants, in their answer to the petition for dower, admitted that the legal title to each and every lot or parcel of land described in the petition was in the husband at the time of his death, but they averred that one of the parcels (the Bee Tree tract) in equity belonged to them, and that the petitioner, therefore, was not entitled to dower therein. Issues of fact were raised by the pleadings, and under section 256 of The Code the case was transferred to the civil-issue docket for trial. At January term, 1896, upon the case being called, the defendants' counsel stated that, as the answer set forth facts which constituted an equitable defense and counterclaim and prayed for affirmative relief, he thought there should be a reply to the same by the petitioner. The counsel of the petitioner thought a replication unnecessary. It was then agreed that a jury trial should be waived and that the judge should pass upon the issues of fact and law and render judgment accordingly. The defendant's counsel then moved for judgment upon the answer, on account of the failure of the petitioner to make replication. Upon our first examination of the matter of the motion for judgment we were inclined to the view that an equitable counterclaim could be set up in the answer; that if no replication was filed the clerk would on his own motion send the matter on to the judge, in chambers, as under the old chancery practice, for

his orders and directions as to how to administer the equities;
(868) and that if issues of fact were raised concerning the alleged equities the case would be transferred to the ensuing term of the court for the trial of the issues. But upon fuller investigation we are of opinion that the clerk, in special proceedings, has no power to make any order or decree granting affirmative equitable relief. *Bragg v. Lyon,* 93 N. C., 151. New matter, by way of avoidance, may be set up in the answer containing equitable rights, and when such rights exist they ought to be pleaded before the clerk, but when pleaded they amount to no more than an equitable defense. This question has not been directly presented to this Court before, but the same principle of pleading has been applied to actions before a justice of the peace, where equities were set up in the answer. *Lutz v. Thompson,* 87 N. C., 334; *McAdoo v. Callum,* 86 N. C., 419. The motion to dismiss the petition for failure on the part of the plaintiff to reply to the answer was properly overruled by his Honor.

A jury trial was waived by the parties and the issues of fact and law were, by consent, tried by the judge. His Honor found as facts, in substance: (1) That in 1888 the husband of the petitioner purchased the land called the Bee Tree tract, took a deed for it and had it registered; that the vendor owed a debt of $2,000 to Baylus and one of $1,500 to Davidson, secured by mortgage upon the land, which the vendee agreed to pay, and that he did pay them in 1891; that in 1890 or 1891 the husband of the petitioner, under a power of attorney from his children by a former marriage, who were all of full age, sold a part of the real estate of his former deceased wife (mother of the children who gave the power of attorney), in which he had a life estate as tenant by the courtesy, and from the proceeds of the sale paid the debt, referred to, of Baylus and Davidson. (2) That the husband of the petitioner, Zebulon B. Vance, died in April,
(869) 1894 (in Washington, D. C.), regarding Charlotte as his place of residence, having voted there in 1892. All and every part of the testimony went to prove the fact as found by his Honor, and there was nothing in the averments of the answer intimating that the deed was not written just as it ought to have been—no intimation that the deed was taken by mistake, accident or fraud. The case was argued before us simply on the point of practice, which we have decided against the defendants. On the facts found by his Honor the court concluded and adjudged:

"1. That the petitioner is entitled to dower in the Bee Tree tract of land, as well as the other lands mentioned in the petition.

"2. That the house in Charlotte was not the last usual place of residence of the said Zebulon B. Vance.

"It is therefore adjudged by the court that the petitioner is entitled to dower in all the lands described in her petition. It is further adjudged that the same be allotted to her in the manner provided by law."

An order was also made for an account to be taken of the rents which have been collected since April, 1894, and that the petitioner's part thereof be ascertained. The defendants appealed.

We see no error in the rulings made by his Honor, and the judgment seems to be a proper one.

No error.

Cited: Austin v. Austin, 132 N. C., 266; *Hoggard v. Jordan,* 140 N. C., 619; *Levin v. Gladstein,* 142 N. C., 494; *Webster v. Williams,* 153 N. C., 311.

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(870)

VAN BROWN v. JOHN HOUSE ET AL.

BOUNDARIES—SURVEY—CALLS IN GRANT OR DEED—COURSE AND DISTANCE—MONUMENTS.

The decision of the case between same parties, 116 N. C., 859, was based upon correct principle, and, supported by the citation of additional authorities, is sustained upon a petition to rehear and reargument. (For syllabus see former report.)

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

PETITION by defendants to rehear this case, decided at February Term, 1895, 116 N. C., 859.

J. M. Gudger, Jr., and Shepherd & Busbee for petitioners.
V. S. Lusk contra.

FURCHES, J. This case was before us at Spring Term, 1895, and the opinion of the Court rendered at that term (*Brown v. House,* 116 N. C., 859), is now before us upon a petition to rehear. After a careful examination of the grounds alleged in the petition, we see no reason for reversing the judgment of the Court rendered on the former hearing. In our opinion the case was then put upon correct principle, and upon the facts in the case was correctly decided.

Being of this opinion, it does not become necessary for us at this time to review any argument in the opinion as then delivered, nor to explain or modify the same, nor to review, explain or correct any authority cited in support of our former opinion. The only thing we

can do is to cite additional authority to sustain the judgment of the Court as heretofore rendered. The opinion of the Court de-
(871) livered at Spring Term, 1895, enunciates no new doctrine, as the petitioners seem to think it does. It recognizes the doctrine that course and distance contained in a deed or grant may be controlled by another call contained in the deed or grant that is more certain than course and distance. It also recognizes the fact that a call for another tract of land has been held by this Court to be sufficient to vary course and distance, when the line called for was a known and established line at the date of the deed or grant calling for the same, and that when a line so called for is *established* it will control, unless there are reasons to show that it was not in fact the line called for.

But admitting all this, as we did in the former opinion, there are two infirmities in defendant's contention that are fatal to him: First, the Blount grant does not call for the "Stokley Donelson line," and, secondly, the "Stokley Donelson line" was not established. The call is 360 chains south to a stake, *supposed to be* in Stokley Donelson's line. If the call had stopped at the word "stake," we suppose no lawyer would have contended that the line south from the painted rock did not end when the 360 chains called for gave out. Then how can this be changed by the fact that it was *supposed* this stake was in Stokley Donelson's line, when in fact it was not? The Stokley Donelson line is not the point called for, but a *stake* at the south end of a line 360 chains in length, commencing at the painted rock. The term, "*supposed to be in Stokley Donelson's line,*" must be treated as surplusage or as a term intended in explanation of or qualifying this point. Suppose I sell to A my gray horse, Jackson, *supposed* to be twelve years old, but it turns out he is fifteen years old. I was mistaken in my *supposition,* but A gets the horse and nothing
(872) more. Or I sell to A my gray horse, Jackson, which I supposed to be at Stokley Donelson's, and it turns out that he is not at Stokley Donelson's, but at William Johnston's. I was mistaken in my *supposition* that the horse was at Stokley Donelson's, but A gets the horse, just the same as if I had not been mistaken as to where he was.

As we have said, this is no new doctrine. In *Harry v. Graham,* 18 N. C., 76, where the call of the grant was to a black oak, near the line of another tract of the grantee, the black oak could not be found, and the distance called for gave out thirty poles short of the line of the grantee's other tract and it was held that the call, *near to,* would not carry the line *thirty* poles further, and that the line must terminate at the end of the distance called for.

In *Carson v. Burnett,* 18 N. C., 546, it is held that course and distance called for must control, unless there is another call more definite and certain than course and distance. In *Kissam v. Gaylord,* 44 N. C., 116, it is held that course and distance must control, unless there is some other description or call in the conveyance that is more certain than course and distance. In that case it was claimed by defendant to be a deed for a lot 200 feet square, in the town of Plymouth, and the second call in the deed was along Jefferson Street 200 feet, thence to the northwest corner of the "Winchell lot," and the lot being granted was known as the "Winchell lot." To stop at the call of 200 would lack a few feet of going to the southwest corner and would not cover the *locus in quo.* And it was held that the line in the second call must stop at the end of 200 feet.

In *Spruill v. Davenport,* 44 N. C., 134, it is held that "course and distance govern in questions of boundary, unless controlled by some more certain description." In this case the call was "to Benjamin Spruill's line and thence along his line and *Thomas* Mackey's line 300 poles to Greenland Swamp." The plaintiff undertook to reach Greenland Swamp by his lane and the line of a tract (873) that had belonged to one *William* Mackey, not being able to find any line of Thomas Mackey, and the court below sustained the view of the plaintiff and so instructed the jury. But this Court, on appeal, reversed the court below. *Pearson, J.,* delivering the opinion of the Court, said there was no evidence to take the case out of the general rule that course and distance control, and the court should have so instructed the jury.

In *Cansler v. Fite,* 50 N. C., 424, in a call in a deed, "south 300 poles to a Spanish oak, *in or near Richmond's line,*" and the Spanish oak could not be found, and the distance called for gave out 30 poles before *Richmond's* line was reached, it was held that the call, "in or near Richmond's line," was too indefinite and uncertain to change course and distance, and that the line terminated at the end of the distance called for.

Mizell v. Simmons, 79 N. C., 182, cited in the former opinion of this Court, must be overruled or the former opinion sustained. This opinion was simply cited in the former opinion of the Court, and as that opinion has not been satisfactory to the counsel of defendant we feel called upon to make some quotations from this well-considered opinion bearing directly on the point under consideration in this case.

"A call in a grant for a line beginning at the mouth of a gut, *supposed* to be J.'s bounds, running along his *supposed* line south 300 poles, in the pocosin, *to or near* the head of Speller's Creek, etc., indi-

cates that there was no *established or known line,* and, the course and distance being certain within themselves, must govern.

"In such case, the calls being from an established corner, south 300 poles to the pocosin, *to or near* the head of Speller's Creek, the course and distance must prevail, without being controlled by the
(874) words *to or near* the head of Speller's Creek. In such a case it was unnecessary, as a matter of fact, to ascertain where was the head of Speller's Creek, because, as a matter of law, the terminus of the line was at the end of the course and distance called for."

These quotations are taken from the headnote in *Mizell v. Simmons,* and sustain the view taken in the opinion that the call of 360 chains south to a stake, *supposed* to be in Stokley Donelson's line, cannot be used to control course and distance which is considered certain, in the absence of something more certain and we see from the authorities cited that this *supposition* contended for by defendant is not more certain—is not certain at all. This might end this examination of defendant's petition to rehear. But we have said there was another infirmity in the claim of defense: That defendant had not established Stokley Donelson's line at the point where he claims they intersect. And this leads us to a short review of what was said in the former opinion as to marked lines tending to locate the Stokley Donelson grant. We are somewhat unprepared at this criticism of the opinion, when no such grounds were taken in a vigorous dissenting opinion by one member of the Court. But still, if injustice has been done the defendant, by neglect or inadvertence to the facts, such wrong should be corrected. Upon a review of the evidence we find that a Mr. Gudger and some other witneses testified as to seeing some marks in former surveys, about 1856. But it seems that R. S. Tweed was appointed by the court to make an official survey of these lands, and upon the trial the defendants introduced him as a witness, and he testified as follows: "I began to survey at index 28 (see official plat); ran east to 29; ran south to 30; then 17 chains to 31; thence north 560
(875) chains to 32; thence east 1680 to 23; thence about 600 poles to the beginning. At the beginning I found some linn stumps on a branch. Plaintiff was present and showed me the stumps—one stump 1½ feet through—and logs, in what looked like a spring. I reversed the line and ran to north 23, and found same land, marked about five or six years old; from 23 we ran west to 22, and plaintiff said that he and I. N. Ebbs had run these lines, and ran them about as I ran, and showed me marks they made, and I understood that he said they were tracing the Donelson grant; found no landmarks, except marks made by Brown and Ebbs; this line crossed Spring

Creek." We therefore feel fully authorized to say that not a single marked tree is shown, going to establish the Donelson grant, unless it is to establish the beginning corner. The defendant claims that the Blount grant extends to an east and west line, between 22 and 23, some twenty miles long, where no tree or anything else was found, at either 22 or 23, establishing a corner, and not a marked tree was found on the line, except a few made by Ebbs five or six years ago. And this is the mathematical line that plaintiff claims should govern and control the call in the Blount grant and carry it a mile and a quarter farther after the distance gives out.

Carson v. McCrary, supra, relied on by defendants, is so different from the case before the Court that it hardly seems necessary to distinguish them. There *Pearson, C. J.,* speaks of the mathematical line. But that opinion is put on the ground that the corners at both ends of the line were known, and there was nothing to do but to run a straight line between these known corners. In this case the plaintiff claimed under a grant for 300 acres and the defendant claimed under a junior grant for 100 acres, but calling to commence and to run with plaintiff's line. This being so, the Court properly (876) held that defendant's land ran to and with plaintiff's line. That is not our case.

The former opinion of the Court has been criticised for indulging in some speculation as to the history of what is known and called "speculation grants." And it was intimated that the Court was not disposed to give these speculators the same measure of justice that it gives others. We do not think the Court is justly liable to this criticism. We have no idea that there is a single member of this Court who would not give such speculators every foot of land they thought them justly entitled to, and not one of them who would give them a foot more. All we know about the titles in this case is from deeds and grants offered in evidence. The plaintiff offered a grant, dated in 1890, which is admitted covers the land he claims. The defendant then offered a grant to Blount in 1795, a grant to Stokley Donelson in 1790, and a deed from Sawyer to William Johnston, and we suppose the defendants claim under Johnston or his heirs.

What we said amounts to no more than had been said by this Court before. In *Cherry v. Slade,* 7 N. C., 82, *Taylor, C. J.,* delivering the opinion of the Court, said: "In many cases surveys were in no otherwise made than upon paper." This was said in reference to early grants. And in the case of *Literary Board v. Clark,* 31 N. C., 58, *Ruffin, C. J.,* delivering the opinion of the Court, in speaking of the omission in a plat to note a water course called for in the grant, said: "The omission renders it highly probable that the plat was made with-

out actual survey, and thus deprives it of whatever credit it might otherwise be entitled to." This was the view presented in the opinion heretofore rendered, that in all probability the Blount grant and Donelson grant were both located without an actual survey,
(877) and were therefore not entitled to the credit they might otherwise be entitled to. What is a boundary is a question of law for the court, and where this boundary is, is a question of fact for the jury. *Jones v. Bunker,* 83 N. C., 326; *Burnett v. Thompson,* 35 N. C., 379; *Marshall v. Fisher,* 46 N. C., 111; *Clark v. Wagoner,* 70 N. C., 706. We are of the opinion, from the evidence in this case, that the court, as a matter of law, should have instructed the jury that the stake—the imaginary point—at which the 360 chains gave out, on the line south from the beginning corner on the birch on the south side of the river, opposite the painted rock, was the southwest corner of the Blount grant, and that the line ran east from that point. This was substantially the plaintiff's prayer for instruction, which was refused. This was error.

Petition Dismissed.

AVERY, J., dissenting: The two calls in the grant to John Gray Blount, offered by the defendant, and which gave rise to the controversy, were: "South 360 chains to a stake supposed to be in Stokley Donelson's line; thence with his line 390 chains to his northeast corner." The learned judge and experienced real estate lawyer, who tried the case below, was asked to instruct the jury that those two calls, taken together, were too vague and uncertain to vary course and distance, and should therefore have been run 360 poles from the admitted beginning at Paint Rock, and thence east, from the point where the distance gave out, 390 poles. Instead of complying with the request, the judge told the jury that the first call "360 chains to a stake near Stokley Donelson's line," standing alone and of itself, could not be extended beyond the actual distance, and, therefore, if counsel for the defendant contended that it should have been extended,
(878) that question was not raised by the appeal. But the judge did instruct the jury that, construing the second call with the first, if they considered the evidence sufficient to locate the Donelson line as one that had been run and marked, or that it was susceptible of being located with mathematical certainty by running from known points, then the second call would run from the end of the first to the nearest point on the Donelson line, and with it east 390 poles.

Pretermitting the inquiry as to the sufficiency of the evidence submitted to the jury to determine whether there was either a marked

or a mathematical line of the Stokley Donelson survey located so that an extension of the first line from the end of the distance (360 poles) would intersect it, we are confronted at the outset with the question whether the first and second call, construed together, ought to have been run, as his Honor told the jury, to such line, if established satisfactorily to them in either way.

1. Addressing the argument to this point first, we will find that our reports furnish a long line of authorities bearing directly upon it, and beginning as far back as the Conference Reports, when the land law of North Carolina, in its formative period, was shaped by jurists whose good judgment and practical knowledge of surveying, as well as clear apprehension of legal principles, fitted them in an eminent degree for the task of adapting the expansive principles of the common law to a new subject in a new country.

In the early case of *Sandifer v. Foster,* 2 N. C., 283, the call, next to the last, of a deed was for a white oak (which stood a half-mile from the river), and the last call was "thence along the river to the beginning." The Court held that the line should be extended from the white oak a half-mile, and then run with the river to the beginning, though by so running, instead of directly from the white oak to the beginning, a large additional area of land would (879) be embraced in the patent, and the reason given was that it had always been thus uniformly decided in this Court.

In *Hartsfield v. Westbrook,* 2 N. C., 258 (297), the call was "from a tree (not at a swamp) to another (not at the swamp), down the swamp to the beginning." The Court declared the true line to be to the swamp from the first tree, then with the swamp to a point opposite the second tree. The two cases last mentioned are cited with approval in *Baxter v. Wilson,* 95 N. C., 137.

This principle is familiar to layman and lawyer, in the practical application of it, upon which a call from one corner tree to another on the bank of a stream runs *ad filum aquae* to a point opposite the corner called for, and then to it by a course at a right angle with the general direction of the stream between the two points.

The rule laid down in the early case of *Bradford v. Hill,* 2 N. C., 22, was that courses and distances must be observed, except where a natural boundary is called for and shown, or when marked lines and *corners can be shown to have been made at the original survey.*

When the call is from one known corner to another, by a certain course and distance, "but with" a certain public road, the line must be varied from the course and distance so as to run to and with the public road, and as between two branches of the road it is for *the jury to determine* which was the public road *when the deed was exe-*

cuted. Hough v. Horn, 20 N. C., 369. A striking instance of the rule requiring an off-set to be made to intersect with and run with marked lines in order to fulfill all of the descriptions of a deed is found in *Blount v. Benbury,* 3 N. C., 353, where the call was "running south 85 east with Beasley's and Blount's lines," Blount's line being located 51 poles north of and parallel with the other. The
(880) Court held that it should be run with Beasley's line till it gave out, and then 31 poles to Benbury's line, and with it, *Judge Hall* giving as a reason that there "had been many decisions in this country which warrant a departure from the line described in a deed or patent, to follow a *marked line which the jury have good reason to believe was the true one.*" The doctrine of filling as nearly as possible all of the descriptions is founded upon the familiar rule that a contract should be so construed as, if possible, to give effect to all of its provisions, and is commended in its application to questions of boundary in *Shaffer v. Hahn,* 111 N. C., 1, and *Buckner v. Anderson, ib.,* 572. Another case exactly on all fours with this, and in which the Court cited and approved *Blount v. Benbury, supra,* was *Fruit v. Brower,* 9 N. C., 337. There the call which gave rise to the controversy was from a marked corner, a black oak, "along said old line (Thomas Williams') west to a stake in McGee's line." The court below instructed the jury that the line extended to Thomas Williams' old line, wherever that was, notwithstanding the black-oak corner and a line marked from it in the proper direction, and this ruling was affirmed. The effect there was to locate the line by running from the black oak about twenty poles at a right angle to it (as it is here proposed to run to the Donelson line), and thence with the Thomas Williams line, so as to increase the acreage embraced in the tract by this departure from the course about one-fourth. A glance at the calls of the Blount grant will show that the proportional increase in this case is not in any aspect of the evidence one-third. The two last cases are cited in *Dobson v. Whisenhant,* 101 N. C., 648. A deed of conveyance is an executed contract, and in its interpretation we must
(881) begin with the admission that the description, if sufficient, is so far ambiguous as to require parol testimony "to fit it to the thing." *Safret v. Hartman,* 52 N. C., 199. Where the calls are conflicting, the courts incline always to adopt that which is the more certain, following the fundamental principle upon which the whole of the law of evidence is founded. Hence, in the absence of proof of a line and corners actually run and marked and agreed upon by both of the parties when they entered into the contract, a call for a natural object is deemed more certain than course or distance, and when identified will control both. In *McPhail v. Gilchrist,* 29 N. C., 169, the

two last calls of the deed were "thence north 87 west 179 poles to a hickory; thence the course of the swamp to the beginning." The distance gave out 9 chains and 50 links from the swamp, and there was no hickory found, nor was its previous existence at any place shown. This Court approved of the charge of the judge, that the line must be extended to the swamp (just as in this case to Donelson's line), and thence to the beginning. *Hurley v. Morgan,* 18 N. C., 425; *Lynch v. Allen,* 15 N. C., 62; *Bectton v. Chesnutt, ib.,* 335; *Stapleford v. Brinson,* 24 N. C., 311; *McPhail v. Gilchrist, supra; Literary Board v. Clark,* 31 N. C., 58; *Spruill v. Davenport,* 46 N. C., 203; *Waters v. Simmons,* 52 N. C., 541; *Strickland v. Drawhorn,* 88 N. C., 315; *Brittain v. Daniels,* 94 N. C., 781; *Redmond v. Stepp,* 100 N. C., 212.

2. If it is undeniably true, as the authorities cited, and others which might be added, show, that the call, "thence with Stokley Donelson's line," would prolong the first line till it should intersect that line, and then run with it, if it could be established to the satisfaction of the jury, we are brought to the discussion, first, of the question the judge below erred in holding that there was evidence which the defendant had a right to demand should be submitted to the jury as tending to show the existence of the old marked (882) Donelson line; and that if the jury believed it was ascertained, as contended by the defendant, they should locate the second call by running from the end of the call for 360 chains to it, and then with it. The Court, in the opinion in the former case, was not advertent to the testimony offered to show the line of the Donelson tract, to which defendant contends that the line of the Blount grant extends. A. M. Gudger testified that he was present when Blackstock ran the Stokley Donelson line from the line trees (which are called for as dogwood in the third call of the Blount grant). He testifies that Blackstock, a surveyor, in the year 1856, blocked a linn tree at the point now claimed by defendant to be the Stokley Donelson corner, and the marks corresponded by count with the date of the Donaldson grant. He further testifies that Blackstock, the surveyor, and Joe Massey, both now dead, told him the linns were the corner. A. M. Gudger testified that in running from those trees 275 chains north to the northeast corner (called for in the Blount grant, and thence along the line of the Donelson tract, which the defendant insists he has so located as to extend his line to it) he and Blackstock found, forty years ago, old marked line trees on that north line. Dr. Reynolds testified that he had always heard the point now spoken of by Gudger as the "linn corner" called the "Stokley Donelson beginning corner," and that he ran the Donelson deed from it north, and then along what is the north line, with which defendant claims to run east, and found "old

marks, very old," along the line. Robert Justice testified that one Davis, now dead, showed him the linn stumps, and said that was the Donelson corner, and that the place was called by some the "Reynolds Camp," and by some "Puncheon Camp," by both of which
(883) descriptions its location is indicated in the grant, and that the place corresponded with the grant, in that it was near a spring. In running from the linns so pointed out, it seems that Justice also found old marked trees that Davis said were the linn trees of the Donelson grant, but his testimony is not given very fully or stated very clearly upon that subject. Tweed, the last surveyor, ran from a linn stump near a spring, shown to him as the beginning corner of the Donelson grant by the plaintiff. He found no marks.

It was contended that the testimony that a stump was shown which was reputed to be a corner was not evidence to go to the jury. In *Murray v. Spencer,* 88 N. C., 357, it was held that a stump without a mark upon it, but which had been pointed to as a corner by reputation for thirty years, was some evidence that a line had been run, corresponding with the first call of the grant, from that stump as a beginning, and citing *Icehour v. Rives,* 32 N. C., 256 (where he said the very point was decided), *Justice Ruffin* added: "This must of necessity be so, or else the very flow of time, which should give sanctity and security to titles, will ultimately undermine them by destroying the perishable objects denominated as their boundaries and removing the witnesses acquainted with the localities." There being some evidence of marked lines, the question was properly submitted to the jury; and if they found, even upon evidence of reputation, that there were old marked line trees along the Donelson line, as contended by defendant, and believed they indicated the location of the true Donelson line, the first line of the Blount grant should have been extended. "In questions of boundary, marked lines or trees are more certain than course and distance, and should control them." *McNeill v. Massey,* 10 N. C., 91. *Judge Henderson* said in this case: "Whether they (the lines called for by adjacent patents) proved that marked trees
(884) were once there, is an inference of fact that belongs to the jury. * * * If such were not the law, most of our patents would change their locality as our marked trees decayed and as our proofs direct of their having once stood there were lost." The reasoning in that case would have justified the court below in telling the jury that they might infer the location of the line of an adjacent tract when a survey of it from known points fixed the location of such line. The earlier cases of *Reddick v. Leggatt,* 7 N. C., 529; *Orbison v. Morrison, ib.,* 551, and *Tate v. Greenlee, ib.,* 556, all concur upon the point that where there is any evidence tending to establish the loca-

tion of a line it is the province of the jury to determine where it is, and it is error in the court to express an opinion as to its location. There being evidence of the existence of a marked line, the judge properly left the jury to determine its sufficiency to establish the line.

How is a mathematical line, or one that can be established "with mathematical certainty" (which the trial jury properly held to be synonymous), to be defined? Evidently "mathematical" is used in the sense of "demonstrable by the use of mathematics," or by the rules of surveying, which is a branch of the science of mathematics. The question, as presented by the learned reporters in *Bectton v. Chestnutt, supra,* was whether a branch, as a distant natural object, was to be followed "in preference to the mathematical description by course and distance." *"Id certum est quod certum reddi potest"* is the maxim which furnishes the test of the sufficiency of a description in a deed of conveyance (*Mann v. Taylor,* 49 N. C., 273); and hence, where there is a single corner which can be identified and located, the surveyor can run from that, when the course and distance of other calls are given, and established the location of all the other lines and corners by the "mathematical description of course and distance." It is a mathematical axiom that two points establish (885) the direction of a line, and that two points at either end, being ascertained, will locate the whole line. But it is equally an axiomatic truth that, one of five or six corners being known, and the distances of every call given, a tract of land can be located with mathematical certainty, that being regarded in law as certain which can be made certain by the survey. *Hinchey v. Nichols,* 72 N. C., 66. "The line of another tract which is called for controls course and distance, being considered the more certain description, and it makes no difference," says *Pearson, J.,* in *Corn v. McCrary,* 48 N. C., 499, "whether it is a marked or unmarked or mathematical line (as it is termed in the case), *provided it be the line that is called for."* But it is contended that no line is a mathematical line, within the rule laid down by *Pearson, J.,* unless both ends of it are located. This contention is based upon the idea that, in a single case where the unmarked line was held sufficient as a mathematical line, the two corners at either happened to be proved. But this is a *non sequitur.* In *Corn v. McCrary* there was testimony tending to show a chestnut corner at one end of the line (5, 6), just as there was evidence in our case from which the jury might have found one marked corner of the particular line called for. If, however, the jury believed that the line corner was located where Gudger testified that Blackstock blocked the tree, and where the location was fixed by so much hearsay testimony and by reputation, strengthened by the proximity of the spring called for,

then, the course and distance of every line being given, the surveyor, under the maxim, *"Id certum est quod certum reddi potest,"* could, by a survey made according to the rules prescribed in every mathematical treatise on surveying, have ascertained with absolute certainty the location of the lines, and thereby have "fitted the
(886) description to the thing." Who has arbitrarily prescribed the rule that a line located by the two points admitted to be at each end of it is any more a mathematical line than when the two ends are ascertained by measuring the known distance from other known objects and from each other? Both lines are located upon mathematical axioms and with mathematical certainty.

In the former opinion the Court was inadvertent to the law, as well as the facts, in holding that the number of acres included in the boundary, as run, upon the different theories of the parties, could be considered by the jury, much less by the court, in coming to a conclusion as to the location. At most, quantity was but a circumstance to be considered by the jury for what they deemed it worth, not by the court as conclusive of the location of a line as a question of law. What are boundaries is a question of law. Where they are to be located, by quantity or other competent evidence, is to be determined by the jury. "If one grant to S. S. 1,000 acres, and no more, according to certain lines, and include 2,000 acres (said the Court, in *Reddick v. Leggatt, supra*), the 2,000 acres pass, because the butts and bounds are more certain than the quantity." So the butts and bounds, if fixed by the jury (as it was their province to do), so as to extend to the Donelson line, are more certain than quantity, and upon that principle must control. In *Miller v. White*, 1 N. C., 223, a line calling for 40 poles was held to be properly located by extending it 40 poles farther, or double the distance, to reach a line called for. In *Johnston v. House*, 3 N. C., 301, though it appeared that the surveyor made his certificate extending a line only 80 poles instead of 160, when he had made a line in his certificate, in order to reduce the acreage from 712 to that called for (640 acres),
(887) the Court held that the line was properly extended to the marked corner at 160 poles. Numberless instances can be shown where the acreage was proved to have largely exceeded that called for; yet no instance, except in the opinion in this case, can be found where, in a suit between private parties, course and distance have been declared by the Court sufficient in law to control, instead of a call for a natural boundary, lest a patentee should hold too many acres. Whether the State has been defrauded is not a question to be considered in settling conflicting claims of individuals involving the location of boundaries. If the

courts are to determine, where the testimony is conflicting, whether a given boundary includes a reasonable number of acres, how can counsel advise clients when the calls of a grant happen to include more than the number of acres specified? It is better that the law should be wrong than uncertain.

But there are two other reasons why quantity should not be considered in this case: First, the land inside of the boundary which had been granted by older patents was expressly excepted, and the area of that is left by the evidence uncertain, though the burden was upon the plaintiff to show fraud, if it was competent for him to prove it. In the second place, it was in evidence that the surveyor made a mistake in running another line that, if corrected, would have extended the call east 360 chains much nearer to the line claimed by the defendant to be Donelson's line, and would have reduced the acreage correspondingly. For the reasons given, the charge of the court below was not erroneous, and the judgment ought to have been affirmed.

CLARK, J. I concur in the dissenting opinion.

Cited: Lumber Co. v. Hutton, 152 N. C., 540; *s. c.*, 159 N. C., 450; *Fowler v. Coble*, 162 N. C., 501.

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(888)

STATE ON RELATION OF BLUFORD TILLERY, TREASURER OF MADISON COUNTY, v. C. B. CANDLER, SHERIFF, ET AL.

PRACTICE—AMENDMENT—DISCRETION OF JUDGE—TAX COLLECTOR—SCHOOL TAXES —ACCOUNTING—PLEADING—APPEAL.

1. Where the character of the claim or demand constituting the cause of action is not substantially changed thereby, an amendment adding the name of a party rests in the discretion of the trial judge, and is not reviewable on appeal. (The Code, sec. 273.)

2. The county board of education having been abolished by section 2, chapter 439, Laws 1895, and their duties transferred to the board of county commissioners, rendered necessary and proper a change in the relator, in an action brought by the treasurer of a county against a sheriff who had defaulted in settling for the school taxes of the county.

3. All the school taxes are included in the accounting to be made between the county treasurer and the sheriff, and for the failure to pay over such taxes, whether exclusively school taxes or of that part collected for county purposes, the sheriff is liable for the statutory penalty of $2,500.

ACTION pending in MADISON, and heard on complaint and demurrer, before *Robinson, J.*, at chambers, on 3 October, 1895.

The action was against the defendant Candler and the sureties on his official bond, as collector of the school and other taxes of Madison County, and was brought in the name of the plaintiff, as treasurer of said county.

One cause of demurrer was as follows: "The complaint shows that the suit was brought for an alleged deficiency in paying over the school fund by the said C. B. Candler, sheriff, and the suit should have been brought upon the relation of the county board of education, for and in behalf of the State, instead of the State of North Carolina on relation of Bluford Tillery, Treasurer of Madison County."

(889) The court sustained this ground of demurrer and granted leave to plaintiff to amend by adding as one of the relators in the action the Board of Commissioners of Madison County, for the reason that the office of county board of education was abolished by section 2 of chapter 439, Laws 1895, and the powers and duties of said county board of education were devolved upon the board of county commissioners of the several counties of the State. The court further granted leave to the defendant to answer the complaint within sixty days.

The defendant excepted to the order of court allowing the amendment, and appealed.

J. M. Gudger, Jr., for plaintiff.
V. S. Lusk for defendant.

CLARK, J. The amendment, "adding the name of a party," was within the discretion of the court and not appealable. The Code, sec. 273; *Burwell v. Hughes,* 116 N. C., 430; *Warrenton v. Arrington,* 101 N. C., 109; *Maggett v. Roberts,* 108 N. C., 174. The change in the relators was made requisite and proper by section 2, chapter 439, Laws 1895, which abolished the county board of education and devolved its powers and duties upon the county commissioners. *Board of Education v. Wall,* 117 N. C., 382, was decided under Laws 1889 (as stated in the opinion in that case), section 2 of the act of 1895, *supra,* not taking effect, by its terms, till the first Monday in June, 1895.

The amendment renders it unnecessary to consider the second and third grounds of demurrer. As to the fourth ground of demurrer, while part of the school funds are, strictly speaking, State taxes (*Parker v. Comrs.,* 104 N. C., 166), all the school taxes are

(890) included in the accounting to be made between the county treasurer and the sheriff, and for the failure to account for them or to pay any balance due on said accounting, whether of school funds or of that part of the taxes collected for county purposes, the

defendant is liable to the $2,500 penalty. Laws 1895, ch. 119, sec. 111; Laws 1893, ch. 297, sec. 111; Laws 1881, ch. 326, sec. 113.

No error.

Cited: Comrs. v. Sutton, 120 N. C., 301; *Comrs. v. Candler,* 123 N. C., 683; *Comrs. v. Fry,* 127 N. C., 262; *Bernard v. Shemwell,* 139 N. C., 447; *Etchison v. McGuire,* 147 N. C., 389; *Waddill v. Masten,* 172 N. C., 585.

HENRY W. WOLFE & CO. ET AL. v. J. W. L. ARTHUR ET AL.

FRAUDULENT CONVEYANCE—CORRUPT INTENT OF SELLER—KNOWLEDGE OF PURCHASER OF SELLER'S FRAUDULENT INTENT—BADGES OF FRAUD.

1. A sale or mortgage of property for a valuable consideration will be upheld as valid, though intended by the grantor to defraud his creditors, provided it is not shown that the purchaser or mortgagee participated in or had notice of the fraudulent purpose or of such facts as would put a prudent man upon inquiry that would lead to a discovery of the covinous purpose.

2. Fraud, in law, does not always necessarily involve a corrupt or dishonorable intent on the part of the person to whom it is imputed; and knowledge of the seller's fraudulent purpose may vitiate a sale, though the intent of the purchaser was to secure an honest debt due to himself.

3. Where, in the trial of an action to set aside a transfer of property as fraudulent, the testimony tended to excite suspicion and to show certain badges of fraud, challenging inquiry, though not raising an actual presumption of the fraudulent intent, it was proper for the trial judge to mention the circumstances and to instruct the jury that they might consider such circumstances, in connection with all other circumstances, as bearing upon the question of intent.

CREDITOR'S BILL, brought by the plaintiff and other credi- (891) tors of J. W. L. Arthur against him and other defendants to set aside a sale and transfer of property as fraudulent, tried before *Graham, J.,* and a jury, at Spring Term, 1895, of MADISON, whence it had been removed from Swain.

The issues are set out in the opinion of *Associate Justice* (898) *Avery.*

Judgment upon the verdict for plaintiffs. Appeal by defendants.

A. M. Fry for plaintiffs.

J. M. Moody for defendants.

AVERY, J. The issues submitted, and the responses thereto by the jury, were as follows:

1. "Did the defendant Arthur transfer, sell or dispose of his property, described in the complaint, with intent to hinder, delay or defraud his creditors or any one of them?" Answer: "Yes."

2. "Did defendants, Collins and Allison, or either of them, have notice of such fraudulent intent on the part of defendant Arthur?" Answer: "Yes."

The court instructed the jury that if they believed from the testimony that the defendant Arthur sold, transferred or assigned the property described to defendants Collins and Allison with intent to hinder, delay or defraud Smith in the collection of his judgment, they should respond to the first issue in the affirmative. Counsel for defendant rested his argument mainly upon the contention that the finding upon the first issue should, like that in answer to the second, have been made to depend upon the intent of Collins and Alllison as well as that of Arthur. In a subsequent portion of the charge the judge told the jury, in substance, that even though their answer to the first issue should be "Yes," the burden would still rest on the plaintiff to satisfy them that the defendants Collins and Allison had actual notice of the

(899) fraud or notice of such facts as would induce any prudent man to institute and prosecute inquiries that would have led to the discovery by them of the covinous purpose of Arthur.

It is settled law in North Carolina that a sale or mortgage for a valuable consideration may be upheld as valid, though the seller or mortgagor intended by the transaction to delay or defraud his creditors, where it is not shown that the purchaser or mortgagee participated in the fraudulent purpose. *Battle v. Mayo,* 102 N. C., at p. 440; *Beasley v. Bray,* 98 N. C., 266.

It was not error to tell the jury that fraud, in law, does not always necessarily involve a corrupt or dishonorable intent on the part of the person to whom it is imputed. The knowledge on the part of a purchaser of the seller's purpose to perpetrate a fraud on his creditors is thus held to vitiate a sale, though the intent of the former was to secure an honest debt due him. While appellant's counsel did not abandon other exceptions, they were not insisted upon. A careful review and consideration of the exceptions discloses no merit in any of them. There is no error in the specific mention by the judge in his charge of suspicious circumstances, and the instruction that the jury might consider them in connection with all other circumstances as bearing upon the question of intent. The testimony referred to tended to excite suspicion and to show certain badges of fraud which challenged inquiry without raising an actual presumption of a fraudulent purpose. *Bank v. Gilmer,* 116 N. C., 684. There was no error, and the judgment is

Affirmed.

Cited: Calvert v. Alvey, 152 N. C., 613.

H. N. WELLS, ADMINISTRATOR OF J. L. HILL, v. W. C. HILL

ACTION ON NOTE—STATUTE OF LIMITATIONS—ACKNOWLEDGMENT—NEW PROMISE.

1. The acknowledgment necessary to amount to a new promise to pay a debt barred by the statute of limitations must manifest as strong and convincing an intention to renew the debt as if there had been a direct promise to pay it.

2. A promise to pay a debt barred by the statute of limitations must not only be in writing and extend to the whole debt, but must be unconditional and to pay in money and not in something else of value.

3. Where the maker of a note wrote to the holder, after it had been barred by the statute of limitations, saying that he would not give a mortgage as security, but that he had notes on which he expected to realize sufficient to pay all he owed; that he expected to pay every dollar of the note, though he supposed the holder purchased it for much less than its value, and that if the holder would give him time he would pay the note, with other notes he had: *Held* not to be a sufficient acknowledgment and new promise to pay the debt to remove the bar of the statute of limitations.

FURCHES, J., dissents, *arguendo.*

ACTION by the plaintiff, as the North Carolina administrator of J. L. Hill (who died domiciled in South Carolina), against the defendant, on a note dated 27 April, 1885, for $3,915.86, payable one day after date. There were endorsed credits of $582.94 on 1 February, 1888. The action was commenced 21 June, 1893. The defendant pleaded the bar of the statute of limitations.

The plaintiff introduced B. F. Hill, who, together with his brother, W. A. Hill, had administered on the estate of their father (the intestate of plaintiff) in South Carolina, to prove an acknowledgment and new promise by the defendant, as contained in four letters which he and his brother received from the defendant while they, as administrators, were in possession of the note. One of the (901) letters is referred to in the opinion of the Court and copied in full in the dissenting opinion of *Associate Justice Furches.* The others were dated, respectively, 16 April, 6 May and 27 July, 1891, and were as follows:

"B. F. HILL.

"SIR:—I wrote you a note some time ago and requested you to let me hear from you about the note that you have placed in the hands of lawyer for collection.

"I think that I can make the matter all right without you bringing suit for your money. I have a good prospect of selling some min-

eral land this spring, and if I do I will have the means to settle off my note without any trouble. I am corresponding with two large syndicates about the property.

"Write me at once. I have been sick for ten weeks, but will be down as soon as I get straight.

"Yours truly, W. C. HILL."

"B. F. HILL.

"DEAR SIR:—Yours of 22 April at hand, and will say in reply, if you and William Hill will satisfy the balance of the heirs and trade for their interest in the note due the estate it will oblige me very much and save me cost and trouble. I have at all times been willing to secure the debt, with mortgage or otherwise, so as not to expose my property to public sale. I will have to sell some real estate to get the money anyway, and I think it will bring more to sell it privately. I can pay you now $3,000, or more, in good paper, with inter-
(902) est; the notes not due yet, but have land for security.

"If you will get up the rest of the claims I will pay you and William eight per cent on the same.

"I have valuable iron ore, you will see from the enclosed letter from Dr. Williams, agent for the company. I think that I will effect a sale with the company for a good round price that will pay all my debts and have a good surplus left, without selling any of my land at home. I am looking for Dr. Williams any day.

"If we should trade, the money will be paid down on receipt of title.

"The company wrote me on 26 April about my ores, and you can see that they are after my property. There is another large syndicate wanting the same property.

"I will let you hear from me soon again. I will not be down until Williams comes or I hear from him.

"You will please write to Mr. Carson and advise him on the matter, and yours truly, W. C. HILL."

"P. S.—Write soon."

"MR. W. A. AND B. F. HILL:

"I understand that Mr. Carson would be up soon, I presume to bring action against me concerning my indebtedness. If it will suit you I will give you notes for the whole amount I owe the estate at any time you or Ben may come up. I do not want to put my property up at forced sale, for it would not bring half its value for cash. I learned that you appraised my note doubtful, but I assure you that I can pay dollar for dollar. I can give you good notes, with real estate securities. The real estate stands good for the debt until paid, with interest from

date. I will turn the notes over to you, and you can place them to my credit when collected. I am confident that it was through my help that your father was successful. See Ben and write (903) me right away. It will be a great deal more satisfaction to me in that way than to send Mr. Carson to see me. I can, any day you or Ben may come, give you these notes, as I write you.

"Answer at once. W. C. HILL."

His Honor ruled and stated that he would hold and charge the jury that the Code of Civil Procedure had so changed the law in regard to promises sufficient to repel the bar of the statute that now a promise, to have such effect, must be an express promise to pay the debt, and that an acknowledgment or an implied promise is insufficient for that purpose; that the evidence in this case did not show an express promise to pay the debt, and for that reason the jury should answer "No" to the issue submitted to them in this case, to-wit, "Is the defendant indebted to the plaintiff, and if so, in what amount?" and that the plaintiff cannot recover in this action. At this intimation of the judge the plaintiff excepted, and in deference thereto submitted to a nonsuit and appealed.

F. A. Sondley and J. M. Moody for plaintiff.
R. D. Gilmer and Ferguson & Ferguson for defendant.

MONTGOMERY, J. It is admitted that the note sued on is barred by the statute of limitations, unless the remedy to collect has been revived by the contents of four letters written by the defendant, which letters the plaintiff alleges contain a new promise to continue the liability of the defendant. The letters, without doubt, acknowledge the debt, and it was argued for the plaintiff that in such case the law implies a promise to pay. This Court has decided to the contrary. In *Simonton v. Clark*, 65 N. C., 525, it was said: "A mere (904) acknowledgment of the debt is not sufficient to repel the statute, but there must be such facts and circumstances as show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation." We are of the opinion that this means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if here had been a direct promise to pay it. This principle, we think, runs through all the decisions of this Court on this subject. The decision in the last-named case was made under the old law, it is true, but this Court has held, in *Royster v. Farrell*, 115 N. C., 306, that "The Code has not altered at all the effect

of a new promise or acknowledgment." Section 172 (Lord Tenderden's Act) is merely a rule of evidence, enacted to prevent fraud and perjury. The original statute of limitations (21 James I., ch. 16) had no provision as to new promises and acknowledgments. The courts made the law on this subject, and made it apply to all causes of action that rested on a promise. In *Riggs v. Roberts,* 85 N. C., 151, it was decided that an unaccepted offer to pay a debt by a conveyance of land is not such a recognition of a subsisting liability as in law will imply a promise to pay it. In *Greenleaf v. R. R.,* 91 N. C., 33, this Court declared that the promise must be in writing, extend to the whole debt, and must be to pay in money and not in something else of value. The promise to pay the debt, too, must be unconditional. *Taylor v. Miller,* 113 N. C., 340; *Greenleaf v. R. R., supra.* Now, on applying these principles to the facts in this case, as they appear in the letters of the defendant, we find the acknowledgment of the debt therein contained is complete. But we find also, running
(905) through all the letters, that the promise to pay is conditional —that it is made to pay in notes secured by mortgages on lands which he hoped and intended to sell in the future, the notes to be given by the purchasers of the lands and secured by mortgage on the same. He concluded his last letter as follows: "If you will only give me time, I will, at any time you or Ben may come, turn the notes over to you for the full amount of my note, to be credited on my note. I do not think it will do any good for you to send a lawyer to see me, as I will not do any more than I have promised to do. I have disposed of my property that I offered Ben, and have only notes to secure you with now." While his Honor's charge might not have been in the strictest sense correct, yet we agree with him that the plaintiff was not entitled to recover.

No error.

FURCHES, J., dissenting: I do not concur in the opinion of the Court. This is an action of debt upon a plain note of hand for $3,915.86, dated 27 April, 1885, and this action was commenced on 21 June, 1893. The execution of the note, and that the same has not been paid, are admitted by defendant, but he pleaded and relies on the statute of limitations as a bar to plaintiff's recovery. To rebut the bar of the statute the plaintiff offered in evidence four letters from the defendant. The last one of these letters is quoted from in the opinion of the Court, but it seems to me that the most material part of this letter is omitted. Therefore I think it best to reproduce the whole letter, thinking we may better understand the defendant's hand if we see the whole of it than we can if we only see a part, especially

if the index finger is left off, as seems to be the case here. The letter is as follows:

CRABTREE, N. C., 3 August, 1891.

"MR. W. A. HILL, *Enoree, S. C.*

"Yours of the 29th to hand. In reply, will say I will not give you any mortgage. I will secure you as I wrote (906) you. I have notes that will pay every dollar that I owe, with land securities. If that will not satisfy you, you can send Mr. Carson or any other lawyer you may wish. I presume you did not give very much for my note, as you appraised my note doubtful. But don't understand me to say that I do not mean to pay, for I expect to pay every dollar of it. If you only give me time, I will, at any time you and Ben may come, turn the notes over to you for the full amount of my note, to be credited on my note. I do not think it will do any good for you to send a lawyer to see me, as I will not do any more than I have promised to do. I have disposed of my property that I offered Ben, and have got only notes to secure you with now. Show this letter, and also the other I wrote you, to Ben, and see what he may say, and write me at once.

"Yours, W. C. HILL."

It will be seen that in this letter the defendant uses the following language, a sentence not quoted in the opinion of the Court: "But don't understand me to say that I do not mean to pay, for I expect to pay every dollar of it." This, in my opinion, is an explicit acknowledgment of the debt, from which the law will infer a promise to pay, and is itself a promise to pay. And either an acknowledgment or a promise to pay is, in my opinion, sufficient to rebut the bar of the statute of limitations. It is held by this Court, in *Royster v. Farrell*, 115 N. C., 306, that the statute requiring the acknowledgment or promise to be in writing is but a rule of evidence, like the statute of frauds, and does not change the law as to what shall constitute an acknowledgment or promise to rebut the statute of limitations; and, while this is true, it is also a legislative recognition of the existing law that the operation of the statute may be rebutted by an acknowledgment of the debt. If not, why should the statute say, in the very first sentence, and being the second word in (907) the statute, that "*no acknowledgment* or promise shall be received as evidence of a new or continuing contract," etc., if it had not been the law before? In my opinion, it necessarily implied that an explicit acknowledgment of a subsisting debt like this, where there is no uncertainty as to date or amount, will rebut the operation of the statute. But whether this be so or not, it is held, in *Royster v. Farrell,*

supra, that it requires no more since the statute (section 172 of The Code) to rebut the operation of the statute than it did before. It may be that our decisions are not altogether uniform as to what is required. This will be found, upon examination, to be more in appearance than in reality. But our reported cases will show that, from the time of the first-published opinions to the present, there has been a recognition of the principle that the statute might be rebutted by an acknowledgment of the debt. There has been much discussion as to what was a sufficient acknowledgment to do this, but it has been almost if not quite uniformly held that it might be done.

The cases in which this doctrine has been held are too numerous for me to undertake to cite in this opinion, but the earlier opinions may be found (2 Battle's Digest, commencing on p. 877). I will only undertake to give a few of them:

"An acknowledgment to an executor will prevent the bar of the statute as well as when made to the testator." *Billews v. Boggan,* 2 N. C., 13. "To repel the statute, there must be an acknowledgment of the debt, not simply of a fact which may show that the debt is unsatisfied." *Ferguson v. Taylor,* 2 N. C., 20. A defendant wrote to the plaintiff: "I would rather come to a settlement, although
(908) I should allow the account, as insisted on by you, rather than wait the event of a law-suit," and it was held that these words took the case out of the statute. *Ferguson v. Fitt,* 2 N. C., 239. "An acknowledgment by one partner, made after the dissolution of the firm, will prevent the operation of the statute on the claim existing against the partnership." *McIntyre v. Oliver,* 9 N. C., 209; *Walton v. Robinson,* 27 N. C., 341. "An acknowledgment or promise, to repel the statute of limitations, must be distinct and explicit and plainly refer to the debt in question." *Smallwood v. Smallwood,* 19 N. C., 330. "When the new promise is conditional, upon the performance of the condition it is evidence of a previous absolute promise." *Falls v. Sherrill,* 19 N. C., 371. "In order to repel the statute of limitations, there must be either an express promise to pay or an explicit acknowledgment of a subsisting debt." *Maskin v. Waugh,* 19 N. C., 517. The older reports are full of such cases.

I know it has been said in some of the more recent cases that the courts do not look upon the statute of limitations with the disfavor they once did; but I am satisfied that no man, claiming to be a gentleman, ever pleaded the statute of limitations against the collection of a just debt, for which he had received value, without feeling he had done a dishonorable thing and without lowering himself in his own estimation.

I will now consider some of the more recent decisions: In *Vass v.*

Conrad, 52 N. C., 87, it is said there must be a promise to pay or an *acknowledgment* of the debt. In *McGlensey v. Fleming,* 20 N. C., 263, it is said there must be a promise to pay or an *acknowledgment* of a subsisting debt by the debtor, by which a promise to pay is implied. In *Henly v. Lanier,* 75 N. C., 172, *Bynum, J.,* delivering the opinion of the Court, says the "*acknowledgment* (909) or promise to pay must be in writing." In *Taylor v. Miller,* 113 N. C., 340, the defendant Miller, writing to Gaither, the attorney of plaintiff, in reply to a letter from Gaither, says: "Your letter received. I have been to town twice to see you, but you were not in. I propose to settle both of your claims the first of next month, which I hope will be satisfactory. Will see you in person soon." And the Court construed the word "propose" to mean promise, and the word "settle" to mean pay, and held that it renewed a note then barred, and rebutted the operation of the statute of limitations. And *Justice McRae,* in the discussion of the case, on page 343, uses this language: "While either of these qualifying words alone would be applicable to the promise or *acknowledgment* to take the case out of the statute of limitations," etc., "the law speaks for itself: 'No *acknowledgment* or promise shall be received as evidence of a new or continuing contract,' " etc., quoting from the statute (section 172 of The Code). In *Royster v. Farrell,* 115 N. C., at p. 309, *Justice Burwell* uses this language: "It was argued before us that while a written *acknowledgment* of the debt would take it out of the operation of the statute of limitations, *only a promise* could have that effect on the right to foreclose a mortgage. A written acknowledgment is as effective in the one case as in the other." "The Code has not altered at all the effect of a new promise or acknowledgment." *Taylor v. Miller* and *Royster v. Farrell* are the two latest expressions of this Court upon the effect of an acknowledgment or new promise as a bar to the operation of the statute of limitations.

I admit that *Simonton v. Clark,* 65 N. C., 525, quoted and relied upon in the opinion of the Court, tends to sustain that opinion, if nothing more appeared in the defendant's letter of 3 August, 1891, than is quoted in the opinion of the Court, that there (910) was nothing in the letter except an offer to pay in notes; but to my mind this is not the case, as I think I have shown from the letter itself. *Simonton v. Clark,* 65 N. C., 525, is put on the ground that plaintiff's intestate only intended to pay in Confederate money, "which was then plentiful"; that plaintiff's intestate refused this and demanded specie, which proposition was refused. And the Court say that this was evidence that he did not intend to pay the debt in any other way, but intended to rely on the statute of limitations. And,

whether this case is right or not, to my mind it is clearly distinguishable from the one before the Court. It is true that the Judge delivering the opinion of the Court uses this language: "That a mere acknowledgment of a debt is not sufficient to repel the statute, but there must be sufficient facts and circumstances to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation." This case, to my mind, recognized the fact that the operation of the bar might be rebutted by an acknowledgment. But the Court hold that the facts shown in this case do not do so—"a mere acknowledgment." This will not be sufficient, if the circumstances connected with the acknowledgment show that the defendant did not intend to pay, as in *McGlensey v. Fleming,* 20 N. C., 263, and other cases, where the promise which the law implies from the acknowledgment is rebutted by the action of the party making the acknowledgment, as where a debtor offers to pay a less amount than the debt calls for, but says, "If you don't take this, I will plead the statute." This is an acknowledgment of the debt. But the assumption that the law would imply is rebutted by what the debtor says at the time he makes the acknowledgment. But this rule does not apply in this case. The fact that a debtor offered to pay in notes
(911) or land, which was not accepted, cannot defeat a direct acknowledgment or promise to pay. Suppose Clark, in the case of *Simonton v. Clark, supra,* after Miller, plaintiff's intestate, had refused to take the Confederate money, had said to the intestate, "But don't understand me to say that I do not mean to pay, for I expect to pay every dollar of it," can it be supposed that the Court would have said that "no intention was in any way shown of assuming or renewing the obligation"? So, without extending this discussion, my opinion is that *Simonton v. Clark* is not in conflict with this opinion; that the language used in defendant's letter, above quoted, "But don't understand me to say that I do not mean to pay, for I expect to pay every dollar of it," is much stronger than the language used by the defendant in *Taylor v. Miller,* 113 N. C., 340, "I propose to settle"; that under the great weight of authority, as well as section 172 of The Code, the bar of the statute of limitations, in my opinion, is rebutted in this case, and there was error in the ruling of the Court.

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

(912)

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

ACTION FOR DAMAGES—SLANDER—WORDS NOT ACTIONABLE—SPECIAL DAMAGES.

1. A charge by defendant, in a public speech, that plaintiff, a member of Congress, had "signed the 'Alliance demands'" (concerning certain matters of legislation desired by the Farmers' Alliance) and "then went to Washington as a congressman and repudiated those demands," does not impute to plaintiff a crime or dereliction of official duty, and is not *per se* actionable.

2. The complaint in an action for slander alleged as special damage that, by reason of the false, slanderous statement concerning plaintiff, he was defeated for re-election as a member of Congress, and it appeared that the summons in the action was issued six weeks before the election: *Held,* that the action cannot be maintained, and was properly dismissed on demurrer.

ACTION heard on complaint and demurrer, before *Robinson, J.*, at Fall Term, 1895, of HAYWOOD.

The fourth and fifth paragraphs of the complaint were as follows:

"4. That the defendant, W. S. Barnes, well knowing the facts, as hereinbefore alleged, and contriving and wickedly and maliciously intending to injure the plaintiff in his good name and credit, and to destroy the confidence of the people of his district in his integrity, fidelity and fitness for the office he held as a member of Congress, as aforesaid, did, in making public speeches in the Ninth Congressional District of North Carolina (which district the plaintiff then represented in Congress), as secretary and treasurer of the Farmers' State Alliance of North Carolina, at divers and sundry places, and particularly in the town of Webster, in the county of Jackson, (913) on 8 May, 1894, in the presence of a large number of electors of the district, then and there, after having stated that 'the congressman from this district (meaning the plaintiff) had signed the Alliance demands,' which is admitted by the plaintiff to be true, spoke and uttered, in the presence and hearing of the said electors, the following false, slanderous and defamatory words of and concerning the plaintiff, to-wit: 'and then went to Washington as a member of Congress and repudiated those demands, even going so far as to deny that he had signed them, and accused your secretary (meaning the defendant) with fraud and forgery' (meaning that the plaintiff, W. T. Crawford, had gone to Washington as a member of Congress and repudiated the Alliance demands, and even had gone so far as to deny that he had signed them), and accused your secretary (meaning the defendant) with fraud and forgery.

* CLARK and MONTGOMERY, JJ., did not sit on the hearing of this appeal.

"5. That by reason of the utterance of the false, slanderous and defamatory words, as set forth in the preceding paragraph of this complaint by the said defendant, W. S. Barnes, the plaintiff has been injured and damaged in his good name and character and as a member of Congress; and by reason of the utterance of the false, slanderous and defamatory words by said defendant, W. S. Barnes, as set forth in the preceding paragraph, who, by reason of his office as secretary and treasurer of the Farmers' State Alliance of North Carolina, wielded great and powerful influence over the electors who are members of that organization and over other persons, thereby causing them to suspect and believe that the plaintiff had been guilty of lying, misrepresentation and falsely and corruptly misleading and deceiving the people in his office as a member of Congress, and by rea-
(914) son of which false, slanderous and defamatory words the plaintiff lost the confidence of various and sundry electors in the district, who failed to vote for him, thereby causing him to be defeated in his election for Congress on 6 November, 1894, for which said office the plaintiff was a candidate, and the emoluments thereof, to his great injury and damage, to-wit, in the sum of $10,000."

The defendant demurred to the complaint of the plaintiff, and assigned for cause of demurrer:

"Said complaint does not state facts sufficient to constitute a cause of action, in that—

"1. The language charged to have been uttered by the defendant against the plaintiff does not impute to the plaintiff an infamous crime, and therefore is not actionable *per se,* and the special damage alleged is too remote, indefinite and uncertain.

"2. It is not alleged in said complaint that the said language was spoken of the plaintiff in respect to the office which he then held, and the same does not impute to the plaintiff any misconduct, malversation, corruption or inefficiency in office, and the special damage alleged is too remote, indefinite and uncertain.

"3. It is not averred that the said language was spoken of or concerning the plaintiff while in the exercise of his office as a member of Congress.

"4. The said language does not impute any crime or fault to the plaintiff in office, as set forth in the complaint, inasmuch as it is not alleged in the complaint that it was the duty of the plaintiff, as a member of Congress, to support the 'Alliance demands,' nor that it was any neglect or omission of his official duty or any infidelity or malversation in office for him to have repudiated said demands.

"5. It is alleged that the said language was used by the defendant in a public speech in reference to the plaintiff's policy and

conduct as a public servant, and was therefore spoken by the (915) defendant in the exercise of his constitutional right as a citizen freely to speak his sentiments on public subjects, and in respect to the character and conduct of public men, and hence was not slanderous or actionable.

"6. It is alleged in said complaint that said language was used by the defendant as secretary and treasurer of the Farmers' State Alliance of North Carolina to members of the organization in a matter relevant and pertinent to the business of the said order, and hence it is conclusively presumed that the defendant was actuated by a sense of duty and not by malice, and his language was privileged, under the circumstances and by the occasion on which the same was spoken."

The demurrer was sustained and the action dismissed, and the plaintiff appealed.

R. D. Gilmer and J. M. Moody for plaintiff.
W. J. Peele for defendant.

CLARK, J. The language charged to have been uttered by the defendant did not impute to the plaintiff an indictable or infamous offense, nor was it calculated to disparage him in his office (for it was no part of his official obligation to support the "Alliance demands"). Hence the words are not actionable, *per se. Ramsey v. Cheek,* 109 N. C., 270; *Barnes v. Crawford,* 115 N. C., 76; Ogder on Libel and Slander, 308. The action, therefore, cannot be sustained, except upon allegation and proof of special damage. The special damage alleged, to-wit, the loss of the election of the plaintiff to Congress, did not accrue, according to the complaint, till 6 November, and the summons was issued 17 September. The damage not having accrued before the summons issued, the action cannot be maintained. (916) *Bynum v. Comrs.,* 101 N. C., 412; *Clendenin v. Turner,* 96 N. C., 416; Newell on Defamation and Slander, 851 (sec. 19) and 852 (sec. 21). The third and fourth grounds of demurrer were well taken. It is not necessary to consider the other grounds assigned in the demurrer.

No error.

J. K. BOONE v. B. P. CHATFIELD ET AL.*

MECHANIC'S LIEN, ACTION TO ENFORCE—CONTRACT FOR REPAIRS BY LESSEE—LIABILITY OF LESSOR.

1. Before a mechanic's lien can attach, there must exist the relation of creditor and debtor. A debt must be created before a lien can attach.

2. Where the contract of lease of a hotel provided that the lessee should make and pay for repairs and deduct the cost thereof from the rent, and required the lessee to deposit in a bank a sum out of which the cost of repairs should be paid, and provided that no liens should be created on the property for such repairs, and the lessee was ejected for nonpayment of rent: *Held,* that a mechanic's lien cannot be enforced against the property of the lessor for repairs made for the lessee, the remedy of the mechanic being against the lessee, to whose contract with the owners the plaintiff should have looked.

ACTION to enforce a mechanic's lien upon the property, described in plaintiff's complaint, belonging to the *feme* defendants, (917) M. M. Stringfield, wife of W. W. Stringfield, and M. R. Welch, wife of W. P. Welch, tried before *Robinson, J.,* and a jury, at Fall Term, 1895, of HAYWOOD.

After the jury were impaneled the pleadings were read, and the plaintiff tendered issues to be submitted to the jury.

The plaintiff admitted that the contract set out in defendant's answer (the material provisions of which are stated in the opinion of *Justice Montgomery*) was the contract referred to in plaintiff's complaint. Thereupon his Honor held that, it appearing that this action was brought to enforce a mechanic's lien against the property of the said *feme* defendants, M. M. Stringfield and M. R. Welch, both of whom were and are married women, the plaintiff, under the pleadings and the said contract referred to therein, could not recover in this action, and gave judgment dismissing the same, as to all the defendants except B. P. Chatfield, and the plaintiff appealed.

Ferguson & Ferguson for plaintiff.
R. D. Gilmer for defendants.

MONTGOMERY, J. The defendants M. M. Stringfield and M. R. Welch were the owners of the Haywood White Sulphur Springs property. They and their respective husbands leased, in writing, the hotel property for three years to the other defendant, Chatfield. The lease provided, among other things, that Chatfield, the lessee, should have certain necessary repairs made upon the property; that he should

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

pay for the same himself and charge the amount so paid for repairs to the lessors, to be deducted from the first year's rent. It was required, also, by the terms of the lease, that Chatfield should deposit $1,000 in the Waynesville Bank, out of which the amount of repairs was to be paid, with the distinct understanding that no liens (918) were to be created on the property on account of the repairs. The rents were to be paid in installments, and it was stipulated that if they were not regularly paid the defendant lessors might enter and take possession of the property. There was a failure to pay rent, and the lessors took possession. While Chatfield was in possession, under a contract between him and plaintiff, the plaintiff made certain repairs upon the property, for which he has not been paid and for which he filed a lien in Haywood Superior Court. This action is brought to enforce the lien by the sale of the hotel property, and to have applied from the proceeds of sale a sufficiency to pay the amount of the alleged lien. This cannot be done. Before a mechanic's lien can attach, there must exist the relation of creditor and debtor. A debt must be created before there can be a lien. *Wilkey v. Bray,* 71 N. C., 205; *Bailey v. Rutjes,* 86 N. C., 517. The plaintiff had no contract with the defendants, except Chatfield. The plaintiff should have looked to the contract between the lessors and Chatfield. If he had done so, he would have found that Chatfield was bound to pay for the repairs; that there was a special fund set apart for their payment, and a special provision that the hotel property should not be bound for the repairs. It is unnecessary to pass upon the reasons which his Honor assigned for giving the judgment. The plaintiff could not recover in any event against the defendants Stringfield and Welch nor hold the hotel property liable for the repairs.

No error.

Cited: Baker v. Robbins, 119 N. C., 292; *Belvin v. Paper Co.,* 123 N. C., 151; *Weathers v. Cox,* 159 N. C., 576; *Foundry Co. v. Aluminum Co.,* 172 N. C., 705.

(919)

E. EVERETT, ADMINISTRATOR ET AL. v. W. C. NEWTON

DEEDS AS EVIDENCE—LOST RECORDS—PRESUMPTIONS IN FAVOR OF PROPER PROCEEDINGS IN THE COURTS—ADVERSE POSSESSION DEFINED—EQUIVOCAL POSSESSION—WIDOW'S POSSESSION NOT ADVERSE TO HEIR—RECITALS IN DEEDS OF COMMISSIONERS—THE CODE, SECS. 69, 70.

1. Where a deed is offered in evidence, no objection lies, except to the regularity of the probate and registration, the court having the power always to reserve the questions of relevancy and legal effect till a subsequent stage of the trial. Therefore an objection, *in limine*, for all purposes, cannot be sustained.

2. In order to ripen into title, a possession must not only be open, notorious, adverse and continuous during the statutory period, but it must be unequivocal.

3. The test of the sufficiency of the possession to fully mature title depends upon the question whether a right of action had existed for the statutory period, when the suit was instituted, in favor of the parties against whom the benefit of lapse of time is claimed.

4. The possession of a widow is not adverse to the heirs of her husband.

5. Where the original papers of the judgment roll are lost or destroyed, but the rough minute docket of the court shows that a petition to sell land for assets was filed, and the other dockets show memoranda of an order for publication for nonresident defendants that an order of sale was made, report of sale filed and judgment of confirmation, there is a presumption of law, independent of the statute (The Code, secs. 69, 70), that the publication was made, as ordered, and proper proof of it filed before the judgment of sale was entered.

6. Recitals in a commissioner's deed that the sale was made under a judgment of the court are *prima facie* evidence of the "binding force" and validity of such judgment as against all persons who were parties to such judgment; this by virtue of The Code, secs. 69, 70.

(920) ACTION tried before *Starbuck, J.*, at Spring Term, 1895, of SWAIN.

Verdict and judgment in favor of plaintiffs, and appeal by defendant.

The facts are sufficiently set out in the opinion.

A. M. Fry for plaintiffs.
J. W. Cooper for defendant.

AVERY, J. The land in controversy was granted by the State to the defendant, William Newton, in 1854, and he now contends that the title has never passed out of him. The plaintiffs, who are (except the

plaintiff administrator) heirs at law of Clark Whittier, claim through a deed which they allege was executed by the defendant to his father, Solomon Newton, and which was lost or destroyed, and through mesne conveyances to their ancestor, Clark Whittier, who devised to them as tenants in common. There is no controversy as to the execution of the mesne conveyances. They likewise allege that Solomon conveyed at one time to one W. P. Hyde, and that Hyde reconveyed to Solomon, but that the last-named deed has also been lost or destroyed. Upon an issue submitted the jury found that the defendant did execute a deed for the land in controversy to Solomon Newton, as alleged, and in response to a second issue, that Hyde also conveyed the same land to Solomon before his death. Solomon and his wife, according to the undisputed testimony, lived on the land before his death, and he died before 1866. In deraigning title from Solomon the plaintiffs offered in evidence a deed from William R. Grant, administrator of Solomon Newton, dated 15 January, 1869, conveying the land in controversy to James S. Queen, subject to the right of the widow of Solomon to dower, in which deed it is recited that the sale was made on 24 December, 1867, by virtue of a decree of the Court of Pleas (921) and Quarter Sessions of Jackson County (in which the land now embraced in Swain County was then situated), at public auction, and James S. Queen became the highest bidder.

If the land passed to Queen it is not controverted that whatever title he acquired was transmitted to the plaintiffs, the devisees of Clark Whittier. But, despite the finding that he conveyed to his father, the defendant still relies upon his own testimony and that of another witness to prove that in 1866 he (defendant) directed his mother, Keziah Newton, to go upon the land and keep it for him till his return, and that he gave her the grant for it and left the State, remaining absent until 1889, when he came back and took possession from Amburn, with whom he had a fight about the land. The plaintiffs offered evidence for the purpose of showing the existence of the records of proceedings by the administrator for sale of and by the widow of Solomon Newton for allotment of dower in the land. The exception to the admissibility of the deed from Grant, administrator, was without merit. The objection *in limine* to its introduction, for all purposes, cannot be sustained, because it has more than once been held by this Court that no objection lies to the introduction of a deed as evidence when offered, except to the regularity of the probate and registration, the Court having the power always to reserve the questions of relevancy and legal effect till a subsequent stage of the trial. *Vickers v. Leigh*, 104 N. C., 248; *Cox v. Ward*, 107 N. C., 507; *Wilhelm v. Burleyson*, 106 N. C., 381; *Hodges v. Wilkinson*, 111 N. C., 56. But

the exception upon which the defendant relied chiefly was to the refusal of the court to instruct the jury that there were certain
(922) aspects of the testimony in which they might find that the title of the defendant had matured by possession, notwithstanding the fact that he had conveyed the land to his father, as alleged. The instruction asked was based upon the theory that, if the jury believed the testimony offered for the defendant, his mother went upon the land and in 1866, as his tenant, and that the land was occupied till her death, in 1888, either by herself or those who held under her, and whose possession inured to the benefit of the defendant, they holding up to visible lines and boundaries. The court refused to instruct the jury, at the request of the defendant, that the possession of his mother and those holding under her from 1866 till 1888 inured to his benefit so as to ripen title in him, because they could not destroy the privity with him as tenants except by surrender or eviction, and that their possession for twenty years, up to visible lines and boundaries, matured title in him. The contention of counsel on the argument was confined chiefly to the single question whether the court erred in refusing this instruction. It being found that the land had been conveyed by the defendant to his father, who held under the deed when he died, neither the defendant, as the grantor from the State, nor he or the other heirs of Solomon Newton, as heirs, nor anyone claiming through them by a deed, reserving a right to dower like all of the mesne conveyances after that of Grant to Queen, could have maintained an action for possession against her or her grantee during her life, because the possession was not adverse to them. *Avent v. Arrington,* 105 N. C., 377; *Love v. McClure,* 99 N. C., 290. Her life estate was an elongation of the husband's estate, and as widow she held in privity with, not adversely to, the heirs and those claiming under them, certainly under conveyances made expressly subject to her right. Granting that the defendant told her to enter, and
(923) that she consented to do so, if the plaintiffs' ancestor, Clark Whittier, had brought an action for the possession, it would have been a sufficient answer that the claimants held subject to her right to occupy the land as dower. In order to mature title, the possession must not only be open, notorious, adverse and continuous during the statutory period, but it must be unequivocal. *Osborne v. Johnston,* 65 N. C., 22; *McLean v. Smith,* 106 N. C., 172. The test of the sufficiency of the possession to fully mature title depends upon the question whether a right of action had existed for the statutory period, when the suit was instituted, in favor of the parties against whom the benefit of lapse of time is claimed. *S. v. Suttle,* 115 N. C., 784; *Boomer v. Gibbs,* 114 N. C., 76; *Hamilton v. Icard,* 114 N. C., 532;

Osborne v. Johnston, supra. If, therefore, no action could have been maintained by the plaintiffs, as claimants, through the heirs at law of Solomon, against those holding under the widow, the statute did not run, in any aspect of the evidence, against them before her death, in 1888. It follows that there was no error in the ruling of the court that neither plaintiffs nor defendant, in any aspect of the testimony, had offered evidence of possession under color which should be submitted to the jury as tending to prove title.

It was agreed that the court should find the other facts and enter the responses to the third issue, involving the question whether the defendant, William Newton, was a party to a special proceeding, by virtue of a decree in which Grant, administrator of Solomon, sold and conveyed the land to Queen, and to the issue of title numbered four. In the deed of Grant, administrator of Solomon Newton, was a recital of the fact that the sale was made, as already stated, on 24 December, 1867, in pursuance of a decree of the Court of Pleas and Quarter Sessions of Jackson County. There was abundant evidence to prove that most of the records of said court were lost or de- (924) stroyed, and the record of the pleadings and orders in this particular proceeding could not, after diligent search by successive clerks, be found. It appeared, however, from the rough minute docket of the Court of Pleas and Quarter Sessions of Jackson County, that a petition to sell land was filed at the December term, 1866, entitled "W. R. Grant, administrator of Solomon Newton, deceased, against William Newton and others." At the next term, April, 1867, there appears upon the minute docket an order that publication be made for six successive weeks in the Henderson *Pioneer,* a newspaper published in Hendersonville, for G. W. Cline and wife (Lorena), Alfred Shuler and wife, Marion Newton and William Newton, who, as it appeared to the satisfaction of the court, were nonresidents, to appear at the next term, to be held on the fourth Monday in July, 1867. At the next (July) term there was an entry made upon the minutes that the order of sale was allowed, and at the December term the minute made in the same proceeding is: "Report of sales confirmed by the court and filed. Judgment for costs against the administrator to be taxed by the clerk." Leaving out of view the provisions of the statute (The Code, secs. 69, 70), the law would presume, when the papers have been destroyed, that the publication was made, as ordered, and proper proof of it filed before the decree of sale was entered at the succeeding (July) term. The papers being now shown to have been lost or destroyed, the presumption arises upon this state of facts that the court acted upon the prescribed proof that the defendant, William Newton, had been made a party by publication. Lawson Pres. Evi-

dence, p. 34, II, III. The testimony of the defendant that there was no actual service did not tend to rebut the presumption that
(925) he was duly made a party by publication. But the recital in the deed, which refers to the decree, so as to identify it, is of itself *prima facie* evidence of its "binding force" and validity as against all persons "who were parties to said decree." The Code, secs. 69, 70; *Dail v. Sugg,* 85 N. C., 104; *Durham v. Wilson,* 104 N. C., 595.

The finding of the court, therefore, upon an inspection of the record and deed, that there was a presumption that the defendant was a party, was supported by the record and deed from which the facts are gathered, and is sustained in its legal aspects by the statute and authorities cited. The judge was authorized by the parties to find the facts in relation to that branch of the case, and upon the evidence was warranted in holding, in the capacity of juror, that the presumption was not rebutted by the defendant's testimony. It may not be amiss to mention that the discrepancy between the printed and written records upon a very important point misled us for some time. The word "not" was omitted in the printed record, so as to make it appear as the finding of the court that the presumption was "rebutted" by the testimony of William Newton.

No Error. Affirmed.

Cited: Lewis v. Covington, 130 N. C., 544; *Brinkley v. Smith,* 131 N. C., 132; *Joyner v. Futrell,* 136 N. C., 303; *Norcum v. Savage,* 140 N. C., 474; *Card v. Finch,* 142 N. C., 148; *Barefoot v. Musselwhite,* 153 N. C., 211; *Pinnell v. Burroughs,* 168 N. C., 319; *Cooley v. Lee,* 170 N. C., 23; *Graves v. Causey, ib.,* 177; *Kluttz v. Kluttz,* 172 N. C., 624; *Vanderbilt v. Chapman, ib.,* 813.

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(926)

ETTA MOODY v. ROBERT MOODY

PRACTICE IN APPLICATIONS FOR ALIMONY PENDENTE LITE—SPECIAL AND GENERAL APPEARANCE—PARTIES—THE CODE, SEC. 1291.

1. A party who enters a special appearance and moves to dismiss for want of legal service of the summons should except to the refusal of his motion. If he does not except, his subsequent appearance in the action makes him, in law, a party for all purposes.

2. A general appearance waives irregularity in service of the summons.

3. Under section 1291 of The Code, an order allowing alimony is erroneous if made without a finding of the facts by the judge.

MOODY *v.* MOODY.

APPLICATION FOR ALIMONY *pendente lite*, heard by *Robinson, J.*, upon affidavits and motion of defendant to dismiss, at Fall Term, 1895, of MACON.

Defendant appealed.

The facts are sufficiently stated in the opinion.

A. M. Fry and J. F. Ray for plaintiff.
Jones & Johnston for defendant.

FAIRCLOTH, C. J. This is an action for divorce and alimony *pendente lite*. The summons was issued 6 September, 1895, by the Clerk of Macon County Superior Court, N. C., directed to the sheriff of that county. The only return is, "Served 9 September, 1895," by one Dockins, Sheriff of Rabun County, Georgia. There was no attempt to show service by publication, nor in the manner prescribed by Laws 1891, ch. 120. The defendant, on the return day, made a special appearance and moved to dismiss the action for want of service, to which he was then entitled; but without filing exceptions to the refusal to dismiss at the same time, he filed his own affidavit and (927) several others, denying the allegations of the plaintiff's affidavit, which was treated as a complaint. This waived all irregularity in the service and put the defendant in court as completely as if the summons had been duly and legally served. The court then heard the affidavits and, without finding the facts, rendered judgment, making an allowance to the plaintiff, and the whole record is sent to this Court. That was erroneous. The Code, sec. 1291, requires the plaintiff to set forth facts which "shall be found by the judge to be true," and to these facts he must apply the law of the case, and either party may appeal from his judgment. This has been held in other cases, and that the facts found by the court must appear in the record sent to this Court. *Morris v. Morris*, 89 N. C., 109; *Griffith v. Griffith*, 89 N. C., 113; *Lassiter v. Lassiter*, 92 N. C., 129. We must therefore send the case back, to the end that the facts may be found by the court, which this Court has no authority to do.

Remanded.

(928)

A. C. WILLIAMS v. CROSBY LUMBER COMPANY

STATUTE OF FRAUDS—ESTOPPEL TO DENY AUTHORITY OF AGENT—DAMAGES ON SALE OF CHATTELS—JUDGMENT BY DEFAULT AND INQUIRY—INTEREST ON VERDICT—THE CODE, SECS. 413, 1554.

1. The statute of frauds (The Code, sec. 1554) can only be taken advantage of by pleading it; but if an oral contract is alleged in the complaint and denied by the answer, and a different contract set up in the answer, oral evidence of plaintiff's claim will be excluded.

2. Where one pays for part of certain property purchased for him by one who claimed and represented himself to be the agent of such purchaser, he ratifies the contract of purchase and will not be heard to deny the agency.

3. Remarks of the judge, of doubtful propriety, made, not in his charge, but to counsel during the introduction of the evidence, are not a ground for a new trial, unless it reasonably appears that a party is prejudiced in the minds of the jury by such remarks.

4. It is not erroneous or improper for a judge to make a calculation of the amount claimed by a party and to hand such calculation to the jury, with the instruction that they are not bound thereby, but must find the amount due from the evidence.

5. The measure of damages for a breach by a vendee of a contract for the purchase of timber, to be delivered at a designated point, is the contract price, less the cost of putting the timber at the place designated for its delivery.

6. Where there was judgment by default and inquiry, and upon the inquiry an issue was submitted as to what amount was due the plaintiff from defendant on account of certain logs cut and delivered, to which the jury responded a certain amount, it was error to add any interest to the amount so found for time elapsed prior to the inquiry, as such interest is presumed to have been included in the verdict as rendered.

CLARK, J., dissents.

(929) ACTION tried before *Robinson, J.*, at Fall Term, 1895, of GRAHAM.

Defendant appealed.

The facts appear in the opinion.

Dillard & King and Shepherd & Busbee for plaintiff.
J. W. & R. L. Cooper for defendant.

FAIRCLOTH, C. J. The plaintiff sues to collect a balance due him on contract with the defendant, and for damages for breach of the contract. The verbal contract was for "large quantities of timber, growing and felled," on divers tracts of land on the Cheoah and Little Tennessee rivers and their tributaries. In his complaint the

plaintiff alleges that, under a contract with defendant, he "cut and put a large quantity of logs into the Cheoah River, in Graham County, for which labor the said company partly paid plaintiff from time to time, leaving a balance of $500 still due therefor, which sum the plaintiff is entitled to recover, over and above any and all counterclaims and set-offs known to the plaintiff." The complaint also alleges that "the defendant, in 1893, pretended to sell to one Belding, one of the subscribers to its stock, all of its timber, cut and standing, and logs in the streams, with all its sawmill machinery, implements and utensils, at the insignificant sum of $100, while in fact this property was worth several hundred thousand dollars; that said sale and conveyance were inoperative and void, as being done without authority, and likewise fraudulent and void, as against creditors, for lack of valuable consideration and *bona fides,* and was further void against this plaintiff and its other creditors upon the actual intent which it had thereby to hinder, delay and defraud its creditors." It further alleges that "the defendants are nonresidents and cannot, after due diligence (930) be found; that he has taken out a warrant of attachment, and had the same levied, upon a large quantity of logs in Graham County, in the streams and outside, and on the standing timber on said sixty-nine tracts of land," etc. He then demands judgment for his debt and that the attached property be sold to satisfy his judgment. To this complaint no answer or demurrer was filed, and at Spring Term, 1895, a judgment by default and inquiry was rendered. At Fall Term, 1895, the inquiry was taken, and "by consent, the plaintiff having been allowed to so amend his complaint as to set up such claim as he may have against the defendant for damages sustained by him by reason of defendant's breach of its contract, and the defendant being allowed to answer, denying the damage alleged, and both amendment and answer being treated as in, without objection, certain issues were submitted to the jury," which, with the responses thereto, are as follows:

1. "What amount is due and owing to plaintiff from defendant on account of logs cut and delivered, and others cut and not delivered?" Answer: "Three hundred and thirteen dollars and twenty-five cents."

2. "What damage has plaintiff sustained by reason of defendant's breach of contract?" Answer: "Eighty-six dollars and seventy-five cents."

Judgment was entered for $400, with interest till paid, and interest on $313.25 from 21 August, 1894, till the first day of this term, and costs.

The plaintiff testified, over the defendant's objection, that he contracted to sell the trees, in parol, with John Swan, agent of the de-

fendant company, and that he had cut, sawed and peeled large quantities of different kinds of wood, and had delivered 7,000 feet of poplar, of the lengths required by the contract, all of which testimony the defendant objected to, on the ground that Swan had no authority to make the contract, and because the contract was void under
(931) the statute of frauds, the same being for an interest in real estate and not signed by the party to be bound thereby. The objection was overruled, and this evidence was allowed to go to the jury. The plaintiff also testified that he was damaged $500, in addition to the timber contract. No objection to the last evidence was made. Plaintiff offered in evidence a paper containing an account in favor of the defendant for articles sold to plaintiff, on which was a written statement, made by Swan, as to the price the plaintiff was to have for the timber when delivered. Objected to by defendant as evidence. The court admitted it, "with the remark, made in a very pointed manner, that he would allow the paper to be read and risk it; that when people contracted debts they must pay them." Defendants excepted. The court "made a calculation and statement of amount claimed by plaintiff as per alleged contract price, and as testified to by plaintiff, and handed the same to the jury, and told them that it was what the court had calculated to be due the plaintiff by defendant on the contract, but for the jury to make their own calculations; that they were not bound by his; that it was for the jury to say from the evidence what sum was due the plaintiff; that the plaintiff was entitled to the contract price, less the sum it would cost to put the timber to the river, where it was to be delivered. Defendants excepted." The court said to the jury that the plaintiff was entitled to damages, and the amount was for the jury to find from the evidence. Defendants excepted. The transcript in this case is not as easily understood as some we have, and we have copied several of its parts in order that we may arrive at it correctly, as near as may be. It may be observed that the defendant omits to answer or deny the allegation of the original complaint, in which the contract and part delivery of the goods are alleged; so these allegations stand undisputed and affirmed
(932) by the judgment by default. The permission to file an answer to the amended complaint, as a count for damages for the breach of contract, was limited by the terms of the order to a denial of the damages for the breach, and did not extend to a denial of anything in the original complaint and judgment by default. The defendant offered no evidence denying the contract or damages, nor to the agency of Swan, as testified to by the plaintiff. He simply relied on the chance of discovering a mistake on the part of the court at the trial. He does not deny the allegations himself, nor use Swan as a

witness, nor anyone else. He does not plead the statute of frauds, and he cannot avail himself of the statute without pleading, as verbal contracts are not void, but only voidable, at the option of the pleader. *Curtis v. Lumber Co.*, 109 N. C., 401; *Loughran v. Giles*, 110 N. C., 423. In this connection it may be stated, to avoid misapprehension, that if the complaint alleged a parol contract for land, and the answer denied the contract and set up a different contract, the plaintiff could not introduce oral proof of his claim, if objected to by defendant, although the statute of frauds is not pleaded. *Gulley v. Macy*, 84 N. C., 434; *Holler v. Richards*, 102 N. C., 545. A contract required to be in writing can be proved only by the writing itself, not only as the *best*, but as the only admissible evidence of its existence. *Morrison v. Baker*, 81 N. C., 76. The Code, sec. 683, requiring corporation contracts exceeding $100 to be in writing, was repealed by Laws 1893, ch. 84.

The first exception, except as already noticed, is that Swan had no authority to make the contract. The defendant, having received and paid for a portion of the logs, as alleged in the original complaint, and not denied, and thereby ratified the contract made by Swan, is concluded as to his authority to make the contract. The defendant, in his argument, however, insists that the judge ought to have set out the evidence pertinent to the question of agency, and re- (933) lies on The Code, sec. 412 (2). So far as we can see, the evidence is all in the record before us. We cannot say that it is so, but the appellant nowhere suggests that it is not so. We hold, however, that question to be settled by defendant's ratification, as above stated. The plaintiff testified that he was damaged $500, in addition to the timber contract, and there was no exception to that evidence. This is the only evidence on the question of damages that went to the jury. The objection to the account of defendant for articles sold plaintiff, we suppose, was to the writing thereon by Swan, stating the price of the timber when delivered. This is without force, as it was only a statement by defendant's agent concerning the contract which he had made and they had ratified. The next exception was to the paper writing, above referred to and offered in evidence and admitted. "The court admitted the same, with the remark, made in a very pointed manner, that he would allow the paper to be read and risk it; that when people contracted debts they must pay them. Defendant excepted." Whether the exception was pointed to the admission of the paper, the pointed manner, or that when people contracted debts they must pay them, does not appear from the exception, as it should do. But assuming that it refers to the manner and the last part of the sentence, as defendant now argues, we must consider it that way. The Code, sec. 413, says: "No judge, in giving a

charge to the petit jury, either 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." We do not approve
(934) the use of such loose expressions, but the question still remains whether they are a violation of the statute and injurious to the party complaining. Numerous decisions on this question have been made, and they all agree that the judge is not permitted to express an opinion as to whether a fact, which is for the jury to find, is fully or sufficiently proved, in his charge to the jury. In the present case the remark complained of was not made in his charge to the jury, but was an announcement to counsel as to the competency of the evidence, made in the presence of the jury. In *S. v. Boone*, 82 N. C., 637, it was held that "the language of a judge, in his charge to the jury, must be read with reference to the evidence and points in dispute, and construed in reference to the context."

In *S. v. Brabham*, 108 N. C., 793 (7), it is said: "Remarks by the court of doubtful propriety are not ground for exception, where it appears they did no harm to the prisoner."

In *S. v. Browning*, 78 N. C., 555, it is stated: "In most cases, in the course of the trial, it becomes necessary for the judge to pass upon and decide collateral questions of fact, and such decisions, taken abstractly and without their proper connection with other things, might seem to be an opinion upon those matters belonging exclusively to the jury; but it must be presumed that their true import and bearing are understood by the jury, and unless it appears with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error."

In *S. v. Angel*, 29 N. C., 27, "the act of Assembly restraining judges from expressing to the jury an opinion as to the facts of the case only applies to those facts respecting which the parties take issue or dispute."

(935) In *S. v. Dick*, 60 N. C., 440, after stating the general rule, the Court says: "But if the party excepting could not possibly be injured by it, it is not ground for a *venire de novo*." Recognizing the general rule, these cases are cited to show that unless it appears reasonably certain that the party is prejudiced, in the minds of the jury, there is no error.

In the present case the judge was not charging the jury. There was a judgment by default and inquiry, establishing a legal liability of the defendant to the plaintiff for something. There was no evi-

dence in the case except the plaintiff's; there was no denial by plea or proof on the part of the defendant, and it appears unreasonable to suppose that the verdict would have been different without the remark of the court, as above stated. As to the manner of the judge, we have no suggestion, except so far as the words explain themselves.

The next exception was that the judge made a calculation "as per alleged contract price and handed it to the jury," telling them to make their own calculation; that they were not bound by his; that they must find the amount from the evidence, etc., as we have already stated. This seems harmless, and we understand it is frequently done by the judge, without prejudice to anyone. The interest on $313.25 from 21 August, 1894, till the first day of the trial term must be eliminated on final settlement, as we must presume that was included in the verdict as rendered.

The main question pressed upon our attention was the rule of damages in a case like the present. His Honor instructed the jury that "the plaintiff was entitled to the contract price, less the sum it would cost to put the timber to the river, where it was to be delivered." The rule seems to be settled in this State, but the diversity of opinion in other places and the insistence of counsel has induced (936) us to look at the authorities and refer to some of them.

By many it is urged that the measure of damages is the difference in the market value of the articles at the place of delivery and the contract price. By others it is claimed that the measure of damages is the contract price, less any necessary cost of putting the goods at the place of delivery.

In *Parker v. Smith,* 64 N. C., 291, it was held that a judgment by default operates as an admission of a cause of action, but the plaintiff must prove the delivery of the goods and their value.

Adrian v. Jackson, 75 N. C., 536: That when a claim for damages is certain in amount, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only when the claim is uncertain.

Hartman v. Farrior, 95 N. C., 177: When a verified complaint alleges a promise to pay a sum certain on default, the plaintiff is entitled to a judgment final, but when it alleges the value of the property, without any promise, the judgment should be by default and inquiry.

Garrard v. Dollar, 49 N. C., 175: Upon a judgment by default, nothing that would have amounted to a plea in bar to the cause of action can be given in evidence to reduce the damages. In that case the question of the measure of damages in land sales was first passed on in our State, and it was held that the measure of damages against a vendee for refusing to perform his contract for the purchase of land

—the vendor being ready to perform his part—is the purchase money, with interest. The English rule was that the difference between the value and the contract was the measure. Sedgwick Damages,
(937) 192, so states in regard to land sales, but admits (on page 281) that it is different in respect to sales of personal chattels.

Oldham v. Kerchner, 81 N. C., 430: Here the plaintiff sues for failure to deliver corn to be ground at his mill, and the measure of damages is *prima facie* the difference between the cost of grinding and the contract price, and the burden is upon the defendant to prove all matters in reduction of such damages.

Hinckley v. Steam Co., 121 U. S., 264, 275: The defendant agreed to purchase rails from the plaintiff at $58 per ton. On refusal to receive the rails the defendant was liable for breach of contract, and it was held that the rule of damages was the difference between the cost per ton of making and delivering the rails and the $58.

3 Parsons on Contracts, 209: The rule is well stated by the author —"If the goods remained in the vendor's hands it may be said that now all his damages is the difference between their value and the price to be paid, which may be nothing. This would be true if the vendor chose to consider the articles as his own, but it does not seem that the law lays upon him any such obligation. He may consider them as his own if there has been no delivery, or he may consider them as the vendee's, * * * subject to his call or order, and then he recovers the whole of the price which the vendee should pay." In either case the action is upon the breach of the contract by the vendee, and it seems reasonable that this election should be given to the vendor and not to the vendee.

Sands v. Taylor, 5 Johns., 305: Here, after receiving a part of the cargo, the defendant refused to receive the balance, and the plaintiff sold it at the best price in the market, and by action recovered the difference between the proceeds of the sale and the original contract price.

Bement v. Smith, 15 Wend., 493: The defendant refused
(938) to take a carriage built according to the terms of the agreement. The plaintiff deposited the carriage with a third party and notified the defendant. The plaintiff recovered the contract price.

Masterton v. Mayor, 42 Am. Dec., 38: *Held,* that the measure of damages was the difference between the cost of doing the work and the agreed price to be paid.

We approve the rule pointed out in these authorities. The recovery is only the proximate contract profits and does not fall within the line of inhibited speculative profits. A party contracts, expends his time, skill and capital, and assumes risk. It would seem unreasonable to

deprive him of his direct profits and relieve the other party simply because he has violated the agreement. With the record as it comes to us, we can see no error, and, with the modification already indicated, the judgment is

Modified and Affirmed.

CLARK, J., dissenting: The learning as to judgments by default and inquiry is not applicable in this case, for, though such judgment was taken by mutual consent, it was in effect set aside, the plaintiff at the trial term being permitted to amend his complaint and the defendant to file his answer, and the issues arising thereon were duly submitted to the jury. The plaintiff testified that he made the contract with one Swan, as agent of the defendant. The defendant objected that there was no evidence of agency. The court overruled the objection, and the defendant excepted. Whether there was *prima facie* evidence of agency was for the court. The material fact that Swan was the agent of the defendant, authorized to contract, was for the jury. The judge overruled the exception, thus passing on the fact himself. The exception being made, it was incumbent on the judge to set out the pertinent evidence. The Code, sec. 412 (2), expressly so re- (939) quires, but there is no evidence in the record tending to show the agency. It may have been stated on the argument here that the defendant had theretofore paid for timber bought for it by Swan, but nothing of the kind appears in the case on appeal. The record states: "The defendant objected to the paper as evidence. The court admitted the same, with the remark, made in a very pointed manner, that he would allow the paper to be read and risk it; that when people contracted debts, they must pay the same. Defendant excepted." This was an expression of opinion that the defendant had contracted a debt to the plaintiff which was still due and ought to be paid, and was a violation of the act of 1796, now The Code, sec. 413. *S. v. Dick,* 60 N. C., 440; *Reiger v. Davis,* 67 N. C., 185; *S. v. Dancy,* 78 N. C., 437. "The court made calculation and statement of amount claimed by plaintiff as per alleged contract price and as testified to by plaintiff, and handed same to the jury and told them that the same was what the court had calculated to be *due the plaintiff by the defendant* by the contract." This was an expression of opinion by the court that the testimony of the plaintiff was correct, and this could not be corrected by the judge adding thereto "but for the jury to make their own calculations, that they were not bound by his." *S. v. Dick, supra,* is exactly "on all fours," but, indeed, no precedent is needed to show that, if this is admissible, the statute designed to prevent the weight of the judge's views of the evidence going to the jury is henceforth a

nullity. It is a violation of section 413 of The Code for the judge, at any time during the trial, and not in the charge only, to express an opinion before the jury on the weight of the evidence. *S. v. Browning,* 78 N. C., 555; *March v. Verble,* 79 N. C., 19; *Sever v. McLaughlin,* 79 N. C., 153; *Fickey v. Merrimon, ib.,* 585. The plaintiff tes-
(940) tified that he sold to the defendant all his poplar and hardwood trees on 100 acres of land at $4.25 per thousand for poplar and $4 per thousand for hard wood "when cut, peeled, sawed in logs and delivered to defendant on the banks of Cheoah River." He further testified that he delivered only 7,000 feet of poplar, and that he cut, peeled and sawed 41,000 feet of poplar, but did not deliver it, and that he cut and peeled 100,000 feet of hard wood, about 5,000 of this being also sawed into logs of the contract length, but none of this timber was delivered at the Cheoah River except the 7,000 feet of poplar.

Upon this state of facts the court charged, as a measure of damages, that "the plaintiff was entitled to the contract price, less the sum it would cost to put the timber to the river," and the defendant excepted. Upon this the plaintiff recovered (the jury doubtless taking the calculation made for them by the judge) $313.25, when only 7,000 feet of lumber, at $4.25, was shown to have been delivered. There is no evidence in the record showing any state of facts which could have authorized a verdict against the defendant for timber not delivered at the stipulated point, and, this instruction being excepted to, in justice to the defendant, it was incumbent upon the court to set out the evidence pertinent to that charge and which would justify it. On the evidence as it appears in the record this instruction is erroneous. But in any aspect of the evidence, even if it had been shown (as it was not) that the logs had been delivered at the river, the instruction was wrong. When the vendor delivers the goods at the place agreed, if the vendee fails or refuses, without cause, to accept them, the universally recognized rule of damages (save in very exceptional cases) is the difference between the contract price and the market price. This
is, indeed, elementary law, and is to be found easily accessible
(941) in all of the authorities. 2 Southerland Damages, sec. 647, and numerous cases there cited: *Clifton v. Newsom,* 46 N. C., 108; 2 Benjamin Sales, sec. 1117, and cases cited in note; *Barron v. Arnaud,* 8 C. B., 804; 3 Parson Contracts, 209 (marginal page), and cases cited. The instruction of the court in this case gave the plaintiff more damages than he could have had if it had been shown that all the timber had actually been delivered at the stipulated place; but, in fact, his own evidence, far from sustaining the allegations made in the complaint, showed only 7,000 feet delivered and no ex-

cuse for failure to deliver the balance. Even if this had been a judgment by default and inquiry (instead of answer filed and a trial upon issues framed, as it was), still it would have been a default and inquiry and not a judgment by default final. Hence, even in that case it would have been incumbent on the plaintiff to prove his case, the default and inquiry admitting only a cause of action and judgment for costs till something more was approved. *Gatling v. Smith*, 64 N. C., 291. *Oldham v. Kerchner*, 81 N. C., 430, was an action by a vendee for failure to deliver, and not, as in this case, an action by a vendor for failure to receive and pay; besides, in the Oldham case the vendee was allowed to recover profits of grinding, because the vendor contracted, well knowing the purpose of the vendee in buying.

The court further instructed the jury, upon the second issue, as to damages: "That the plaintiff was entitled to damages; that as to the amount of damages it was for the jury to find from the evidence what sum the plaintiff is entitled to." Defendant excepted. On this issue the plaintiff recovered $86.75. The record proper (in the judgment signed by the court) states that, "by consent, the plaintiff having been allowed to so amend his complaint as to set up such claim as he may have against the defendant for damages sus- (942) tained by him by reason of defendant's breach of its contract, and the defendant being allowed to answer, *denying the damage alleged*, and both amendment and answer being treated as in, without objection certain issues were submitted to the jury, as follows." It is on the second of the issues, thus framed on the pleadings, there being an allegation and a denial of damage, that the judge tells the jury that "the plaintiff is entitled to damages—how much is for the jury to say." This charge is erroneous, certainly on the face of the record, and if the state of the evidence was such as to justify this instruction the exception put the court and the appellee on notice to send up the pertinent evidence that would sustain it, and it not being sent up, and taking the record as it is to be full and true, this charge was properly excepted to, it being supported by no evidence and likewise an expression of opinion. It certainly could have been no guide to the jury beyond the instruction by the court to allow the plaintiff something on the second issue. It may be that the case was imperfectly made out, but we must take the record as we find it. The appellee not having excepted to the appellant's case, it is as conclusive as if settled by the judge. Besides, it appears that the judge expressed his opinion three times in the charge that the plaintiff ought to recover. Possibly he ought. We do not know how that may be, but his Honor should not have intimated his opinion to the jury to that effect.

Cited: S. v. Robertson, 121 N. C., 555; *Hemmings v. Doss,* 125 N. C., 402; *Brinkley v. Brinkley,* 128 N. C., 506; *Springs Co. v. Buggy Co.,* 148 N. C., 534; *Stephens v. Midyette,* 161 N. C., 324; *Harper v. R. R., ib.,* 452; *R. R. v. Mfg. Co.,* 166 N. C., 183.

(943)

G. W. WILLIAMS ET AL. v. S. F. CHAPMAN ET AL.

CONTRACT—SALE OF FUTURE PRODUCTS OF MILL—PUBLIC POLICY.

1. A contract whereby one party sells or pledges in advance the contingent products of a mill for a certain period and at a specified price, in consideration of money furnished and agreements entered into by the party who buys, is valid and not against public policy.

2. Where a contract of sale which provided that the vendor, for a valuable consideration and in consideration of obligations to be performed by C., "does hereby sell and agree to deliver" to C., at Waynesville, boxed or sacked (at option of C.), the entire products of the vendor's mill, according to specifications, for a period of three years from date, C. to make certain advances for the purpose of paying for raw material and the cost of boxing, etc., and the contract further provided that all applications for the purchase of such products should be referred to C.: *Held,* that such contract vested the title to the finished products in the vendee.

ACTION tried at Fall Term, 1895, of HAYWOOD, before *Robinson, J.,* and a jury.

The action was a creditor's bill, filed by plaintiff in behalf of himself and all the other creditors of F. T. Hyatt, against defendants for the recovery of certain property alleged to be in the hands of the defendant J. R. Justice, trustee, and the other defendants, for the benefit of the creditors of the said F. T. Hyatt.

The pertinent facts are stated by *Associate Justice Avery* in the opinion.

J. M. Moody for E. F. Hyatt (appellant).
W. T. Crawford for appellee.

AVERY, J. The appeal hinges upon the question whether F. T. Hyatt was the owner of certain locust pins (which were the (944) output of his mill) prior to his executing an assignment, for the benefit of creditors, to J. R. Justice, trustee, on 15 January, 1891. The defendant Chapman claimed title to these pins, some of which had been boxed and others were unboxed when seized at the mill yard of Hyatt, at Waynesville. On 10 March, 1890, a written contract was entered into by the defendant F. T. Hyatt and the de-

fendant S. F. Chapman, in which we find the following stipulation: "For a valuable consideration, and in consideration of certain obligations to be performed by the second party (Chapman), said first party (Hyatt) *does hereby sell* and agree to deliver to said party, f. o. c., at Waynesville, N. C., all the insulator pins, of size and manufacture satisfactory to second party and suitable to the requirements of the best telegraph companies, neatly and smoothly made, that said first party may manufacture for three years from today, at $7.50 per thousand pins. All pins are to cut, be the exact things if dry, and a little larger when green, so as to insure the equality of sizes and provide for shrinkage. All pins must *be boxed or sacked* by first party (*the second party the option of deciding which he will take*) in good sacks or suitable boxes; boxes to be nice and smooth, and shall be marked by stencils, which second party furnishes in a way second party directs. If sacks are used they shall also be marked as above. All inquiries for purchase shall be referred to S. F. Chapman, Asheville, N. C.," etc. Chapman stipulated on his part to advance on rough insulator pins delivered to Hyatt at the mill $3 per thousand, and to advance the cost of boxing and packing. He also agreed to furnish, on reasonable terms, additional machinery, if Hyatt's business should require it. When Hyatt agreed to the stipulation that he did "hereby sell" all of the pins that should be manufactured for three years, it was manifestly the intention of the parties who signed the contract to pass the title to the whole output of (945) the mill for that time. This language, in itself, is susceptible of no other construction, and the subsequent stipulation that all inquiries for purchase should be referred to Chapman is corroborative of the view that the parties themselves understood that under a proper construction of its terms the title to the pins would vest in Chapman as they should be furnished. The validity of a contract whereby one party sells or subjects to a lien in advance the contingent product of a mill in consideration of money furnished and agreements entered into by the party who buys can no longer be questioned, since the full discussion of the subject in *Brown v. Dail,* 117 N. C., 41. The reasons growing out of public policy which induced the Court to adopt the rule that crops should not be subjected to lien more than one year in advance of production do not apply here, and when the reason ceases the rule must cease. To allow a farmer to create indefinite liens might result in the accumulation of heavy burdens, which croppers might be unable to remove, and therefore might discourage the producer and diminish the product. But to permit a mill owner to start a business by pledging the output in advance often affords the only opportunity of carrying on the business. It enables the capitalist

who uses the finished product to make himself secure in sending another into the forest to shape the raw material for his use. As will appear by reference to the authorities cited in *Brown v. Dail, supra,* sales of such contingent interest come within no inhibition founded upon motives of public policy. The sale of the pins was valid, and the title vested in Chapman as they were made, just as the logs became subject to the lien upon the happening of the contingency in *Brown v. Dail, supra.*

(946) The agreement must be construed, in so far as it relates to the sale of the pins, as an executed contract, whereby the title vested as soon as the pins were turned out upon the yard in a finished state. There was a distinct stipulation on the part of Hyatt to box or sack (at the option of Chapman) and to deliver on board the cars, which was executory, and for any breach of which Hyatt was answerable in damages.

There was no error in the instruction given to the jury, and which constitutes the ground of the only exception, that in no aspect of the testimony was Hyatt the owner of the pins on 15 January, 1891, and the judgment is therefore

Affirmed.

Cited: Warren v. Short, 119 N. C., 42; *Godwin v. Bank,* 145 N. C., 327.

N. N. FERGUSON v. THE DAVIS & RANKIN MANUFACTURING COMPANY

PRINCIPAL AND AGENT—DEALINGS WITH AGENT—POWER OF AGENT TO BIND PRINCIPAL.

1. One dealing with an agent must ascertain the extent of his authority to make contracts to bind his principal.

2. Where plaintiff knew that one representing himself as agent had no general power, and that his powers were limited, he cannot recover, against the principal, under a contract made without authority in the latter's name, for services rendered to the agent for his benefit.

(947) ACTION to recover compensation for services rendered to the defendant, begun before a justice of the peace and heard, on appeal, before *Robinson, J.,* and a jury, at Fall Term, 1895, of HAYWOOD.

The plaintiff alleged that he was entitled to compensation, at the rate of $100 per month and expenses, by reason of a special contract entered into with the defendants by their agent, D. F. Gibbons.

The defendants resisted the plaintiff's right to recover, on the grounds that the said Gibbons had no authority to employ the plaintiff, N. N. Ferguson.

Plaintiff testified, in his own behalf: "I had a contract with defendant. In February, 1892, D. F. Gibbons came here and claimed to be the agent of the defendant, and was such agent. The defendant company built creameries—one in this county. D. F. Gibbons secured the stock, and he employed me to help get up the stock, and gave me a note for $150." (The "note" referred to by witness is the paper writing set out in the opinion of the Court.) "On this note I received $50 from Gibbons, in cash, and an order on the creamery company here, given by defendant, per Gibbons, for certificate of stock, the value of $100." (The order referred to is the same as set out in the opinion of *Judge Montgomery*.) "This order was accepted by the creamery company here, charged to the defendant company, and the creamery company here received credit for amount of said order in settlement with the defendant company, and issued stock to the plaintiff in the amount of $100. After this creamery was completed, and after I had received my pay, as before stated, for my services in establishing this creamery, I made a contract with Gibbons to work for his company, the Davis & Rankin Build- (948) ing and Manufacturing Company, and began work on 15 July, 1892. I went with him to Franklin and stayed several days, and he ordered me to Statesville. I went there, and back to Franklin, for the purpose of getting up stock and establishing a creamery at that place, and did get up $3,500 in stock in the name and for the defendant company. The cost of establishing a creamery was $5,000, raised by subscription and taken in stock. I stayed there until 10 September. I had correspondence with parties at Plymouth, N. C., Piedmont, Ala., and other places, in the interest of the defendant company in establishing creameries at such places. I was ordered back to this place by Gibbons (the creamery at Franklin was not established), and remained here until 15 December. They owe me $600, but I only brought this for this amount. I have an expense account at Franklin of about $30. I received some expense money from Gibbons. When the creamery at this place was established some of the parties who subscribed for stock gave their notes to the defendant company, and the defendant company brought suit and recovered judgment. These suits were brought and managed by Gibbons."

On cross-examination: "Gibbons said he would give me $100 per month. They completed the factory at Statesville. I wrote a letter to defendant company in December, 1892, after Gibbons left here, and told the company that I had been employed by Gibbons to work for

them, and that I was at this place awaiting orders; and I have a reply to that letter, dated 19 December, 1892, stating that they knew nothing about it and stating they would refer it to Gibbons. I
(949) have another letter, dated 4 March, 1893, stating that Gibbons had no authority to employ me, and refusing to pay."

The material parts of the defendant's testimony are stated by *Associate Justice Montgomery.*

Upon an intimation by his Honor that in no view of the case could plaintiff recover, the plaintiff submitted to a nonsuit and appealed.

Ferguson & Ferguson and R. D. Gilmer for plaintiff.
Smathers & Crawford for defendant.

MONTGOMERY, J. The plaintiff brought this action to recover an amount which he alleges the defendants owe him for services rendered to them in aiding them to establish and in establishing creameries in North Carolina. The defendants deny that they ever employed the plaintiff for any purpose or owe him anything. The plaintiff alleges that he made his contract with one Gibbons, who represented himself to be the special agent of the defendant. On the trial the defendants, as witnesses for themselves, in their depositions, stated that Gibbons was their agent to canvass for subscriptions of stock in the proposed creamery establishment, at his own expense and on a commission. One of the defendants testified that "He (Gibbons) was acting in the capacity of a special canvassing agent; he had no capacity except to bring his best judgment to bear in the selection of parties who would contract to pay us for a creamery when it was completed according to certain defined terms set out in a printed form of contract, which we furnished him in blank. After he had taken such a contract as he thought was a good one, he sent the contract to us. We looked up the parties, and if we decided that it was a good contract, we
(950) took it off his hands at a contract price, printed therein, and allowed him a good per cent as his commission in full of his expenses and time." The testimony offered by the plaintiff to show that the scope of the authority of the agent was broader than that testified to by the defendants amounted to only a scintilla. That the agent, Gibbons, collected some of the stock subscriptions, and received in payment of some a part in money and a part in lumber with which to build the creameries, affords no sufficient proof that his agency extended further than the matters connected with the special business which the defendants testified he was employed to do. The plaintiff also proved that Gibbons had executed and delivered to the plaintiff a paper writing, as follows:

"WAYNESVILLE, N. C., 15 February, 1892.

"This is to certify that we will allow N. N. Ferguson $150 for services in placing stock for creamery at Waynesville, same to be paid when factory is completed.

"DAVIS & RANKIN,
Per D. F. GIBBONS, *Special Agent.*"

He also testified that Gibbons paid him $50 of the amount and gave him an order on the board of managers of the creamery for one share of stock at the par value of $100; that by an agreement between the defendants and the board of managers of the creamery company a share of stock was issued to the plaintiff, and the defendants were charged with the $100 in the settlement between the creamery company and the defendants. If the order had set forth that the $100 was due to the plaintiff for services which he had rendered to the defendants in soliciting and canvassing for stock in the creameries, and that fact had been made known to the defendants in the settlement between them and the creamery company, and the defendants had assented to it, it would have been competent for the plaintiff to have shown the transaction as evidence going to prove the power of the agent to bind his principal by his contract with the plaintiff, not- (951) withstanding the testimony of the defendants that they had given him no such authority. But the order recited on its face that the $100 in cash had been received from the plaintiff in full of his subscribed stock, and there was no proof that the defendants had ever received notice of the plaintiff's employment by Gibbons or that they ratified the contract between them. The general rule is that where one deals with an agent it is incumbent on him to ascertain the extent of the agent's authority and of his power to make contracts which will bind the principal. Any other rule would subject those who do business through agents (and a large proportion of the business affairs of life is conducted in this manner) to all sorts of inconvenience and loss, however carefully the principal might guard his contracts and limit the authority of his agent. *Biggs v. Ins. Co.*, 88 N. C., 141. The plaintiff knew that Gibbons had no general power over the establishment and erection of the creameries, and that his powers were limited, and he was therefore bound to ascertain the extent of his authority, which he failed to do. Story Agency, p. 149; *Dowden v. Cryder* (N. J. Court of Appeals), 26 Atlantic, 941.

We are of the opinion that there was no error in the ruling of his Honor that in no view of the case could the plaintiff recover.

No Error.

Cited: Willis v. R. R., 120 N. C., 512; *Bank v. Hay*, 143 N. C., 330; *Thompson v. Power Co.*, 154 N. C., 20; *Hall v. Presnell*, 157 N. C., 292; *Bank v. McEwen*, 160 N. C., 420; *Wynn v. Grant*, 166 N. C., 47.

(952)

T. B. ALLISON v. U. G. SNIDER

ACTION TO RECOVER LAND—SHERIFF'S DEED FOR LAND SOLD UNDER EXECUTION—PRIMA FACIE TITLE—RIGHT TO HOMESTEAD—BURDEN OF PROOF—PRACTICE.

1. A purchaser of land at a judicial or sheriff's sale under execution has *prima facie* title.

2. One who seeks to avoid the *prima facie* title of the purchaser of land at sheriff's sale under execution, on the ground of homestead rights, must allege specifically in his pleading the facts upon which the homestead rights depend, and the burden is upon him to establish such facts.

3. If in the trial of an action to recover land by the purchaser at execution sale it appears, either by the admission of the parties or by the evidence of either, that no homestead was allotted before the sale, the plaintiff cannot recover, although such fact was not specially pleaded; but where nothing of the sort is alleged, pleaded or proved, the *prima facie* right of plaintiff will control.

ACTION to recover the possession of the land described in the complaint, tried before *Robinson, J.*, and a jury, at Fall Term, 1895, of JACKSON.

(955) In deference to the opinion of his Honor, that the plaintiff was not entitled to recover, the plaintiff submitted to a judgment of nonsuit and appealed.

Moore & Moore, Walter E. Moore and Shepherd & Busbee for plaintiff.

J. M. Moody, contra.

FAIRCLOTH, C. J. The plaintiff sues for possession of land, and alleges title. The defendant admits that he is in possession, and denies that the plaintiff has any title, and avers nothing more. Plaintiff and defendant claim under one Stiles—the former by a sheriff's deed, under a judgment docketed 8 January, 1894; the latter by a deed from Stiles, dated 13 December, 1893, but not delivered and recorded until 24 April, 1894.

The defendant contends that as it does not appear that any homestead was laid off by the sheriff the sale and deed to plaintiff are void. He does not aver in his answer that the homestead was not laid off,

nor attempt to prove it, and it does not appear whether it was laid off or not. His Honor held that the burden of showing that it was laid off, or that the judgment debtor was not entitled to it, was upon the plaintiff, and that he could not recover. In this there was error.

A purchaser at a judicial or sheriff's sale, under a regular judgment and execution, has a *prima facie* title, because there are circumstances when the judgment debtor is not entitled to a homestead, as if the debt be for the purchase money, nonresidence or sale for taxes. One who seeks to avoid the *prima facie* title on the (956) ground of homestead rights must allege in his pleading specifically the facts upon which the homestead right depends, and the burden is upon him to establish such facts. *Dickens v. Long,* 109 N. C., 165; *Fulton v. Roberts,* 113 N. C., 421.

If, however, the fact that no homestead was allotted (in proper cases) appears, either by the admission of the parties or by evidence of either, it will prevent a recovery, although not specially pleaded. *Mobley v. Griffin,* 104 N. C., 112. Here nothing is alleged, admitted or proved, and the *prima facie* right will control. The case will go back, to the end that the parties may proceed as they are advised.

Reversed.

Cited: Marshburn v. Lashlie, 122 N. C., 240.

JESSE S. DICKEY, ADMINISTRATOR OF B. K. DICKEY, v. H. A. DICKEY ET AL.

PRACTICE—PETITION TO SELL DECEDENT'S LAND FOR ASSETS—MOTION OF CREDITOR TO BE MADE PARTY PLAINTIFF.

1. Creditors of a decedent cannot be permitted to become parties plaintiffs with the personal representative in a proceeding to sell land for assets.

2. Creditors dissatisfied with the conduct of the affairs of the estate by the administrator have ample remedies under The Code, secs. 1448-1477.

PETITION by plaintiff for sale of land of his decedent for (957) assets, heard by *Robinson, J.,* at Fall Term, 1895, of CHEROKEE, on appeal from a judgment of the clerk denying a motion of J. Johnson, a creditor of the estate, to be made a party plaintiff with the administrator.

His Honor reversed the order of the clerk, and plaintiff appealed.

J. W. Cooper for plaintiff.
No counsel contra.

MONTGOMERY, J. There was pending in the Superior Court of Cherokee County, before the clerk, proceedings instituted by Dickey, administrator of Dickey, against the heirs at law of petitioner's intestate, for the sale of the real estate of the intestate, the proceeds to constitute assets for the payment of his debts. The clerk had made two orders or decrees of sale, the former of date December, 1886, and embracing a part only of the real estate of the intestate, and the latter dated June, 1889, embracing the remainder. The administrator had complied with the first order only partially, and with the last in no respect, when one Johnson, in August, 1894, alleging himself to be a creditor of the intestate, had a notice to be issued by the clerk and served on the administrator to the effect that on a day named in the notice he would move before the clerk to be made a party plaintiff in the proceedings, and for a judgment for his debt. On the day named in the notice Johnson appeared before the clerk and, in a petition setting out the alleged facts as above recited, moved to be made a party plaintiff and for a judgment on his debt, and that the administrator should proceed to sell the lands. The clerk refused the motion and dismissed the petition of Johnson, from which he appealed.
(958) The court allowed Johnson to be made a party plaintiff, and at a subsequent term, for want of an answer by the administrator, adjudged, as by default, that the facts stated in the petition of Johnson were true, declared that the debt claimed by him was due, and ordered the administrator to proceed to sell the land for the benefit of all the creditors, and to report to the next term of the court.

These proceedings, from the time of their commencement at the issuing of the notice by Johnson before the clerk to the last order of the court below, cannot be sustained. They are altogether irregular. Creditors cannot be permitted to become parties plaintiffs with the personal representative in proceedings of this kind. All sorts of confusion and delay might and would be the result thereof. The representative might be embarrassed in every step he took to close up his administration. And, besides, Johnson had a plain and full remedy provided by statutory provision, and if he has neglected to avail himself of it, it is his own fault. The sections of The Code, from 1448 to 1478, both inclusive, give creditors all the rights and remedies they need to prove their debts, and to enforce their payment by the administrator to the extent of the value of the estate allowed by law to be appropriated to that purpose.

In the case before us, under section 1474 of The Code, it would be unnecessary for the clerk to issue the process there referred to, for the parties are all in court, and it is only necessary to compel the administrator to proceed with the sale of the land. From the reports

and petitions of the administrator himself it appears that he has been very negligent, and that he has violated the order of the court without making any sufficient excuse for so doing. The clerk was right in refusing the motion of Johnson and in dismissing his petition, and there is error in the proceedings of the court at term time, (959) and they must be set aside.

Error.

Cited: Rawles v. Carter, 119 N. C., 597; *Strickland v. Strickland*, 129 N. C., 87.

JOHN SILVEY & CO. v. J. C. AXLEY & BRO.

ACTION ON NOTE—COLLATERAL SECURITY—DUTY OF HOLDER—ISSUES—INSTRUCTIONS.

1. In the trial of an action on a debt due by defendants to plaintiffs the defense was that defendants had assigned to plaintiffs certain collateral notes which the maker agreed to secure by mortgage; that defendants notified plaintiffs of the opportunity to obtain security, and requested them to forward the notes for the purpose of having them secured, but plaintiffs delayed until the opportunity for getting the security had passed, and that by such delay and negligence the defendants suffered damage, which they set up as a counterclaim: *Held*, that it was proper to submit as an issue, "Are defendants indebted to plaintiffs, and if so, in what amount?" Since (1) such issue was raised by the pleadings, (2) a verdict upon it would constitute a sufficient basis for a judgment, and (3) defendants were not barred for want of an additional issue from presenting to the jury some view of the law arising out of the evidence.

2. In such case testimony that the maker of the collateral notes was ready, able and willing to secure the same when defendants asked plaintiffs to forward them was immaterial, inasmuch as he could have given the security without the presence of the note.

3. In such case it was not error to refuse to instruct the jury that it was the duty of the plaintiffs to use due diligence to have the notes secured after they had notice of the maker's willingness, where it appeared that the notes were afterwards returned to the defendants for collection, without objection, and defendants again assigned them with a judgment obtained thereon.

4. Nor in such case was it error to refuse an instruction that if the maker of the notes could have secured them, and was willing to do so, and plaintiffs, after being notified thereof, failed to send the notes until the opportunity to secure them had passed, then plaintiffs were negligent and defendants were entitled to damages, for security could have been given by the maker of the notes while they were in plaintiff's hands.

5. The holder of a debt secured by mortgage or deed of trust, having two remedies—one *in personam* for the debt, and the other *in rem* to subject the mortgaged property to its payment—can pursue either remedy without waiving his right to resort to the other.

(960) ACTION tried before *Graham, J.*, and a jury, at Spring Term, 1895, of CHEROKEE.

There was a verdict for the plaintiffs, and from the judgment thereon defendants appealed.

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

J. W. Cooper and Kope Elias for plaintiffs.
E. B. Norvell and F. P. Axley for defendants.

MONTGOMERY, J. The plaintiffs had a debt against the defendants, and the latter had assigned, in writing, to the plaintiffs two notes of one Branderth, due to the defendants, as a collateral security for the plaintiffs' debt. The plaintiffs sued the defendants, and the answer makes averment that in August, September or October, 1893, Branderth could have secured, on a sawmill which he owned, his two notes, and had agreed with the defendants that if they could get his two notes sent to them by plaintiffs, who lived in Atlanta, Ga., he would secure them; that defendants wrote to plaintiffs, in August, 1893, requesting them to send on the notes for the purpose of having them secured, but that the plaintiff refused and failed to take any steps until May, 1894, at which time Branderth had disposed of the sawmill, and by reason of this default and delay of the plaintiffs the defen-
(961) dants aver they have sustained damage, and set up the same as a counterclaim against plaintiffs' demand. His Honor submitted the following issue, tendered by plaintiffs: "Are the defendants indebted to the plaintiffs, and if so, in what amount?" This issue was a proper one to have been submitted.

In *Patton v. Garrett,* 116 N. C., 847, this Court said: "It is within the sound discretion of the trial judge to determine what issues shall be submitted, and to frame them, subject to the restrictions: (1) that only issues of fact raised by the pleadings are submitted; (2) that the verdict constitutes a sufficient basis for a judgment; (3) that it does not appear that a party was debarred, for want of an additional issue or issues, of the opportunity to present to the jury some view of the law arising out of the evidence." The issues offered by the defendants in this case presented the different aspects in which the evidence might be viewed, rather than the material issues raised by the pleadings. The court committed no error in its refusal to submit them. In the

course of the trial the defendants proposed to ask Branderth if he was willing, able and ready to secure his notes in August, September and October, 1893, and in May, 1894. The plaintiffs objected, and the objection was sustained. The whole evidence was immaterial, as Branderth could have secured the notes while they were in the hands of the plaintiffs just as well as he could if they had been in his own hands. It was his business to know both the amounts and the dates.

The defendants asked the court to charge the jury: "(1) That it was the duty of the plaintiffs to use due diligence in securing the note on Branderth, turned over to them by defendants, and especially is this true where the plaintiffs had notice of the fact that Branderth was willing to secure them." The court declined to give (962) this instruction, and the defendants excepted. There was no error, for the notes had been returned to defendants without objection, on 1 May, 1894; the defendants had undertaken the collection of them, and again assigned them to the plaintiffs, on 13 November, 1894, and the judgment thereon, on 8 December, 1894, and became the agent of the plaintiffs for the collection of the same.

The defendants further asked the court to instruct the jury: "(2) That if they believed that Branderth could have secured the notes in the fall of 1893, and agreed to do so, and plaintiffs were notified of this by defendants and requested to send the notes on to be secured, but failed to do so and kept the notes in their possession for six or eight months after the offer to secure, and in the meantime all opportunity to secure the same was lost, the plaintiffs were guilty of negligence, and defendants are entitled to whatever damage they sustained by reason of such negligence of plaintiffs." The court declined to give this instruction, and the defendants excepted. We see no error in the refusal to give this instruction. As we said, *supra,* in passing on the plaintiffs' objection to Branderth's testimony, the notes could have been secured while they were in the hands of the plaintiffs just as well as if they had been sent to Branderth for that purpose.

"At the close of the testimony the defendants moved to dismiss the action, upon the ground that the deed of trust dated 13 November, 1894, offered in evidence by plaintiffs, raised an implied promise in law that the plaintiffs would not sue upon the notes secured by the trust until the trustee executed his trust or until negligence was shown on the part of the trustee in not executing the trust. The motion was denied and defendants excepted." There was no error in the refusal to give this instruction. A creditor, whose debt is secured by way of mortgage or trust, has two remedies—one *in personam,* (963) for his debt; the other *in rem,* to subject the mortgaged prop-

erty to its payment; and a resort to one is no waiver of the other. *Ellis v. Hussey,* 66 N. C., 501.

"The court then charged the jury, among other things, that if they believed from the testimony that the Branderth notes were merely taken as collateral security by plaintiffs, and were returned, without objection, to defendants, and then held by them for some time, and on 13 November, 1894, again assigned to plaintiffs and held by defendants, as plaintiffs' agent, for collection, then they should answer the issue in the affirmative for the amount admitted to be unpaid by defendants. Defendants excepted." There is no force in the exception, and the instruction was correct. The judgment of the court below is

Affirmed.

Cited: Credle v. Ayers, 126 N. C., 14; *Sykes v. Everett,* 167 N. C., 609.

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(964)

W. C. HEYSER & CO. v. J. C. GUNTER

JUSTICE OF THE PEACE—JURISDICTION—COUNTERCLAIM.

Defendant contracted to cut and deliver logs from certain lands and to put them upon the river for plaintiff at a stipulated price, it being agreed that plaintiff might retain one-third of the amount due for logs delivered until all the timber from certain lands was delivered. Plaintiff retained one-third of the amount due for logs delivered, and upon failure of the defendant to deliver other logs included in the contract plaintiff caused such logs to be delivered, at expense to himself of $125 more than the contract price of such logs. Thereupon plaintiff sued defendant for the $200 which had been advanced. Defendant pleaded payment and a counterclaim of $200, waiving the balance of his claim in order to confer jurisdiction. Plaintiff admitted that he had retained one-third of the price of the logs delivered by defendant, as provided by the contract. There was judgment for the defendant on his counterclaim, and plaintiff appealed: *Held,* that there was no error in an instruction to the jury that the measure of plaintiff's damages was the amount he was compelled to pay in excess of the contract price to get delivery of the logs which defendant had failed to deliver, and that, if the jury believed the plaintiff's evidence, the defendant was entitled to judgment for $200.

CLARK and MONTGOMERY, JJ., concur in the result, but dissent so far as there is any recognition of jurisdiction of the justice to adjudicate that defendant was indebted to the plaintiff in the sum of $325 and that plaintiff was indebted to defendant $525.

APPEAL from justice of the peace's court, tried before *Robinson, J.*, at Fall Term, 1895, of GRAHAM.

From a judgment for the defendant on his counterclaim the plaintiffs appealed.

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

A. M. Fry for plaintiffs.
J. W. & R. L. Cooper for defendant.

FAIRCLOTH, C. J. If we are able to understand the record (965) in this case, the following are the facts: The defendant agreed to cut logs from certain lands and put them into the Tennessee River for the plaintiff, and the latter agreed to pay for the logs so delivered $4.25 per thousand feet; that it was agreed that plaintiff might retain one-third of the money for the logs, as they were delivered, until all the timber from certain lands was delivered; that logs were delivered to the amount of $1,918.46, and paid for, except one-third, $639.46, which was retained, and that plaintiff advanced $200 to defendant to enable him to prosecute his work; that defendant cut some logs on a 75 or 100-acre tract, but was enjoined from removing them, and that it cost plaintiff $125 more than the contract price to put those logs in the river. The plaintiff sued in a justice's court for the $200 advanced, and defendant pleaded payment and also a counterclaim for $200, waiving and releasing all in excess of $200. The plaintiff's witness and agent proved that it cost him $125 more than the contract price to put the cut logs in the river, by reason of the remote distance from the river, and that the $639.46 was retained by plaintiff, and defendant admitted that plaintiff advanced him $200. The court submitted these issues:

1. "Is defendant indebted to plaintiff, and if so, in what amount?" Answer: "Nothing."

2. "Is plaintiff indebted to defendant, and if so, in what amount?" Answer: "Two hundred dollars."

His Honor charged the jury that "the measure of damage to the plaintiff would be the $125 that he had to pay in excess of the contract price to put in the timber off this tract, and that if the jury should find the fact to be in accordance with the evidence of the plaintiff the defendant would be entitled to a verdict of $200." Plaintiff excepted. This was the only exception relied on in this (966) Court. Judgment according to the verdict.

We see no error in the instruction, as it seems agreeable to the facts and the evidence.

The case may be stated thus:

Amount retained from logs delivered to plaintiff.....		$639.46
Cr. amt. advanced defendant.....	$200.00	
Cost of putting logs in river.....	125.00	
Released for jurisdiction.....	114.46	
Counterclaim	200.00	
	$639.46	$639.46

If the conclusion is correct, it is plain that the plaintiff has sustained no injury.

Affirmed.

CLARK, J., concurring: Concurring in the result, I cannot agree to the process by which the conclusion is reached, as it recognizes jurisdiction in a justice of the peace to adjudicate that the defendant was indebted to the plaintiff $325, and that the plaintiff was indebted to the defendant $525, exclusive of $114.25 remitted to give jurisdiction. I do not think that a justice of the peace has such jurisdiction. The plaintiff sued for $200. The defendant pleaded that this $200 had been paid, and pleaded a counterclaim of $200, remitting all his claim against the plaintiff in excess of $200, *i. e.*, remitting $239.25. Of such proceeding the justice had jurisdiction, and the justice's judgment, holding as it did that the plaintiff's claim had been paid and that the defendant should have judgment on his counterclaim for $200, was valid. But the plaintiff's counterclaim of $125 to defendant's counterclaim could not be considered by the justice, for two
(967) reasons: first, because to recognize it would be in effect to confer on the justice jurisdiction to consider a demand of the plaintiff for $325; and, secondly, because a counterclaim cannot be pleaded in reply to a counterclaim, even in the Superior Court. *Boyett v. Vaughan,* 85 N. C., 363, which is exactly in point, and which overruled a former decision in same case, *Boyett v. Vaughan,* 79 N. C., 528. The remedy, when the plaintiff wishes to reinforce his first demand, is to amend the complaint, and that in this case would be to put the plaintiff out of the jurisdiction of the justice. *Scott v. Bryan,* 96 N. C., 289. It will be noted that this is not an action for a balance admitted to be due on an account stated, for which balance, if not more than $200, an action can be sustained before a justice of the peace.

MONTGOMERY, J. I concur in the above opinion.

Cited: Electric Co. v. Williams, 123 N. C., 56.

W. W. DYSART v. G. BRANDRETH

PRACTICE—EXECUTION—RETURN OF SHERIFF—FALSE RECITAL—MOTION TO STRIKE OUT RETURN—JUDGMENT OF JUSTICE OF THE PEACE—DOCKETING—LIEN—APPEAL—SUPERSEDEAS BOND—EXECUTION SALE—APPLICATION OF PROCEEDS—PRIORITIES.

1. Where a sheriff's return on an execution recited payment of the money realized thereon in satisfaction of a judgment, and it appeared from a subsequent affidavit of the sheriff that the return was incorrect and that he retained the money to await the orders of the court: *Held*, that such return will, on motion of an interested party, be stricken from the record.

2. A judgment of a justice of the peace, when duly docketed in the office of the Superior Court clerk, becomes a judgment of that court to all intents and purposes, and is a lien upon all of the real estate of the defendant in the county.

3. Where an appeal is taken from a judgment of a justice of the peace, and security is given to stay execution, the plaintiff is not deprived of the right to have it docketed in the Superior Court, nor is the lien of the judgment destroyed by the appeal and supersedeas bond.

4. A judgment of a justice of the peace does not become dormant by the failure to issue execution thereon pending an appeal from the judgment, where bond has been given to stay.

5. Where a sheriff sells land under execution, the law applies the proceeds first to the satisfaction of the execution issuing on the oldest judgment in his hands at time of the sale.

6. It is not necessary, in order that a judgment may share, according to its priority of lien, in the proceeds of sale, that advertisement shall have been made under it, if the sheriff has other valid executions in his hands, under which proper notice of sale has been given, but there must be an execution on such judgment in the sheriff's hands on the day of sale.

7. Where a sheriff sells land under several executions, having in his hands at time of sale an execution issued on the judgment having the oldest lien, the purchaser gets the land discharged from the lien of any judgment subsequent to the oldest.

8. Where a sheriff sells land under a junior judgment or judgments, having no execution in his hands issuing on older judgments, the purchaser takes the title subject to the liens of the older judgments.

MOTION heard upon affidavits, before *Graham, J.*, at Spring (969) Term, 1895, of CHEROKEE.

M. L. Mauney, R. Akin and Black & Moore obtained judgments against G. Brandreth before a justice of the peace, and caused transcripts of the same to be docketed in the Superior Court of Cherokee County on 20 and 22 June, 1891.

Brandreth appealed to the Superior Court, and A. L. Cooper became surety on his bond to stay execution. To indemnify Cooper against any loss he might suffer by reason of said suretyship, G. Brandreth, on 11 July, 1891, executed to W. N. Cooper a deed in trust upon his dwelling house and lot in Murphy, N. C.

At July (Special) Term, 1893, of the Superior Court, Mauney, Akin and Black & Moore each obtained judgment against Brandreth and A. L. Cooper on the appeals, and said judgments were forthwith docketed on the judgment docket.

At Spring Term, 1892, of the Superior Court of Cherokee County, W. W. Dysart recovered judgment against G. Brandreth and one J. S. Meroney, and the same was docketed on the judgment docket.

On 8 September, 1893, Brandreth's homestead was allotted to him in the dwelling house and lot in the town of Murphy that had been conveyed to W. N. Cooper, trustee, to indemnify A. L. Cooper, his surety on the bonds, to stay execution on appeal.

(970) After Fall Term, 1894, of Cherokee Superior Court execution was issued upon the Dysart judgment and upon the judgments recovered in the Superior Court, on appeal, against G. Brandreth and A. L. Cooper, his surety. No execution was ever issued upon the judgments recovered in the justice of the peace's court and docketed on the judgment docket of the Superior Court.

Under said executions the sheriff sold the excess of Brandreth's real property over the homestead, amounting to $1,950, and threatened to apply the proceeds to the payment, first, of the Dysart judgment, and the excess, so far as it would go, to the Akin, Mauney and Black & Moore judgments. It was admitted that there would not be a sufficiency to meet said judgments, and that A. L. Cooper would have to pay the balance, as Brandreth was insolvent, and would then have the right to have the *deed in trust* upon Brandreth's homestead foreclosed.

Brandreth filed an affidavit setting forth these facts and praying that the sheriff be required to apply the proceeds of the sale of the excess of his real property, first, to the payment of the executions in his hands on the Mauney, Akin and Black & Moore judgments, in order to exonerate his homestead from the *deed in trust* executed to indemnify his surety, A. L. Cooper, and that any excess be applied to the payment of the Dysart judgment.

The plaintiffs Mauney, Akin and Black & Moore filed no answer to the affidavit.

W. W. Dysart, through his attorney, J. W. Cooper, Esq., filed an answer.

Upon a full argument in behalf of Brandreth and Dysart, the

court rendered judgment directing the sheriff to apply the proceeds of the sale to the judgments of Mauney, Akin and Black & Moore, according to their priority, and the balance, if any, to the (971) payment of the W. W. Dysart judgment. Plaintiff Dysart excepted and appealed.

J. W. Cooper for plaintiff.
E. B. Norvell for defendant.

FURCHES, J. Preliminary to the main question presented by the case is the motion of defendant to strike from the record what purports to be the return of Sheriff Davidson, dated 22 May, 1895. This motion must be allowed. The sale took place on 22 May, the day the return bears date, the time when it should have been made. But several witnesses testified to the fact that it was not made on that day, but some weeks afterwards. It is a matter of common knowledge that public officers, in the press of business, as this was during court week (22 May), do not make their returns at once, but do so as soon thereafter as it is convenient, and date them back to agree with the date of sale or transaction; and while it is best to make these returns at the time of the transaction, it is almost impossible always to do so. In this return, as appears of record, the sheriff states that he had paid J. W. Cooper, as attorney, $960 on the Dysart execution; and as J. W. Cooper was acting as attorney for Dysart, and Sheriff Davidson, in his affidavit, made on 28 May, 1895 (in reply to a rule upon them), says that the sheriff had then paid on the Dysart execution $960, we would be disposed to let the return stand, upon the idea that the money was paid on the day of the sale, or at least before 28 May, and the return made afterwards was dated to fit the facts. But the defendant Brandreth files the affidavit of Sheriff Davidson, dated 4 December, 1895, in which he says that he has not paid out his money on the Dysart claim; that after being served with the order of the judge, he held the money, to be applied as the (972) court might direct.

So this affidavit knocks up the theory by which we would have been disposed to reconcile the making the return some weeks after court with the affidavit of J. W. Cooper. It may be that neither Cooper's affidavit nor Sheriff Davidson's affidavit is true, but it is certain that both cannot be true. One of the affiants is an important public officer, whose official acts imply verity, and the other affiant is a member of the bar, where honor and integrity are usually held in the highest appreciation. It is stated in the affidavits that this money had been receipted for by Cooper. He was the attorney of Dysart and

of Davidson in this matter, and, it would seem, must have been cognizant of the facts. This return will be stricken from the files of the court, so far as it purports to apply the money.

Having disposed of this preliminary motion, we now proceed to consider the case on appeal, with the sheriff's return, so far as it professes to apply the money eliminated from the record, treating the case as if the money was now in the hands of the sheriff.

On 20 June, 1891, M. L. Mauney recovered three judgments against the defendant Brandreth before a justice of the peace, amounting to something less than four hundred dollars, which were docketed in the office of the clerk of the Superior Court the same day (20th). On 20 June, R. A. Akin recovered three judgments against the defendant Brandreth before a justice of the peace for something over three hundred dollars, and these judgments were duly docketed in said office on 22 June, 1891. On 20 June, 1891, Black & Moore recovered a judgment against defendant Brandreth before a justice of the peace for $181.28 and costs, which was duly docketed in said office on 22 June, 1891. The defendant Brandreth appealed to the Superior
(973) Court in all of these cases and, in order to stay execution during the pendency of the appeal, entered into bond to that effect, with A. L. Cooper as his surety. At July (Special) Term, 1893, of Cherokee Superior Court these cases were tried on the appeals, the three cases of Mauney being consolidated by order of court and tried as one case, and the three cases of Akin being also consolidated by order of court and tried as one case; and the plaintiffs each recovered judgment for the amounts recovered before the justice of the peace, and interests and costs, except the plaintiffs Black & Moore, whose judgment, it is alleged by respondents, was a little more than they recovered below, which seems to be the accrued interest and costs. These last-named judgments were also docketed in the clerk's office, as the law provides and requires. But at Spring Term, 1892, of said court, W. W. Dysart recovered a judgment against the defendant Brandreth for $1,219.91 and costs, which was duly docketed. It also appears that there were a number of other judgments taken against the defendant Brandreth and duly docketed in the clerk's office; and the sheriff returns that at the time of the sale, on 22 May, 1895, he had in his hands executions against the defendant Brandreth in favor of W. W. Dysart, R. A. Akin, M. L. Mauney, Black & Moore, Farmer & Farmer, Thomas Odell, and the State against defendant Brandreth. The executions in favor of R. A. Akin, W. L. Mauney and Black & Moore were issued on the judgments recovered at July (Special) Term, 1893; that no executions were ever issued on the justice's judgments of June, 1891, and docketed as above stated, and that he had no

execution in his hands, at the time of sale, issued upon these judgments.

A justice's judgment, when duly docketed in the office of the clerk of the Superior Court, becomes a judgment of the Superior Court, to all intents and purposes. (*Cannon v. Parker,* 81 (974) N. C., 320; *Adams v. Guy,* 106 N. C., 275), and it becomes a lien on all the real estate of the defendant in the county where it is docketed, which continues for ten years from the date of docketing. *Cannon v. Parker, supra; Murchison v. Williams,* 71 N. C., 135.

The fact that defendant appealed from the judgment of the justice of the peace and gave security to stay execution did not deprive the plaintiff of the right to have the judgment docketed, nor did it take away the lien of the judgment. This is created by law upon the docketing of the judgment. This being so, the judgment of Mauney, having been docketed on 20 June, 1891, was the oldest lien, and the judgments of Akin and Black & Moore, both having been docketed on 22 June, 1891, were next and equal in priority, having been docketed on the same day. But as there was no execution issued and in the hands of the sheriff at the time of the sale, he could not sell under these judgments, nor can he apply any part of the proceeds of the sale to the satisfaction of these judgments. *Titman v. Rhyne,* 89 N. C., 64; *Motz v. Stowe,* 83 N. C., 434; *Burton v. Spiers,* 92 N. C., 503. Where a sheriff makes a sale of land under execution, the law applies the money first to the satisfaction of the execution issuing on the oldest judgment lien in his hands at the time of the sale. *Motz v. Stowe, supra; Henry v. Rich,* 64 N. C., 379, and cases cited in the brief of Phillips & Merrimon; and if he fails to so appropriate it, as the law applies it, he commits a breach of his trust for which he and his sureties are liable. *Henry v. Rich* and *Motz v. Stowe, supra; Titman v. Rhyne,* 98 N. C., 64. He need not have advertised under a judgment if he has given the requisite notice under other executions in his hands. It is sufficient that he had the execution in his (975) hands at the time of sale. This he must have to entitle the judgment to any portion of the proceeds of the sale. *Motz v. Stowe, supra,* and authorities there cited. If he has execution in his hands issuing from any proper judgment, it authorizes him to sell; and if the execution issues upon the judgment having the oldest lien, the purchaser takes the land discharged of any subsequent judgment lien; and if there is a surplus left in his hands after satisfying the execution issuing on the judgment having the oldest lien, then he should apply it to the oldest lien, where he has the execution in his hands at the date of sale, and so on. *Sharpe v. Williams,* 76 N. C., 87. But where he sells under a junior judgment, or junior judgments, having no exe-

cution in his hands issuing on the older judgments, as in this case, the purchaser takes the title of the defendant in the execution, subject to the liens of the older judgments. *Cannon v. Parker, supra.*

So we see that the sheriff must apply the money raised from the sale of defendant's land on 22 May, 1895, to the payment or satisfaction of the executions in his hands at the time of sale, according to their priority. The purchaser at said sale takes the title of defendant Brandreth, subject to the payment of the judgments of Akin, Mauney and Black & Moore, taken before the justice of the peace and docketed in June, 1891. If said purchasers voluntarily satisfy these judgments (as we suppose there are no others older than these) they will then have a clear title; or if these older judgments can be satisfied out of other property of the defendant (as counsel for Dysart suggests that he has other property subject to sale and not sold) then the purchasers will have a clear title; but if neither of these things is done, it
(976) will be the duty of the plaintiffs in these older judgments to cause execution to issue thereon and have this property (sold on 22 May, 1895) resold, at which sale the purchaser will get the title against the defendant and the purchasers at the sale in May, 1895. This must be before the defendant's homestead can be sold under the deed of trust to secure A. L. Cooper, as defendant's surety on the appeals.

It is contended by counsel for Dysart that the justice's judgments, so docketed, are dormant, no executions having issued on them; but this is not the case, as executions on these judgments were stayed, pending the appeal, and this prevents the statute from running. *Adams v. Guy, supra.*

Error.

Cited: Darden v. Blount, 126 N. C., 250; *Dunham v. Anders,* 128 N. C., 212; *Jones v. Williams,* 155 N. C., 194.

D. W. C. PIERCY ET AL. v. J. M. WATSON

ACTION TO RECOVER LAND—EVIDENCE—SUMMONS IN SPECIAL PROCEEDINGS—IRREGULARITY.

A summons in a special proceeding by an administrator to sell land for the payment of debts, requiring defendants to appear before the "judge," instead of before the "clerk" of the Superior Court, "and answer the complaint and petition which will be deposited in the office of the clerk of the Superior Court of said county," is irregular, but not void, and such irregularity does not render the judgment roll in such special proceeding inadmissible as evidence in support of title based thereon, in the trial of an action for the recovery of the land sold thereunder.

ACTION for the recovery of land, tried before *Graham, J.*, (977) at Spring Term, 1895, of CHEROKEE.

The defendant appealed.

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

Ferguson & Ferguson and Ben Posey for plaintiffs.
J. W. Cooper for defendant.

MONTGOMERY, J. This is an action brought to recover the possession of a tract of land. The defendant claims by a succession of deeds from one Washburne, who was a purchaser at judicial sale made by one Hyatt, administrator of Piercy, deceased. Hyatt filed a petition for the sale of the land, the proceeds to constitute assets for the payment of the debts of his intestate. The summons was issued and served on the heirs at law of Hyatt's intestate, who are the plaintiffs in this action, and two of whom (Richard and Jane) were infants under twenty-one years of age. The defendants in that proceeding made no appearance, except the infant defendants (Richard and Jane), who appeared and answered by their guardian *ad litem.* On the trial below of the case now before the Court, the defendant, to prove title in himself, offered in evidence the summons and judgment roll in the special proceedings mentioned above. His Honor refused to receive the same as testimony, on the grounds that the summons was void and the subsequent proceedings thereunder necessarily so, and that the deed made to the purchaser of the land under the decrees and judgments in the special proceeding conveyed no title. As we understand it, from the argument here, there was no question made about the service of the summons on all the defendants. The objection to the summons was that the matter was a special proceeding and the summons ought to have been made returnable before the clerk, but that

(978) the defendants were summoned "to be and appear before the judge of our Superior Court, to be held for the county of Cherokee, at the courthouse in Murphy, on 27 May, 1882, and answer the complaint and petition which will be deposited in the office of the Clerk of the Superior Court of said county." The summons was irregular, but not void. To the extent that it cited the defendants to appear before the judge it was misleading; but it also contained the information that there would be a complaint and petition on file in the clerk's office on its return day. It was the duty of the adult defendants to have inquired at the clerk's office to see what was demanded of them in the complaint. The paper bears upon its face evidence of its official origin. It gives notice to the defendants that there would be a matter alleged against them, in writing, in the clerk's office of their county on a future day certain. If a special appearance had been made for the purpose of dismissing the action for irregularity on the face of the summons, there can be no doubt that the court would have had the power, under section 273 of The Code, to amend by striking out the word "judge." *Redmond v. Mullenax*, 113 N. C., 510, and cases there cited. In *Roberts v. Allman*, 106 N. C., 391, the summons was issued 2 July, 1883, requiring the defendants to appear "on the fourth Monday after the ..... Monday of November," and this Court decided that the irregularity was slight and that the defendants were compelled to take notice of its requirements. We are of opinion that his Honor was in error in excluding as evidence the summons and the judgment roll, for which there must be a new trial.

There are such gross irregularities and suspicious circumstances appearing in the record in this case that we cannot let them pass without notice. So far as the record discloses, the defendant (979) appears to be an innocent purchaser and for value. It appears, however, that the person who was appointed by the clerk guardian *ad litem* for the infant defendants in the special proceeding, wherein their land was condemned to pay the debts of their deceased father, had been a judgment creditor of the deceased; that his judgments were procured more than ten years before the summons was issued, as appears from the petition of the administrator, and that he had assigned the same for less than their value to one Washburne, who was purchaser of the land; that all of the indebtedness of the decedent was in the shape of a judgment in favor of Washburne for more than $3,000, founded on old judgments in favor of other parties against the decedent, which he had had assigned to him; that the land was bid off by one Schenck, the terms being 10 per cent cash and the balance on six and twelve months' time, the purchaser not being required to give security for the deferred payments, and that he as-

signed his bid afterwards to Washburne, the holder of the judgments; that another Hyatt was appointed a referee to ascertain the indebtedness of the deceased, and that he reported the indebtedness, consisting altogether of the judgment in favor of Washburne, before described, without giving its date or the dates of the old judgments on which it was founded; that all the papers from the summons, including a judgment for the sale of the land in the proceedings before the clerk, were alleged to have been lost. It appears also that, though the guardian *ad litem* in his first answer denied that the intestate, the father of his wards, owed the debts set out by the administrator in his petition to sell the land, yet the clerk, instead of sending the fact on to be tried in the Superior Court in term time, ignored the answer and gave judgment for sale of the land. The issue raised before the clerk was never tried. It appears also that the guardian *ad litem* did not insist in the Superior Court, where new pleadings were sub- (980) stituted for those alleged to have been lost, on the trial of the issue raised before the clerk, but let it go off on the reference of the matter to Hyatt, who was doubtless a kinsman of the administrator. The answer of the guardian *ad litem*, too, in the Superior Court, before the judge, was totally unlike the answer filed before the clerk. In the answer filed before the clerk he denied the indebtedness positively, and also pleaded the statute of limitations, while in the one before the judge he simply said, in substance, "I don't know," and did not plead the statute.

From all the foregoing it seems that the infant defendants were not properly defended in the special proceeding, but as the rights of an innocent purchaser have intervened, and the proceeding seems to have been regular, they are concluded.

In the present action there was error in the ruling of his Honor in excluding the evidence offered by the defendant, and there must be a New Trial.

Cited: Ewbank v. Turner, 134 N. C., 81.

(981)

TUCKASEGEE MINING COMPANY v. W. F. GOODHUE ET AL.

CORPORATION—TRUST—LIABILITY OF TRUSTEE—ESTOPPEL—PRIVITY IN ESTATE.

1. While it is true that a corporation created by the laws of North Carolina cannot be lawfully organized in another State, yet neither the corporation nor its debtors, nor anyone dealing with it as a lawful corporation, will be permitted to deny its entity upon the ground that it was so organized in another State.

2. Where, in an agreement for the organization of a corporation and for the purchase of lands, it was provided that title to the lands should be taken in the name of G., to be held in trust for the corporation and to be conveyed to it when organized, and lands were so bought and the corporation was organized, G. becoming a stockholder and an officer: *Held,* that during his lifetime G. was estopped from denying the legality of the organization in order to avoid the trust.

3. In such case the heir at law of G. is also estopped, as a privy in estate, from denying the right of the corporation to hold the lands.

ACTION tried before *Robinson, J.,* at Fall Term, 1895, of GRAHAM.

The plaintiff introduced and read the Acts of Assembly of 1856 and 1857, and the articles of association of 14 April, 1857. The plaintiff offered to prove that on 10 March, 1857, Daniel F. Goodhue and the other parties mentioned in said act as corporators, after having obtained the subscription of $200,000, met in the city of Cincinnati and State of Ohio, organized and accepted the charter, and that at said meeting Daniel F. Goodhue, David Christy, John Probasco, William B. Probasco and John W. Goodhue were elected directors of
(982) said corporation; the appellant for one year, and that said Daniel F. Goodhue was elected president for one year; that the plaintiff, the Tuckasegee Mining Company, held regular annual meetings from the first organization till the bringing of this action, and that the said Goodhue was elected and served as president each year, up to his death, in 1883; that said Daniel F. Goodhue issued certificates of stock of said corporation, as said president, to himself and various other persons, and that at the time of his death he owned more stock of said corporation than any other person, which was sold by his administrator after his death; that said Goodhue executed leases for the land described in the pleadings to various parties, describing himself as trustee of the Tuckasegee Mining Company; that the defendant Willis F. Goodhue is the son and only heir at law of Daniel F. Goodhue, and that he is a stockholder of the plaintiff and refuses to execute deeds to the plaintiff for the lands described in the pleadings; that at a regular meeting of the directors of the said corporation

(Daniel F. Goodhue being one) said Daniel F. Goodhue and John Probasco were appointed and made trustees, to receive and hold titles to all lands purchased by the Tuckasegee Mining Company for the Tuckasegee Mining Company; that the plaintiff, the Tuckasegee Mining Company, paid with its own funds and stock for all the lands described in the pleadings; that J. W. Cooper is a stockholder of the Tuckasegee Mining Company; that neither Daniel F. Goodhue nor Willis F. Goodhue have ever paid anything directly for the lands described in the pleadings, but only indirectly, as stockholders; that Daniel F. Goodhue accepted and held the deeds and grants in his own name for the lands described in the pleadings, as trustee of the Tuckasegee Mining Company, knowing that he was receiving the same as such, and that during his lifetime he never denied said trust; that all the lands described in the pleadings were purchased by plaintiff and conveyed to Daniel F. Goodhue, as trustee; that plain- (983) tiff, at its first meeting, on 10 March, 1857, opened proper books and kept books and offices of the Tuckasegee Mining Company all the time till the bringing of this action, and made and adopted by-laws for the governing of said corporation. All this evidence was objected to by the defendants and ruled out by the court, and the plaintiff excepted.

The plaintiff having admitted that there had been no organization of said corporation in the State of North Carolina, and there having been no evidence offered that there had ever been any meeting of the directors of said corporation in this State, the court intimated that, upon the above-stated evidence and the above-stated admissions, the plaintiff could not recover in this action; whereupon the plaintiff submitted to a nonsuit and appealed.

A. M. Fry for plaintiff.
Ben Posey and J. W. Cooper for defendants.

AVERY, J. The charter of a private corporation confers the right to organize and enjoy the franchise within the limits of the State granting it. When organized in the proper State, it may enjoy such privileges in another, under the rules of comity, as the local law does not prohibit it. The court was not in error in holding, as an abstract proposition, that a corporation created by the laws of North Carolina cannot be lawfully organized in a foreign State. But if the allegations contained in the complaint be true, as the plaintiff offered to show, the defendant's ancestor, in dealing with the plaintiff as a lawful corporation, became a nominal stockholder in pursuance of a pre-existing contract whereby the alleged corporation was to be organized, and the

land in controversy was to be conveyed to a corporation thereafter to be formed (the title to which, meantime, should be vested in said
(984) ancestor, for the benefit of certain individuals composing the association which it was proposed to merge into the body corporate). The plaintiff proposed to prove that the said lands were paid for with the money of the alleged corporators and stockholders who, at least, attempted to form the plaintiff corporation. The question is whether one who entered into a contract to hold lands in trust for an association and transfer the title to a corporation which it was agreed should be formed by the members of the association, and who afterwards dealt with the alleged corporation as a lawful entity, was not estopped from denying his fiduciary relation to the body during his life, and if so, whether his heir at law, to whom the legal title descended at his death, is not estopped also as a privy in estate from denying the right of the plaintiff to hold the land, and from thereby evading the duty (he in conscience was bound to discharge) of turning over the trust estate to the rightful owner. After taking upon himself the duties of trustee for the association, the defendant's father participated in the organization of the corporation, was elected president of it, and had certificates of shares of stock issued, a larger number of shares having been issued to him than to any other person. After his death these shares were sold by his administrator for the benefit of his estate. If these and other facts which plaintiff offered to prove had been shown, the defendant Goodhue would have been estopped from denying the lawful existence of the corporation for which he was trustee. One who contracts with a party or association as a corporation is estopped from denying the corporate existence of the body at the time of contracting, and especially is this the case where such person attempts, by denying its existence, to evade a legal
(985) obligation or duty. *Jones v. Cincinnati,* 14 Ind., 90; *Ryan v. Martin,* 91 N. C., 464; 110 Ill., 22. Whether it be called an estoppel or not, it is unquestionably a rule of evidence that often works very just and equitable results. The fact that one incurred an obligation or duty in dealing with a party as a corporation is evidence of the corporate existence of the party contracting in such capacity, which cannot be denied for the purpose of avoiding the payment of the debt or the performance of the duty. 1 Spelling Pr. Corp., sec. 57. In cases of this sort, though the first meeting of stockholders may have been held outside of the State, that fact cannot be shown by the body assuming the powers of a corporation in order to avoid its liability, nor by its debtors for the purpose of evading their accountability under contracts made with it. *Heath v. Sylvester,* 39 Wis., 146. If the law could constitute any other agent for the State than

the Attorney-General to institute proceedings against pretended corporations, the courts would not select as such agents those who are attempting to evade the performance of a duty which equity and good morals require them to discharge without hesitation or delay.

We think that the court below erred in holding that the proof was not sufficient to preclude the defendant from denying his father's obligations and duties to the plaintiff company as a corporation. There was error. The judgment of nonsuit is set aside.

New Trial.

Cited: Water Works v. Tillinghast, 119 N. C., 347.

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(986)

GRAMBLING, SPALDING & CO. v. T. C. DICKEY

ATTACHMENT—INTERPLEADERS—VALUE OF PROPERTY—JURISDICTION OF JUSTICE OF THE PEACE—TRIAL.

1. In the trial of an action a party cannot object to a question, put to his witness by his adversary on cross-examination, substantially the same as one asked by himself.

2. Where an insolvent person sells property to a near relative the law presumes fraud, and the burden of showing the transaction to be *bona fide* rests on the purchaser.

3. Upon the trial of an issue as to whether a wife has acquired a separate property in her own earnings by agreement with her husband is on the party alleging that fact.

4. Attachment proceedings relating to personal property being only ancillary to the main action, a justice of the peace may entertain and try an interplea to determine the title, although the value of the property exceeds $50.

ACTION (consolidation of thirteen different cases) heard on appeal from judgments of a justice of the peace, before *Graham, J.,* and a jury, at Spring Term, 1895, of CHEROKEE.

Plaintiff appealed.

The facts appear in the opinion of the Chief Justice.

J. W. & R. L. Cooper for plaintiffs.
Ferguson & Ferguson and Ben Posey for defendant.

FAIRCLOTH, C. J. The plaintiffs instituted several actions before a justice of the peace against defendant T. C. Dickey for sums less than two hundred dollars in each case. Dickey admitted the debts

and consented to judgments. The plaintiff also attached certain property, alleging that it was Dickey's property. The other defendants interpleaded before the justice, alleging that they were *bona*
(987) *fide* owners of the property before the attachments issued. The plaintiffs filed affidavits, and moved to dismiss the interpleas on the ground that the value of the property attached was more than fifty dollars, and that the justice could not try the title to property exceeding fifty dollars in value. The value is admitted to be more than fifty dollars in each case. The motion to dismiss the interpleas was allowed by the justice, and the intervenors appealed. The cases were consolidated by consent, and at the trial the court below refused to sever the cases for trial, and also refused to dismiss the interpleas on the grounds above stated, and the plaintiffs appealed.

The defendant Dickey, on the same day, but after the attachments were levied, made a general assignment of his personal property for the benefit of his creditors. Neither party tendered any issues, and the court submitted these:

1. "Did the defendant, T. C. Dickey, assign, dispose of or secrete his property with intent to defraud his creditors as alleged in the complaint?" Answer: "No."

2. "Was the defendant, T. C. Dickey, on 11 December, 1893, about to assign, dispose of or secrete his property with intent to defraud his creditors, as alleged in the complaint?" Answer: "No."

3. "Was A. B. Dickey, on 11 December, 1893, the owner of the horses and livery outfit described in the interplea in this action?" Answer: "Yes."

The fourth, fifth and sixth issues were the same as to the other interpleaders, and each was answered "Yes."

There was considerable evidence bearing upon the value of the property and the alleged sales before the attachments issued. The proofs showed that some of the intervenors were near relatives of T. C. Dickey and that one was his wife. Plaintiffs filed numerous exceptions. They introduced John M. Dickey, who testified that
(988) the sales made to the intervenors before the attachments were for a valuable consideration and full value. Defendants asked him, "Was the transaction between you and T. C. Dickey for a valuable and *bona fide* (consideration) on your part?" Answer: "Yes." Plaintiffs objected. His Honor told the jury "that plaintiff has shown by his own witness, J. M. Dickey, that each of those transactions was in good faith and for a valuable consideration," and that "defendant may rely entirely on the testimony furnished by the plaintiff's witnesses," in his discretion. The defendant's question was unobjection-

able, inasmuch as plaintiff had asked the same witness substantially the same question.

Without writing out in detail the several objections, exceptions and prayers for instructions, we have carefully examined them, and we find nothing therein prejudicial to the plaintiffs, whatever might have been said by the defendants if the verdicts had been given against them.

His Honor charged the jury that when an insolvent sold property to a near relative the law presumes fraud, and the burden of showing a *bona fide* transaction and a full consideration rested upon such purchaser. He also told the jury that ordinarily the wife's earnings belonged to her husband, but in North Carolina she may acquire separate property by agreement with her husband, free from her husband's control, "but upon this issue the burden of proof is on the interpleader (she being one), as it is upon each interpleader in this action," and those questions were left to the jury.

The principal controversy made on the argument was jurisdiction in the justice to entertain the attachments. The plaintiffs' misconception of the question arises from considering an attachment as an action, whereas it is only a remedy ancillary to the action, adopted to avoid driving the claimant to a separate action to (989) try his title. The plaintiffs' contention would lead to the inconsistent result that the creditor could attach property worth more than fifty dollars before a justice, and the claimant could not be allowed to assert his title to the property seized. The right to interplead was considered in *Sims v. Goettle,* 82 N. C., 268. The interplea is allowed by The Code, secs. 375, 331. The plaintiffs contend that these sections violate the Constitution, Art. IV, sec. 27, and rely on *Peyton v. Robertson,* 9 Wheat. (U. S.), 527. That article inhibits jurisdiction in the justice of the peace where the title to *real* estate is in controversy, and *Peyton v. Robertson, supra,* was an action in detinue, and the jurisdiction failed because the amount was too small in that court. In attachment proceedings the title and not the value of the property is the inquiry to be tried. *Dobson v. Bush,* 4 N. C., 18; *McLean v. Douglas,* 28 N. C., 233; *Wallace v. Robeson,* 100 N. C., 206. We find no error.

Affirmed.

H. S. BRITTAIN v. W. G. PAYNE

TORT—WAIVER—ACTION ON CONTRACT—JURISDICTION OF JUSTICE—PRACTICE.

1. Where property is tortiously taken and sold, the owner may waive the tort and maintain an action to recover the proceeds of the sale.

2. Where, in an action before a justice of the peace, the complaint can be construed as being either for the tort or to recover the money received by the defendant, it will be construed to be an action on the implied contract.

3. Every intendment being in favor of jurisdiction, an action brought before a justice of the peace, in which the complaint can be construed as being either for the tortious taking of the property or to recover the money received by the defendant, will be construed to be an action on the implied contract, so as to preserve the jurisdiction of the justice of the peace.

(990) APPEAL from a justice of the peace, heard before *Robinson, J.*, at Fall Term, 1895, of CHEROKEE.

The complaint was as follows:

1. That the plaintiff was owner of certain walnut timber, in said county and State, on the lands of said defendant, sold to plaintiff by said defendant; that the defendant sold off the said walnut timber to the amount of one hundred and sixty dollars' worth, or thereabout, and got pay for the same.

2. That by reason of said sale by the said defendant of the said timber and the receipt of said sum of $160 by him for the same, he (the said defendant) is indebted to this plaintiff in the sum of $160 and interest on the same from the date of said sale, which was in the year 1893, or 1894, and which sum the said defendant, in law, agreed to pay to this plaintiff, but which sum he fails and refuses to pay.

Wherefore plaintiff demands the judgment of the court:

1. For the sum of $160 and interest on same.

2. For the costs of this action.

The defendant, contending that the action was in tort, moved the court to dismiss the action on the ground of want of jurisdic-
(991) tion in the justice's court and of the Superior Court, on appeal, to hear and try the action. The plaintiff resisted the motion, contending that the action was for money had and received; that the tort, if any, had been waived by plaintiff, and that the action was properly brought. His Honor, being of opinion with the defendant, gave judgment dismissing the action, and plaintiff appealed.

J. W. & R. L. Cooper for plaintiff.

J. M. Gudger, Jr., for defendant.

CLARK, J. Where property is tortiously taken and sold, the owner

may waive the tort and maintain an action to recover the money realized from the sale by the defendant. *Lumber Co. v. Brooks,* 109 N. C., 698; *Wall v. Williams,* 91 N. C., 477. And this is clearly what the plaintiff did by his complaint in this case. Every intendment being in favor of jurisdiction, if the complaint could have been construed as being either for the tort or to recover the money received by the defendant, this being an action before the justice, the Court would construe it to be an action on the implied contract in favor of the jurisdiction. *Lewis v. R. R.,* 95 N. C., 179; *Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601.

Error.

Cited: Schulhoffer v. R. R., post, 1097; *Sams v. Price,* 119 N. C., 574; *White v. Boyd,* 124 N. C., 178; *Parker v. Express Co.,* 132 N. C., 130; *White v. Eley,* 145 N. C., 36.

M. N. ROBERSON v. J. L. MORGAN

ACTION FOR DAMAGES—SPREADING FIRES—PLEADING—COMPLAINT.

1. Sections 52 and 53 of The Code apply only to adjoining landowners, and hence an action cannot be maintained thereunder by one damaged by fire started on the land not adjacent to plaintiff's.

2. Though a complaint, in an action for destruction of plaintiff's fencing, etc., by a fire started by defendant on land not adjoining plaintiff's, appears to have been brought under sections 52 and 53 of The Code, which apply only to adjacent landowners, yet, where it alleges that the defendant "willfully permitted" the fire to spread over and burn plaintiff's fencing, etc., it in effect alleges negligence, and under the liberality of The Code practice it might be sustained as stating a common-law cause of action grounded on negligence.

3. An agreement by a person to take care of his own lands and to put out a fire started on defendant's lands will prevent recovery by plaintiff for damages caused by fire spreading to his own premises.

ACTION tried before *Robinson, J.,* and a jury, at Fall Term, (992) 1895, of HAYWOOD.

The action was brought by plaintiff, under sections 52 and 53 of The Code to recover damages against the defendant for willfully and unlawfully setting fire to his (defendant's) woods without giving notice to plaintiff, from which the fire spread and damaged plaintiff.

The complaint was as follows:

1. That on or about 27 December, 1893, the defendant, without

notice to the plaintiff, unlawfully and willfully did set fire in and to the woods in Haywood County, and did unlawfully and willfully permit said fire, after having set the same as aforesaid, to spread and burn over the lands of persons whose lands adjoin the plaintiff, and did unlawfully and willfully permit said fire to burn the fences of the plaintiff on the plaintiff's land to the amount of about five hundred panels, and to burn over the grass, timber and undergrowth on the plaintiffs' lands, to the great damage of the plaintiff, to-wit, in the sum of $300.

2. That the plaintiff has been damaged by the said wrong-
(993) ful acts of the defendant in the sum of $300.

Wherefore the plaintiff demands judgment against the defendant for $300, costs of the action, and for such other and further relief as to the court appears equitable and legal.

The answer contained a general denial. It was admitted on the trial that the defendant did set fire to his own woods, on a tract of land on the north side of Pigeon River, in Haywood County, N. C., on the south side of the Chambers Mountain, near Clyde, N. C., and that the plaintiff owned two tracts on the south side of said mountain, upon which the alleged damage was sustained, and that neither of the plaintiff's said tracts adjoined the land of the defendant.

There was evidence to the effect that plaintiff had notice of defendant's intention to start the fire for the purpose of burning new ground, and that plaintiff told him to start it, that it would take the fire twenty-four hours to get to his own place, and that he would whip it or fire against it.

The defendant insisted that plaintiff could not sustain his action in any view of the case:

"1. He cannot sustain his action under the statute (The Code, secs. 52, 53), for the reason that the statutory right of action, and the remedy given under it, to recover damages is only open to adjoining landowners.

"2. He cannot sustain his action as a common-law remedy, for the reason that he does not allege in his complaint that the defendant carelessly and negligently set the fire by which he was damaged.

"3. But if the court should hold otherwise, then we insist that his Honor erred in not submitting the issue to the jury tendered by defendant's counsel, to-wit, 'Did the plaintiff waive notice?'
(994) and in charging the jury, in effect, that the question of notice was immaterial, and that it was the duty of the defendant at all events to confine the fire to his own land." *Robinson v. Kirby,* 52 N. C., 477; *Lamb v. Sloan,* 94 N. C., 534.

There was a verdict for the plaintiff for $50, and defendant appealed from the judgment thereon.

J. M. Moody for plaintiff.
Smathers & Crawford for defendant.

FURCHES, J. This action seems to have been brought and tried under sections 52 and 53 of The Code. It is admitted in the statement of the case on appeal that plaintiff and defendant are not adjacent landowners. This being so, sections 52 and 53 do not apply, and plaintiff's action cannot be maintained under the statute.

But it was argued here that if it cannot be maintained under the statute it may be as at common law. To this the defendant objected that the complaint does not allege a common-law liability, in that it failed to allege negligence. And it is plain enough that the complaint was not framed with a view to a common-law liability, and does not in terms allege negligence; yet we are of opinion that negligence is, in effect, alleged in the allegation that "defendant willfully permitted" the fire to spread over and burn plaintiff's fencing, etc., and that under the liberality of the Code practice, as construed in *Stokes v. Taylor,* 104 N. C., 394, and *Fulps v. Mock,* 108 N. C., 601, the complaint might be sustained as stating a common-law cause of action. And if the case had been tried on this theory, and there had been no other errors in the trial, we would affirm the judgment. There should be *allegata* as well as *probata. Smith v. B. & L. Assn.,* 116 N. C., 102.

But defendant alleges that he had an agreement with (995) plaintiff to put out the fire, and plaintiff agreed to look after and take care of his lands; and from the evidence sent up as a part of the case on appeal it appears that defendant introduced evidence tending to establish this allegation. And defendant makes this as one of his assignments of error, that the court did not give him the benefit of this evidence in his charge. It does not appear that defendant requested the court to charge upon this evidence, which he should have done if he wanted the benefit of an exception.

But it appears to us that the case was tried under the conception that defendant was liable, if liable at all, under sections 52 and 53 of The Code, which was an error, and that it has not been presented to the jury and tried as a common-law liability in which the parties were put squarely at issue upon the correct theory of the case.

If plaintiff did agree with the defendant that he should put out the fire and that plaintiff would look after and take care of his premises, he should not recover. *Roberson v. Kirby,* 52 N. C., 477.

It may be that when the case goes back for a new trial plaintiff

will, by leave of court, amend his complaint so as to make it more in conformity with the rules of pleading as a common-law action. We are of the opinion there should be a

New Trial.

Cited: Sams v. Price, 119 N. C., 574; *Parker v. R. R., ib.,* 686; *Simpson v. Lumber Co.,* 131 N. C., 526; *Parker v. Express Co.,* 132 N. C., 131; *Mitchem v. Parsons,* 173 N. C., 488.

(996)

N. T. RIDLEY v. SEABOARD AND ROANOKE RAILROAD COMPANY

RAILROADS—NUISANCE—ESTOPPEL BY JUDGMENT—DEFECTIVE CONSTRUCTION—OBSTRUCTING WATER COURSES—PERMANENT DAMAGE.

1. A railway company that has constructed its road under lawful authority creates neither an abatable public nuisance nor a continuing private nuisance by failing to leave sufficient space between embankments or by means of culverts for the passage of water of running streams, in case of any rise in the streams that might be reasonably expected, and injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action.

2. It is a legal right of either plaintiff or defendant to elect to have permanent damages assessed in such an action upon demand made in the pleading, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant is required to set up this or any other equity upon which he relies, as well as to prove the averment on the trial. But where the plaintiff is allowed, without objection, to have such damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage.

3. The measure of damages is the difference in the value of the plaintiff's land with a railway constructed as it is, and what would have been its value had the road been skillfully constructed.

4. The statute of limitations begins to run in such cases, not necessarily from the construction of the road, but from the time when the first injury was sustained.

5. An action pending in another State cannot be pleaded in bar of an action in this State.

6. Injury done to land in another State cannot be considered in an action in this State.

(997) ACTION tried before *Graves, J.,* and a jury, at May Term, 1894, of NORTHAMPTON, to recover damages for alleged injuries to the lands and crops of the plaintiff, caused by ponding of water by the defendant's roadbed and bridge.

The defendant tendered the following issues, numbered 3 and 4, which his Honor refused to submit to the jury:

3. "Are the bridge and embankment of the defendant permanent structures?

4. "Is the damage of the plaintiff's land permanent in its character?"

The defendant excepted.

The question involved in these rejected issues arose upon defenses duly set up in the answer.

There were a number of exceptions made below, but as the only one passed upon by this Court is the rejection of the above issues it is deemed unnecessary to refer to them. There was a verdict and judgment in favor of plaintiff. Defendant appealed.

R. B. Peebles for plaintiff.

L. R. Watts and McRae & Day for defendant.

AVERY, J. Ordinarily, where a trespass results in a nuisance, not only is the original wrong actionable, but successive suits may be brought for its continuance, in each of which the damages, if apportionable, can be estimated only up to the time when it was brought, in some of the States, but in this State up to the time of trial. 5 Am. & Eng. Enc., 17; *Blount v. McCormick,* 3 Denio, 283; *Bare v. Hoffman,* 79 Pa. St., 71; *Russell v. Brown,* 63 Maine, 203.

In ordinary transactions between individuals, where the trespass consists in the erection of temporary structures that (998) prove to be nuisances, the law presumes that tort feasor will desist from keeping it up, after being once mulcted in damages, but where he persists in the wrong, permits continued actions to be maintained against him, as an inducement to its removal. *Battishill v. Reed,* 18 C. B., 696; *Bare v. Hoffman, supra;* 5 Am. & Eng. Enc., 17, note 1.

Where the building of a railroad is authorized by law, and is done with reasonable care and skill, it is not a nuisance, and the company is not answerable, after paying the sum assessed or agreed upon by the owner for taking the land occupied for the public use, in any additional damage resulting from the original construction. *Adams v. R. R.,* 110 N. C., 325; 5 Am. & Eng. Enc., 20.

But even where the injury complained of, either by the servient owner or an adjacent proprietor, is due to the negligent construction of such public works as railways, which it is the policy of the law to encourage, if the injury is permanent and affects the value of the estate a recovery may be had, at law, of the entire damages in one

action. *Smith v. R. R.*, 23 W. Va., 453; *Troy v. R. R.*, 3 Foster (N. H.), 83; *R. R. v. Maher*, 91 Ill., 312; *Bizer v. R. R.*, 70 Iowa, 146; *Fowle v. R. R.*, 112 Mass., 334, 338; *S. c.*, 107 Mass., 352; *R. R. v. Esterle*, 76 Ky., 667; *R. R. v. Combs*, 73 Ky., 382, 393; *Stodghill v. R. R.*, 53 Iowa, 341; *Cadle v. R. R.*, 44 Iowa, 1.

The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question, whether the whole injury results from the original tortious act or "from the wrongful continuance of the state of facts produced by these
(999) acts." *Troy v. R. R., supra.* In this case, which has been cited as authority by text writers and many of the courts of the States, the action was brought for damages for the occupation of a street and town bridge by a railway company, and it was conceded that in the sense that the highway was obstructed the company had created a nuisance. The Court said: "The railroad is, in its nature and design and use, a permanent structure, which cannot be assumed to be liable to change. The appropriation of the roadway and materials to the use of the railroad is therefore a permanent appropriation. The use of the land set apart to be used as a highway by the railroad company for its tracks is a *permanent diversion* of the property to that new use and a permanent dispossession of the town of it as the place on which to maintain the highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is *dependent upon no contingency of which the law can take notice*, and for the injury thus done to them they are entitled to recover at once their reasonable damages." "Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, bridges, permanent dams and permanent pollutions of water," says Gould on Waters, sec. 416, "fall within the class where the palintiff is required to recover his entire damage, present and prospective." *Ib.*, sec. 582; *Duncan v. Sylvester*, 24 Mo., 482. In *Van Orsdol v. R. R.*, 56 Iowa, the Supreme Court of that State held that the negligent failure to construct a railroad skillfully subjected the company to a liability distinct from that arising out of the appropriation of the right of way; and when the want of care consisted in the omission to build a culvert to carry off the water of a slough, and the diversion of it into another slough, whereby the land of plaintiff was wrongfully
(1000) injured, the plaintiff could recover damages for the *permanent* injury done to the land. In the subsequent case of *Bizer v. R. R.*, 70 Iowa, 147, the Court, citing *Van Orsdol's case*, said: "Where an injury is permanent it is such as is spoken of in the books as original—that is, as accruing wholly when the wrongful act was

done—and is distinguished from an act which is to be regarded as continuing—that is, an injury that could and should be terminated and is to be compensated for strictly with reference to the past, and upon the theory that it would be terminated."

Where a railway company, duly authorized by law to construct a railway, built an embankment partly on the bed of a river, and thereby changed the current of the stream from its proper course and caused it to wash away adjacent land, it was held by the Supreme Court of Massachusetts, in *Fowle v. R. R.*, 107 Mass., 354, that a second action brought to recover damages for the wrongful washing away of more of plaintiff's land, due to the same diversion of the water course, was barred by the judgment in the former action, instituted for the same purpose, though several acres of land had washed away after the judgment in the first and before the bringing of the last action. *Gray, J.*, for the Court, said: "The embankment of the defendant was a permanent structure, which, without any further act, except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which he had actually suffered at the date of the writ; and the judgment in one such action is a bar to another like action between the parties for subsequent injuries for the same cause. *Troy v. R. R.*, 3 Foster, 83; *Warner v. Bacon*, 8 Gray, 397, 402, 405. This case is not like one of illegally flooding land (1001) by means of a milldam, when the change is not caused by the mere existence of the dam itself, but by the height at which the water is retained by it; nor is it the case of an action against a grantee who, after notice to remove it, *maintains* a nuisance erected by his grantor." When the same case came up on appeal again (112 Mass., 334, 338) the Court said: "As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is an exception to this rule in cases of nuisance, where damages, after action brought, are held to be recoverable, because every continuance of a nuisance is a new injury and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an *abatable nuisance.* More accurately, it is an action against the defendant for the construction of a public work, under its charter, in such a *manner as to cause unnecessary damage by want of reasonable care and skill in its construction.* For such an injury the remedy is at common law; and if it results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury." In *Smith v. R. R.*, 23 W.

Va., at p. 453, the Court said: "Where the damages are of a permanent character and effect the value of the estate, a recovery may be had, in a suit at law, of the entire damage in one action." The action in that case was brought by an abutting owner against a railway company whose road was constructed along the street in his front, and asking an injunction on the ground that he would otherwise be driven to repeated actions at law. High Injunctions, sec. 602, says: "The
(1002) construction of a railway in a city is not regarded as a *nuisance per se,* and the laying of its tracks along a public street will not be enjoined on that ground; nor can a private property owner, abutting upon and owning the fee to the center of a street, enjoin the construction of an ordinary surface railway in the street on the ground of nuisance." The same principle was recognized by this Court in *Brown v. R. R.,* 83 N. C., 128, where the Court refused an injunction and order of abatement on the ground that the structure complained of (a railway trestle) was being used for the benefit of the public. This was an explicit recognition of the doctrine that no structure erected by a chartered railway company and constantly used by it in serving the public is to be considered and dealt with as a continuing nuisance because its unskillful and defective construction has injured the land of a neighboring proprietor; yet it is familiar learning that there is no elementary principle upon which continued actions have been held to lie for the wrongful erection of a structure, except in cases where its erection was a trespass resulting in a nuisance, and then for the purpose of bringing about a removal. It must be conceded that unless a railway embankment or culvert which obstructs the passage of the water of a non-navigable stream in ordinary freshets so as to pond it back upon and injure a land-owner is a nuisance, the damage present and prospective must be assessed in one action. If this is not true, the authorities that we have already cited, and those that we purpose presently to add, embracing cases from the leading courts of the country and opinions of eminent text writers, are founded upon a misconception of the law.

In England, where the act of Parliament authorizes the bringing of an action, in such cases as that before us, by a land-owner who can show any special injury done to his land by the construction of the
road, it was held that a proprietor whose premises abutted on
(1003) a highway fifty feet wide could recover only permanent damages for injury to his land caused by the building of an embankment by a railway covering twenty feet of the highway in his front. *Beckett v. R. R.,* 3 Com. Pleas (L. R., 1887-'88), 81. In *R. R. v. Esterle,* 76 *Ky.,* 667, the Supreme Court of Kentucky rested the ruling, in part, upon the proposition that an abutting owner upon a

street dedicated to the use of the public, having no possession or right of possession in such highway, could not, at common law, have maintained an action for trespass *quare clausum fregit*, but must have brought an action on the case. Where the easement of such abutting owner was interfered with by the construction of a railroad, the Court held that he could recover a sum representing the diminution in value of his land or lot by the location and use of the railway track in his front. In *Cadle v. R. R.*, 44 Iowa, 7, which was more nearly in point, the Court held that where an injury to land was due to the unskillful construction of a railroad the measure of damage was the difference between the value of his property with the road as constructed and its estimated value with the line properly constructed.

In *North Vernon v. Voegler*, 103 Ind., 314, the Court held that while the municipality was liable for an injury due to the negligent and unskillful manner of making an improvement by grading its streets, such public work was not a nuisance, and being of a permanent character, so that no fresh injury could result from it, the damage present and prospective should be assessed in one action. In *Meares v. Wilmington*, 31 N. C., 73, the plaintiff brought an action on the case to recover damages for the unskillful and negligent grading of a street in his front. The Court there affirmed a judgment for permanent damage, and sustained the view that a corporation authorized by law to do such work could incur no liability in having it done, except for injuries due to careless construction. The (1004) same principle was applied, as we have seen, in *Brown v. R. R., supra*, to *quasi* public corporations. After having given its sanction to the proposition that, though the unskillful construction of a track or bridge by a railroad company may cause special damage to a neighboring landowner, the structure is not a nuisance, it would seem that authority as well as reason would lead to the adoption by this Court of the rule that permanent damage can be recovered for such injuries as well as for the same kind of wrong on the part of such public agencies as cities and towns. In *White v. R. R.*, 113 N. C., 610, 622, where it was found that a railway company regularly chartered had built its track upon a street by a license from the city, *Chief Justice Shepherd*, speaking for the Court, said: "If this be so, the plaintiff may maintain a common-law action for damages, to be assessed up to the time of the trial, or, it seems, she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendants' road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street." Here we find the doctrine laid down that, in a case where the railroad is not proceeding strictly under its

statutory authority to condemn, the plaintiff can at his election bring an action for the trespass or for the permanent damage. It must be acknowledged that the ruling in that case is in conflict with some other *obiter* expressions, but is more nearly in harmony with the current of authority elsewhere. The question whether the damages should be assessed for the permanent injury, or whether repeated actions should be brought, was not directly raised, either in *Knight v. R. R.*, 111 N. C., 80, in *Adams v. R. R., supra,* or in *Spilman*
(1005) *v. Nav. Co.*, 74 N. C., 675. The two first opinions were, in so far as they referred to that subject, *obiter*. While there is some conflict of authority, it seems manifest that it is contrary to public policy to have every embankment abutting on a stream and every trestle and culvert under which a natural water course flows made subject to the uncertainty of being declared a nuisance upon the finding of a jury that it is not properly constructed. No such mischief as a willful omission to provide sufficient waterways is to be apprehended, where it entails a liability for any diminution in the value of land consequent upon such negligence. Such a remedy affords adequate protection for all injury, without interfering with the discharge by the corporation of its duties to the public. The injury inflicted by a railway company occupying land held in the exercise of the right of eminent domain, by reason of unskillful construction of embankments, culverts or bridges, is to be distinguished from the obstruction by it of a navigable river without lawful authority. Such streams being public highways, an obstruction to the navigation of them is a public nuisance, which may be abated by anyone "who is annoyed thereby." *S. v. Parrott,* 71 N. C., 312; *S. v. Dibble,* 49 N. C., 107; Wood on Nuisances, sec. 730. The railway company is in the lawful occupation of every foot of its way that it is authorized by law to take; and where, by neglect in constructing its road, injury is done that is not covered by the compensation made for taking, public policy requires that the additional damage should be compensated for in one action rather than that a *quasi* public servant should be subjected to continual annoyance by suits allowed by law only upon the theory that they will lead to the removal of the structure or some portion of it. The law does not contemplate that such petty annoyances as being compelled to tear down embankments abutt-
(1006) ing on every little stream, trestle and culvert shall impair the efficiency of railways as safe and expeditious carriers of freight and passengers. When we attempt to evolve a consistent and reasonable rule for assessing damage for injuries due to the careless building of bridges, embankments and trestles, we are confronted not only with the *obiter* expression referred to, but with the fact that the

rule laid down *obiter* in *Knight v. R. R.* is not easily reconcilable with that followed on the first appeal in *Emry v. R. R.*, 102 N. C., 209, though it appears that the question raised on both appeals was whether the plaintiff was guilty of contributory negligence. When the same case was again before the Court on appeal (109 N. C., 589) the discussion was confined to contributory negligence and to the doctrine of the ideal prudent man, as to which it has been overruled in *Hinshaw v. R. R., post,* 1047.

The Legislature may empower a steam railway company, which already has the license of a city to occupy a public street with its track, to take, in the exercise of the right of eminent domain, whatever interest abutting proprietors have therein, or to make compensation for whatever injury they may sustain as holders of rights or easements in the street by reason of the construction and operating of the road. It has been decided, in *White v. R. R., supra,* that where no such steps had been taken, but the streets were occupied under a license from the municipality, the abutting owner might elect to waive the want of authority to condemn, and to demand damages, present and prospective, or to ask compensation only up to the time of trial. In some of the States, and it seems in England, where suit is brought for an injury to land in the nature of a private nuisance created by an individual, the judgment in the first suit of this nature may be pleaded in bar of recovery in any subsequent action for the same nuisance. The Court of Illinois drew a very (1007) nice distinction in such actions between cases where the nuisance is alleged as the cause of action and where it is brought for diminution in the value of the land by reason of the nuisance. In that case (*R. R. v. Grovill,* 50 Ill., 241) the injury complained of by the owner of a lot grew out of the erecting and maintaining cattle pens near his premises. The Court held that he might elect to bring an action solely for the nuisance of rendering the air unwholesome, and in that event a similar recovery might be had in a suit brought to any succeeding term while the nuisance should be kept up. But it was also held that where the plaintiff declared for the depreciation of his land, as well as for the annoyance of the nuisance to him while occupying the premises, permanent damages would be allowed and the judgment would operate as a bar to any subsequent suit for injury due to the erection of the pens. An intimation that such an election may be made in all cases where a nuisance presents the two aspects of constant annoyance and of diminishing the value of land in the vicinity is made in a recent case decided by the Court of West Virginia. 23 L. R. A., 674. In *Fowle v. R. R., supra,* the Supreme Court of Massachusetts laid stress upon the fact that the plaintiff in

the first action had declared not only for the injury in washing away about thirty thousand cubic feet of earth, but in that "*the residue of said parcel* by reason of the premises has been greatly lessened in value," and the fact that the assessment had been made upon such a complaint, and the damages accepted, was assigned as a reason for holding that the new action was barred by the record and judgment in the former suit. The better opinion is that in all such cases pros-
(1008) pective damages may be recovered if demanded by the plaintiff, and that the defendant railway may also, at its option, elect to have a permanent assessment made. Successive actions being permitted as an indictment to remove the nuisance, no such reason exists where the structure on account of its public nature is not in law a nuisance. Upon this principle, where a plaintiff elects to annoy a corporation which owes duties to the public, and there is danger that its efficiency as a public servant may be thereby impaired, the defendant has an equity to compel the assessment of the entire damages in a single action. This equitable right was enforcible under the former practice by a bill in chancery, but under The Code may be asserted by demand in an answer. Where the law declares the damage in its essential character permanent, the defendant is entitled to the benefit of the fundamental principle that it is the interest of the public that there should be an end of litigation. Even where the trespass results in a continuing nuisance, for which repeated actions lie, it is a well-established principle that the plaintiff can file his bill to prevent multiplicity of actions and have his entire damages assessed at once, or, to state it more accurately, may obtain an order that upon the payment of permanent damages no injunction shall issue. 1 Pomeroy Eq. Jur., 271; 2 Beach Mod. Eq. Jur., 727. On the other hand, the right to appeal to a court of equity for protection against vexatious litigation must be extended also to a defendant, where it appears that the plaintiff has elected to annoy him with a succession of suits, the subject-matter of all of which may be settled in a single action. 1 Pom., *supra*, sec. 254. It being once conceded that present and prospective damages are recoverable, a *quasi* public corporation not only has the clear equity of all other defendants to be protected against vexation, but to appeal to the courts upon the additional ground that the public may be subjected to annoyance by any proceeding which is calculated to impair its capacity to serve its patrons.

The Code of Civil Procedure is founded upon the principles
(1009) and practice of courts of equity rather than courts of law, and the provision for consolidating actions that may be disposed of by a single trial is but an affirmance of the equitable doctrine of preventing a multiplicity of suits.

Upon a careful consideration of the authorities already cited, and those that will be added, and the reasons on which they rest, we deduce the following principles as decisive of the questions involved in this appeal:

1. A railway company that has constructed its road under lawful authority creates neither an abatable public nuisance nor a continuing private nuisance by failing to leave sufficient space between embankments or by means of culverts for the passage of the water of running streams in case of any rise in the streams that might reasonably be expected, and the injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action.

2. It is the legal right of the plaintiff or defendant to elect to have permanent damages assessed in such an action upon demand made in the pleadings, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant is required to set up this or any other equity upon which he relies, as well as to prove that averment on the trial. But where a plaintiff is allowed, without objection, to have such damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage.

3. The measure of damage is the difference in the value (1010) of the plaintiff's land with the railway constructed as it is, and what would have been its value had the road been skillfully constructed. *Cadle v. R. R.*, 44 Iowa, 1.

4. The statute of limitations begins to run in such cases not necessarily from the construction of the road, but from the time when the first injury was sustained. *Van Orsdol's case, supra,* at p. 473.

Having set up in its answer that the damage was permanent, and excepted on the trial to the refusal of the court to submit an issue involving that question, the defendant is entitled to a new trial.

It is not necessary to pass upon all other questions discussed. Indeed, we did not understand counsel to seriously insist that the suit for damage done in Virginia could be pleaded in bar here, or that any injury done to land in another State could be considered in this action.

New Trial.

Cited: Parker v. R. R., 119 N. C., 685, 687; *Beach v. R. R.,* 120 N. C., 502, 505; *Ridley v. R. R.,* 124 N. C., 36; *Hocutt v. R. R., ib.,* 219; *Lassiter v. R. R.,* 126 N. C., 513; *Mullen v. Canal Co.,* 130 N. C.,

502, 505; *Phillips v. Tel. Co., ib.*, 527; *Jones v. Kramer,* 133 N. C., 448; *Candler v. Electric Co.,* 135 N. C., 17; *Chaffin v. Mfg. Co., ib.*, 98; *Brown v. Power Co.,* 140 N. C., 350; *Cherry v. Canal Co., ib.*, 427; *Mast v. Sapp, ib.*, 537, 538; *Thomason v. R. R.,* 142 N. C., 331; *Beasley v. R. R.,* 147 N. C., 365; *Staton v. R. R., ib.*, 441; *Willis v. White,* 150 N. C., 203; *Harper v. Lenoir,* 152 N. C., 728; *Pickett v. R. R.,* 153 N. C., 150; *Earnhardt v. Comrs.,* 157 N. C., 236; *Duval v. R. R.,* 161 N. C., 451; *Carpenter v. Hanes,* 162 N. C., 50; *Moser v. Burlington, ib.*, 144; *Brown v. Chemical Co.,* 165 N. C., 423; *Rhodes v. Durham, ib.*, 681; *Webb v. Chemical Co.,* 170 N. C., 664, 665; *Caveness v. R. R.,* 172 N. C., 308.

LAURA LLOYD, ADMINISTRATRIX, v. ALBEMARLE AND RALEIGH RAILROAD COMPANY

NEGLIGENCE—"LAST CLEAR CHANCE" TO AVOID AN ACCIDENT—INTOXICATED PERSONS ON THE TRACK—INFERENCES THE JURY MAY DRAW.

1. Where an engine is run at night, with the tender in front and no headlight, and a person lying on the track is injured, if the jury find that a headlight would have enabled the engineer to see the person on the track in time to have avoided an injury, then the failure to provide a headlight and have it at the front was a continuing negligent omission of a duty, the performance of which would have afforded the last clear chance to prevent the injury, and becomes the proximate cause of such injury.

2. If a person is drunk and lying upon a railroad track, such negligence is not deemed the proximate cause of an injury sustained from a moving train, if the engineer, by the exercise of ordinary care, could have seen him in time to have prevented the injury by the proper use of the appliances at his command.

3. It is competent for the jury to be guided by their own reason, experience and observation in such questions as within what distance and period of time a moving train can be stopped, or how far an engineer can see an object on the track, with or without a headlight. It is idle to offer witnesses to conclude either courts or juries from inquiring whether a headlight helps an engineer to see or prevents his seeing.

4. The rule established by *Pickett v. R. R.,* 117 N. C., 616, and cases that have followed at this term, with reference to the "last clear chance" to avoid an injury, affirmed.

(1011) ACTION tried before *Boykin, J.,* at October Term, 1895, of EDGECOMBE.

Verdict and judgment for the plaintiff. Defendant appealed.

Don Gilliam and J. H. Blount for plaintiff.
J. L. Bridgers for defendant.

AVERY, J. The plaintiff's intestate was killed in the night by an

engine running with tender in front at a speed of about twenty-five miles an hour and carrying a train of cars. He was on the end of a trestle when stricken. The only light used on the tender was a small hand lantern, which was held by a man placed on the tender for that purpose. This presents the question so fully discussed in *Pickett v. R. R.*, 117 N. C., 616, and cases that have followed at this term. Notwithstanding the negligence of the plaintiff's intestate in exposing himself to danger, could the defendant, by subsequently avoiding some careless act or negligent omission of duty, have prevented the collision, with its serious consequences? The engine could not have been turned around without the use of a turn-table, (1012) and under the circumstances it is not probable that by keeping the most vigilant outlook, with the small lantern on the tender, the defendant could have seen the intestate in time to stop the train before it came in contact with him, if we suppose that he was lying prostrate upon the track and apparently helpless. The court carefully instructed the jury that if the engineer or watchman actually saw the intestate walking upon the track, apparently in possession of all his powers and faculties, either was warranted in acting on the assumption that he would step off before the train reached him, unless he was seen upon a trestle, with all of the peril incident to such a situation. *Clark v. R. R.*, 109 N. C., 430. We may assume that, acting upon the instruction given, the jury concluded that by the exercise of proper care the defendant's servants might have seen the intestate in time to prevent the collision, and that if seen he would have appeared to them to be prone upon the track or in peril on the trestle. The point involved may be discussed upon the supposition that the jury did not believe from the testimony that the deceased was walking upon the track, beyond the trestle, when he was seen or could by a proper outlook have been seen. But it was negligence on the part of the defendant to run its engine after night, rear in front, without such a light, for two reasons: First, because by its aid the intestate might possibly have been seen in time to stop the train and avert the accident; and, secondly, because every person who used the track as a footway, under the implied license of the defendant, had reasonable ground to expect that such care would be exercised and to feel secure in acting upon that supposition. But a witness was introduced who testified that the engineer, with the aid of a headlight, could not under any circumstances have seen a person on the (1013) track in his front in time to have stopped the train before coming in collision with him. This was an opinion which the jury were not obliged to accept as conclusive. How far the engineer ought to have been able to see in front by means of a good headlight is a

question (like determining within what distance a train can be stopped under given circumstances) the solution of which depends upon the exercise of good common sense and the use of knowledge acquired by observation and experience. *Deans v. R. R.*, 107 N. C., 686, and authorities there cited. Both inquiries were involved in passing upon the issues, and the jury were at liberty to take notice of such matters of general knowledge as are involved in the determination of the question whether a headlight in front would have enabled the engineer to see the injured person in time, by the use of the appliances at his command, to have prevented the accident. If the jury found that a headlight would have enabled the defendant, by due diligence on the part of its servant, to have seen the intestate in time to have stopped the train before reaching him, then the failure to provide one and have it at the front was a continuing negligent omission of duty, the performance of which would have given the defendant the last clear chance to prevent the injury and therefore have made its negligence the proximate cause of it. *Pickett v. R. R., supra.* The omission of duty consisted in running and continuing to run the train without proper light in front. After the intestate went upon the track, and possibly fell asleep there, the defendant's servants, seeing it was dark, might have stopped the train upon the track and waited till morning before moving on towards Tarboro. A still safer course would have been to have run back to a turntable and placed the headlight in front before starting. It is idle to offer witnesses to
(1014) conclude either courts or juries from inquiring whether a headlight helps an engineer to see or so blinds him as totally to prevent his seeing. If there were any foundation for the defendant's contention on this point, it might be questionable whether the warning to persons in the front would not be given at too great a cost, if enabling them to see rendered it impossible to avert injury by keeping an outlook from the engine. In refusing to desist from running in such a manner after night, the defendant's servants voluntarily incurred such risk every moment as the jury found due to the failure to move with the headlight in front. This case is easily distinguishable from *Styles v. R. R., post,* 1084. There the judge, in effect, told the jury that the failure to remove earth, which had been allowed negligently to accumulate before the plaintiff attempted to escape danger from a passing train by going upon it, was the proximate cause of the injury. The negligence in the case at bar consisted in running without a headlight, if by its use the train might have been stopped after the injured party exposed himself. The leaving of the earth unmoved was a fact accomplished before the plaintiff, Styles, attempted to take refuge upon it. It could not have

been taken away then in time to avert the injury. In the case at bar it was a question for the jury whether, after the plaintiff's intestate had exposed himself to danger, the defendant's servants might by the use of a headlight have seen him in time to have stopped the engine and averted the accident, and the court properly left the jury to determine it. It is now settled law in this State (*Pickett v. R. R., supra*) that, notwithstanding the fact that a person who is lying insensible upon a railway track is drunk, his negligence is not deemed concurrent, where the company's servants, by the exercise of ordinary care, could have seen him in time to have prevented the injury by the proper use of the appliances at their command. The fact that
the court below adhered to this view of the law before *Smith* (1015)
v. R. R., 114 N. C., 728, had been overruled cannot be assigned
as error, now that the later ruling of the Court sustains the position of the trial judge. The charge is long, but a careful view of it discloses no such inconsistency as was calculated to mislead the jury. The inference which must be drawn from the finding, in the light of the instruction given, is that the jury believed that with a headlight the engineer could by due diligence have discovered that the plaintiff's intestate was lying helpless upon the track in time to have stopped the train before coming in contact with him. For the reasons given, the judgment is

Affirmed.

Cited: Sheldon v. Asheville, 119 N. C., 610; *Mesic v. R. R.,* 120 N. C., 491; *Stanley v. R. R., ib.,* 516; *Fulp v. R. R., ib.,* 529; *Purnell v. R. R.,* 122 N. C., 840, 845; *Norton v. R. R., ib.,* 936; *McIlhaney v. R. R., ib.,* 998; *Arrowood v. R. R.,* 126 N. C., 632; *Wright v. R. R.,* 127 N. C., 226; *Jeffries v. R. R.,* 129 N. C., 241; *Lea v. R. R., ib.,* 463; *Davis v. R. R.,* 136 N. C., 117; *Stewart v. R. R., ib.,* 391; *Reid v. R. R.,* 140 N. C., 150; *Plemmons v. R. R., ib.,* 288; *Gerringer v. R. R.,* 146 N. C., 34; *Morrow v. R. R.,* 147 N. C., 627; *Whitfield v. R. R., ib.,* 240; *S. v. R. R.,* 149 N. C., 478; *Edge v. R. R.,* 153 N. C., 215; *Shepherd v. R. R.,* 163 N. C., 522; *Hill v. R. R.,* 166 N. C., 596; *Powers v. R. R., ib.,* 601; *Hanford v. R. R.,* 167 N. C., 278; *Hill v. R. R.,* 169 N. C., 741; *LeGuin v. R. R.,* 170 N. C., 361; *Horne v. R. R., ib.,* 651. N. C., 741; *LeGuin v. R. R.,* 170 N. C., 361; *Horne v. R. R., ib.,* 651; *Smith v. Electric R. R.,* 173 N. C., 493.

A. BAKER v. WILMINGTON AND WELDON RAILROAD COMPANY

ISSUES—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—VERDICT.

1. Where, in action for damages, based upon alleged negligence of defendant, the jury find that the plaintiff was injured by the negligence of the defendant, and nothing to the contrary appears in the way of admissions of record, judgment must be entered for plaintiff; but where the jury also find that plaintiff was guilty of negligence on his part which contributed to his injury, the law will assume, in the absence of any further finding, that plaintiff's contributory negligence was the proximate cause of his injury, and judgment must be entered against him.
2. If the jury find that defendant was negligent and plaintiff was guilty of contributory negligence, and further find that defendant might, by the exercise of ordinary care, have avoided injuring plaintiff, notwithstanding plaintiff's negligence, judgment will be entered for plaintiff.
3. One who exposes himself to danger by going on a railroad trestle or lying down upon the track to sleep, whether drunk or sober, is guilty of negligence; but such negligence is not deemed the proximate cause of his injury, when the engineer, by discharging the duty of watchfulness imposed upon him by law, could subsequently have avoided the injury. Notwithstanding the drunkenness of one who goes to sleep on the track, the engineer must keep the same lookout for his safety as for that of a cow or hog.
4. In cases based upon alleged negligence, in which contributory negligence is pleaded, where the pleadings and testimony are of such a character as to justify it, the issues should include the questions of negligence of defendant, contributory negligence of plaintiff, and whether defendant could have avoided the injury by the exercise of ordinary care, notwithstanding plaintiff's negligence.
5. In all cases which necessitate the application of intricate questions of law to the facts the issues should be so framed as to admit of a clear understanding by the jury of the various aspects in which the law applies to the different conclusions properly deducible from the testimony.
6. A verdict finding defendant guilty of negligence, the plaintiff guilty of contributory negligence, and that plaintiff was entitled to recover a certain sum, entitles the defendant to judgment against the plaintiff.

(1016) ACTION tried before *Norwood, J.*, at April Term, 1895, of BRUNSWICK.

Defendant appealed.

The judgment appealed from is as follows:

"This cause coming on to be heard and issues having been submitted to the jury as follows:

"1. Was the plaintiff injured by the negligence of the defendant or its agents?

"2. Was the engineer of the defendant, at the time of the accident, a fellow-servant with the plaintiff?

(1017) "3. Was the plaintiff guilty of negligence on his part which contributed to his injury?

"4. What damages, if any, is the plaintiff entitled to recover?

"And the jury having responded 'Yes' to the first issue, 'No' to the second issue, 'Yes' to the third issue, and 'One thousand dollars' to the fourth issue:

"It is now, on motion of counsel for plaintiff, adjudged that the plaintiff recover of the defendant, the Wilmington and Weldon Railroad Company, the sum of $1,000, with interest on said sum from 8 April, 1895."

Among other instructions, the judge gave the following, at the request of plaintiff:

"The negligence of the defendant is alleged to be in the failure of the engineer or other agents of the defendant to keep a proper lookout and stop the train after they saw the man on the track, and after they knew, or ought to have known, that he was asleep or otherwise insensible. The negligence of the plaintiff precedes in point of time the negligence of the defendant. The faulty conduct of the plaintiff was all complete before the fault of the defendant, if it is guilty of any fault, began. If the engineer saw a man (plaintiff) in a recumbent position on the track, and blew his whistle, and the man did not move, then it was his duty to slow down the train and to stop it before reaching the man; and if he could have stopped it after he saw the man did not heed the warning, defendant is guilty of negligence and plaintiff must recover."

After the verdict, the plaintiff's counsel moved the court to strike out the issue on contributory negligence, on the ground that upon the whole case the contributory negligence, taking all the evidence with regard to it to be true, could not operate to defeat the plaintiff's recovery on the negligence assigned by him against the (1018) defendant. This the court refused to do.

Counsel for the defendants moved for a judgment in their favor upon the verdict of the jury. His Honor refused the motion.

Defendant excepted, upon the ground that, the jury having by their answer to the third issue found the plaintiff guilty of contributory negligence, judgment should have been rendered in favor of the defendant.

Shepherd & Busbee for plaintiff.
Junius Davis for defendant.

AVERY, J. Upon the findings of the jury that the plaintiff was "injured by the negligence of the defendant or its agents," and that the plaintiff was "guilty of negligence on his part, which contributed to his injury," the court refused the motion of the defendant for judgment against the plaintiff for costs, and rendered judgment in favor of the latter for the latter for the amount of damages assessed

by the jury, and for costs. The appeal by the defendant raises the single question whether the judgment is erroneous.

Where nothing more appears from the verdict of the jury, or by way of admissions in the pleadings, or in the record or statement of the case on appeal, than that the injury of a complainant was caused by the negligence of the defendant, the plaintiff may of right demand judgment for the damages ascertained by the jury, and for costs. Where it is found, in addition, that the plaintiff's own carelessness contributed to bring about the injury, the court in the absence of any further finding, must assume that the contributory negligence was a concurrent cause and give judgment for the defendant. But,
(1019) though the questions involved in the two issues passed upon in this case be both answered affirmatively, if in addition it be found by the jury, in response to a distinct and separate issue, that, notwithstanding the negligence of the plaintiff, the defendant might by the exercise of ordinary care have prevented the injury, the rule becomes applicable that was last laid down in *Pickett v. R. R.*, 117 N. C., 616, where the cases involving that question, from *Gunter v. Wicker*, 85 N. C., 310, to that case, were cited and fully discussed. The principle was stated by *Chief Justice Smith*, in *Gunter v. Wicker*, as follows: "Notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed 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. *Davies v. Mann*, 10 M. & W. (Exc.), 545." To apply the rule to the case before us: If the jury believed that, notwithstanding the negligence of the plaintiff in becoming intoxicated and going upon the track so as to expose himself to danger, the engineer, by keeping a proper lookout for obstructions on the track, might have seen the plaintiff and might have had by observing his posture reasonable ground to believe he was drunk or disabled, in time, by the use of all the appliances at his command and without danger to those on board the train, to stop the train and avert the accident, then his negligence would have been deemed in law the proximate cause. The Court said, in *Pickett v. R. R.*: "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 construed 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 exercising
(1020) 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 reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of 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. * * * 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." A glance at the case of *Pickett v. R. R.* must satisfy anyone that the opinion, like that in *Dean's case,* 107 N. C., 686, and in *Clark's case,* 109 N. C., 430, is founded upon the assumption that anyone who exposes himself to danger by going on a trestle or lying down upon the track to sleep, whether drunk or sober, is guilty of negligence. But that negligence is not deemed the proximate cause of an injury received, where the engineer, by discharging the duty of watchfulness plainly imposed upon him by repeated rulings in this State, could subsequently have saved the party from all harm. We cannot understand, therefore, how the learned counsel for the plaintiff could have been led inadvertently to rest his argument upon the idea that this Court had ever anywhere said or intimated that a drunken man who lies down upon the track of a railway and falls asleep is not negligent in doing so. The Court did hold in *Pickett's case* that, notwithstanding such negligence on the part of a careless boy or drunken man, an engineer was not thereby licensed to kill him, but was to keep the same outlook for his safety as for that of a cow (1021) or a hog. This defendant appeals, and the only question directly involved is the correctness of the judgment, which must be reversed. But, in view of the testimony offered by the plaintiff, it seems eminently proper to call attention to the advisability (if not, in such cases as this, the necessity) of submitting a third issue, involving the question whether there was any intervening negligence after the careless act of the plaintiff was complete and became a fact accomplished. As has been said in *Pickett's case* and in the cases there cited, the three questions—first, whether the defendant was negligent; second, whether the plaintiff's carelessness contributed to cause the injury; and, third, whether, notwithstanding the negligence of the plaintiff, the defendant might, subsequently, by the exercise of reasonable care, have averted the injury—may be determined by submitting, with proper instructions, the single inquiry, whether the injury was caused by the negligence of the defendant or whether the negligence of the defendant was the proximate cause of it. But where the pleadings and testimony raise the question whether the plaintiff was guilty of contributory negligence, and also whether, if he was

careless, any want of care on the part of the defendant has nevertheless been shown to have intervened as the *causa causans,* after his negligent act, it is always difficult to make the most intelligent jury of laymen analyze the evidence and apply it, in its threefold aspects, in responding to a single question. If the object of the courts is to insure to every litigant who is entitled to a trial by jury the opportunity to have the jury made an intelligent and independent factor in protecting his rights and redressing his wrongs, it is the duty of the courts to frame these mixed questions of law and fact upon which they are to pass in such a way as to enable them most clearly
(1022) and readily to apply the law to every phase of the evidence.

It often taxes the powers of a judge to so instruct the jury upon the application of those phases of the testimony to the single question, whether the defendant's negligence was the proximate cause of the injury, as to enable an appellate court even to intelligently review his charge. However correct, in the abstract or in the concrete, his propositions may be, it will be readily seen that one unlearned in the law, however intelligent, must from the very nature of the case get but indistinct glimpses of the principles given for his guidance. On the other hand, the same reason that induces learned authors to classify decisions under the separate and distinct titles of negligence, contributory negligence and intervening negligence for the use of men learned in law, viz., to enable them to understand the principles treated more clearly, operates with tenfold force when the object is to impart to a layman, in a few moments or, at most, in a few hours, such instruction as will enable him to collate and classify the testimony to which each of these branches of the law of negligence is to be applied, and sum up the result of this complicated investigation in his affirmative or negative answer to a single question. It must have required extraordinary learning and unusual power of expression on the part of the judge and a high order of intelligence on the part of the jury, in many cases which have been tried in the courts, if the jury were made to fully comprehend how to sum up their opinion of the facts in the response "Yes" or "No" to a single issue. But while there are cases tried in the courts where no testimony is offered which tends to show that the negligence of the defendant intervened as the cause of an injury after the careless act of the plaintiff was complete, and where it is consequently proper to submit only the two issues passed upon below, we can conceive of circum-
(1023) stances under which a plaintiff might rightfully demand a separate issue, involving the question whether the defendant's negligence intervened as a proximate cause after the careless act of the plaintiff. It is true that it has been held (in *Scott v. R. R.,* 96

N. C., 428; *Denmark v. R. R.*, 107 N. C., 185, and in *Pickett's case, supra*) that as a general rule it rests in the sound discretion of the court to determine whether one or more issues involving negligence shall be submitted. But this general rule must give way to the broader principle, which is applicable to all cases, that a party has meritorious ground of exception whenever he is deprived, by the refusal of the judge to submit an issue tendered by him, of the opportunity to present to the jury the law governing a particular phase of the testimony. Had the plaintiff tendered an issue involving the question whether the injury might have been avoided by reasonable care on the part of the defendant in failing to stop the train, instead of asking for the withdrawal of that involving contributory negligence, a different question might have been raised by exception to the refusal of the court to do so.

Judgment Reversed.

Cited: Nathan v. R. R., post, 1069; *Little v. R. R., post,* 1076; *Bank v. School,* 121 N. C., 108; *Wheeler v. Gibbon,* 126 N. C., 812; *Cook v. R. R.,* 128 N. C., 335; *McArver v. R. R.,* 129 N. C., 384; *Boney v. R. R.,* 145 N. C., 250; *Hamilton v. Lumber Co.,* 160 N. C., 52; *Sasser v. Lumber,* 165 N. C., 243; *Carter v. R. R., ib.,* 255; *Holton v. Moore, ib.,* 551.

(1024)

W. W. ELLERBE, ADMINISTRATOR, v. CAROLINA CENTRAL RAILROAD COMPANY

ISSUES—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—INTOXICATION—JUDGE'S CHARGE.

1. An issue which there is no evidence to support should not be submitted to the jury.
2. In actions for damages, where negligence is alleged and contributory negligence is pleaded as a defense, issues as to negligence, contributory negligence and amount of damages are enough. It is not error to refuse to submit an issue as to whether the injury could have been avoided by defendant, notwithstanding plaintiff's contributory negligence, as that can be explained in the charge.
3. In the absence of any evidence that an injury might have been avoided, notwithstanding the contributory negligence of the injured person, it is proper to instruct the jury that no damages can be recovered for the death of one who could by the exercise of ordinary prudence have avoided injury, but whose intoxication prevented his exercise of such prudence and circumspection.
4. The rule of the "prudent man" affirmed.
5. The rule established by *Tillett v. R. R.*, at this term, as to when negligence and contributory negligence are pure questions of law to be determined by

the court upon a given state of facts, and when issues must be submitted to the jury with appropriate instructions, affirmed.

ACTION tried before *Hoke, J.*, at October Term, 1895, of RICHMOND.

There was a verdict and judgment for defendant. The plaintiff appealed.

All essential facts are set out in the opinion of the Court.

Cameron Morrison and Shepherd & Busbee for plaintiff.
MacRae & Day for defendant.

(1025) MONTGOMERY, J. The defendant's train of cars having become detached, was moving along with an interval of from fifty to one hundred yards. The plaintiff's intestate and two others were walking on the track, and their attention being attracted by the noise of the train in their rear, they stepped off the track in good time. They had not observed that the train had become detached, and instantly, upon the front section having passed, they jumped back upon the track and continued their walk. The other two, discovering the rear section coming from behind them, got out of danger, but the intestate, remaining on the track, was run over and killed. He could have seen the rear section if he had looked. The defendant had proper appliances to stop the train, and the train was properly equipped and manned. There was evidence going to show that the intestate was under the influence of liquor at the time he was killed. The following issues were submitted to the jury:

1. "Was the intestate killed by the negligence of the defendant, as alleged in the complaint?

2. "Was the intestate guilty of contributory negligence?

3. "What damage, if any, is plaintiff entitled to recover?"

The plaintiff insisted that another issue should have been submitted, viz.: "Notwithstanding the contributory negligence of plaintiff's intestate, could the defendant have avoided the injury by the exercise of ordinary care and prudence?" This was declined, but his Honor remarked that if the evidence, after it was all in, justified, he would submit it to the jury. After the evidence was concluded, the court, being of opinion that the issue was not warranted, refused to submit it, and the plaintiff excepted. There was no error in this ruling of his Honor, for, as he said, there was no evidence tending to prove that the defendant could have averted the plaintiff's
(1026) injury. The engineer had passed him, standing off the track, and there was no evidence that he could have given him warning of the separation in the time between his stepping back on the

track and his injury. We do not mean to say that his Honor should have submitted the issue tendered by the plaintiff, even if there had been testimony going to show that the defendant could have avoided the injury by the exercise of ordinary care and prudence after the intestate stepped back on the track. The issues which had been submitted were sufficient, under any phase that the testimony might present, under proper instructions from the court. *Denmark v. R. R.*, 107 N. C., 185; *Sherrill v. Tel. Co.*, 117 N. C., 352. But as, in refusing plaintiff's issue, his Honor also passed upon the question whether there was any testimony going to prove that the defendant could have avoided the injury, in case the jury should believe that the plaintiff contributed to his own hurt, we have discussed and passed upon the exception, and we find no error.

The first issue, under instructions from his Honor, was found against the defendant, and there was no appeal; and, as we have said, there was no evidence that defendant had the last clear chance to avoid doing the injury, the case resolves itself into a very narrow compass. Was the plaintiff's intestate ordinarily careful under the circumstances? Did he act, under all the circumstances, as a prudent man similarly situated would have done? If so, he was entitled to recover; if not, he would not be. It is the province of the court, where the facts are undisputed or where but a single inference can be drawn from the testimony, to instruct the jury whether either of the parties has been negligent and what culpable act must be deemed the proximate cause of an injury. Where the facts are in dispute, or more than one inference might be drawn from the testimony by fair-minded men, it is the duty of the court to instruct the (1027) jury, when requested to do so, whether in any aspect of the case, arising out of the testimony, the acts of either party would constitute culpable carelessness; but in such cases it is always the province of the court to tell the jury that they are to determine whether, under all the circumstances, the party charged with culpability acted as would the ideal prudent man, and to make their verdict depend upon their decision of that question. *Tillett v. R. R., post*, 1031; *R. R. v. Crawford*, 24 Ohio St., 631. Though the facts in this case, as to the intestate's contributory negligence, were undisputed, yet his Honor took the view that more than one inference might be drawn from the testimony, and submitted the question to the jury. The plaintiff made no exception to this course. It was in proof that the intestate's home was near the place where he was killed, and he was going home on that day; that the train was a freight train; that all the caboose cars were painted green, different from the color of box cars, and that a caboose is attached to every freight train; that

there was no obstruction which could have prevented the deceased from seeing the cars if he had looked; and that some of the witnesses said that the deceased was under the influence of liquor, and others that he had only drunk a small quantity. There was enough testimony going to show negligence on the part of the plaintiff's intestate to be submitted to the jury, they being the sole judges of its weight and importance. His Honor charged the jury:

"The law requires of persons who enter on a railroad track to exercise the ordinary care of a prudent person in like circumstances, and they are required to look and listen and take notice of danger which they could so discover, and they are accordingly re-
(1028) quired to look both ways; but in a case like this the matter is left to the jury to say, on the whole evidence and under all the circumstances, whether the intestate was in the exercise of the ordinary care of a prudent person in failing to observe and take note of his danger, with this special direction, which the evidence makes pertinent, that if the failure to observe or note the danger was caused by his being drunk or under the influence of liquor the plaintiff cannot recover, and in such case the jury should answer the second issue 'Yes.' With this special direction the matter is submitted to the jury to say, on the whole evidence, whether the deceased was in the exercise of the ordinary care of a prudent person in going upon the track, just after the front section of the train had passed, and failing to observe and note the danger from rear cars, the plaintiff contending that his intestate had a right to suppose that all the train had passed and that no cars were so near behind the others and that there was no danger in that direction; and defendant contending that the deceased was negligent in any event for going on the track without looking both ways, and he should have known that all of the train had not passed, because the caboose is always of a different color, and this was behind the rear cars."

The exceptions to the charge, though varied in form, are all directed to this portion, or other parts embracing the same proposition and statements.

We see no error in the charge. There was no exception to the admissibility of the evidence going to show that the deceased was under the influence of liquor. The exception to the charge bearing on this point of evidence was that his Honor stated, as if the fact were found or admitted, that the deceased was under the influence of liquor. The language used by the court was: "If the failure (of defend-
(1029) ant) to observe or note the danger was caused by his being drunk or under the influence of liquor, he cannot recover." It would have been better if the court had told the jury that if they

found from the testimony that deceased was under the influence of liquor, and that that was the cause of his failure to get off the track, and that he thereby contributed to his own hurt, he could not recover. We cannot believe, however, that the jury understood his Honor to mean for them to take as a matter certain, at his hand, that the defendant was under the influence of liquor, regardless of the testimony. The testimony was conflicting, and some of it went so far as to state that the defendant was not drinking at all.

We think it unreasonable that the jury should have been misled by the charge of the judge or should have understood him to mean to declare as a fact found by himself that the deceased was drunk or under the influence of liquor. With the exception that the plaintiff's intestate was entirely sober, and that there were fewer elements of contributory negligence on his part, the case of *Breckinfelder v. R. R.*, 79 Mich., 560, is like the case before us. In that case two box cars were detached from the engine and the front ones, and the plaintiff's intestate, not looking in the direction from which the train came, stepped in the interval, only a few feet, and was run over and killed by the rear cars, and the Court said: "The only negligence or want of care that can be imputed to the plaintiff's intestate is that he did not look west to see if cars were approaching before stepping on the track. Had he done so, he would have seen the box cars coming and so near that he could not get across safely. He was neither deaf nor blind, and was in the possession of the ordinary faculties of mankind. He was familiar with the railroad and had crossed the track at Adams Street for years. He had seen the train pass west. It was (1030) passing him, going east, as he was crossing from the west to the east side of Adams Street, and had cleared the street as he reached the sidewalk. Was it a natural conclusion, under such circumstances, for a man of ordinary prudence to form, that he might safely cross the track upon the sidewalk as soon as the receding train allowed him to do so, and was he justified as a prudent man to act upon such conclusion without looking to see if there would be danger from other cars following closely after the receding train? If a person attempts to cross a street upon a crossing in a crowded thoroughfare, the natural impulse would be to pass in the rear of a passing vehicle; but he would be foolhardy and careless if he attempted to do so without looking to see if another team was not approaching in such proximity as to make the attempt dangerous; and if he should run directly in front of another team and was injured, he would have himself alone to blame. But is the ordinary method of using railroad tracks such that one familiar with their use may ordinarily expect one train of cars upon the same track to be closely fol-

lowing another? I think not. It was for the jury to say whether he took that care and caution, under all the circumstances which surrounded him, that a prudent man, exercising ordinary caution, should have exercised. It was proper to submit the question to the jury."

The exceptions to the charge of the court were numerous, but, as we have said, they are all directed to the parts which we have discussed, and we are of opinion that there is no error and the exceptions not well taken.

No Error.

Cited: Sheldon v. Asheville, 119 N. C., 610; *Little v. R. R., ib.,* 778; *Ward v. Mfg. Co.,* 123 N. C., 252; *Asbury v. R. R.,* 125 N. C., 576; *Cook v. R. R.,* 128 N. C., 335; *Harris v. Quarry Co.,* 131 N. C., 559; *Bessent v. R. R.,* 132 N. C., 941; *Groves v. R. R.,* 136 N. C., 10; *Brewster v. Elizabeth City,* 137 N. C., 394; *Allen v. R. R.,* 145 N. C., 217; *Talley v. R. R.,* 163 N. C., 577.

(1031)

JAMES W. TILLETT v. NORFOLK AND WESTERN RAILROAD COMPANY AND LYNCHBURG AND DURHAM RAILROAD COMPANY

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—WITNESS, OPINION—NEW TRIAL ON PART OF A CASE—JOINT LIABILITY OF LESSOR AND LESSEE RAILROADS—NEGLIGENCE OF BRAKEMEN—DECREPIT PASSENGERS—PASSENGERS DEFINED.

1. What is negligence is a question of law, when the facts are undisputed; but where the facts are controverted, or more than one inference can be properly drawn from them, it is the province of the jury to pass upon an issue involving it. A mixed question of law and fact is then presented, to be answered by the jury, under appropriate instructions from the judge, as to whether negligence did or did not exist under the various phases in which the facts are presented in the testimony. The same rule applies to contributory negligence.

2. A witness will not be permitted to give his opinion as to whether negligence existed or not, or whether a thing was done in a negligent manner, as that would be to invade the province of the jury.

3. In a proper case the Supreme Court will grant a *venire de novo* upon certain issues, leaving the verdict as to others undisturbed, and when that course is taken no evidence bearing exclusively upon the issue left undisturbed should be admitted in the lower court.

4. The lessor and lessee of a railroad are both liable for the negligence of the lessee to the extent determined by this Court in *Logan v. R. R.,* 116 N. C., 940.

5. If the brakeman on a railroad fails to apply the brakes when he has reasonable ground to apprehend that injury would result from such omission, he is clearly culpable and the railroad company answerable for any injury resulting from such negligence.

6. A sudden, violent, unexpected and unnecessary movement of a passenger car while passengers are getting on it at a proper time and place is negligence, *per se*.

7. A passenger has a right to presume that the servants of the carrier will properly discharge their duties. Consequently, one who enters a railroad passenger car is not guilty of contributory negligence because he fails to rush into the first seat he reaches, although he knows the train is about to be coupled.

8. Persons who are old and decrepit are not more culpable for failing to provide against the carelessness of a carrier's servants than those who are vigorous and active.

9. It is not contributory negligence, *per se*, for a decrepit or infirm passenger to carry small bundles under his arms when boarding a train, or to fail to ascertain that the train is about to be coupled, or to stand up in the car until a child under his care can pass him in the aisle.

10. One who gets aboard a car for the purpose of becoming a passenger is entitled to the rights of a passenger, and the carrier is liable to him as such, whether he pays his fare before or after an accident by which he is injured.

ACTION tried before *Starbuck, J.*, at November Term, (1032) 1895, of PERSON, upon the issues directed by the Supreme Court in this case, as will appear from the record and the opinion of the Court (*Tillett v. R. R.*, 115 N. C., 662, and *S. c.*, 116 N. C., 937).

After the jury was impaneled the defendants' counsel tendered the following issues:

3. "Was the plaintiff rightfully on the train of the defendant, the Norfolk and Western Railroad Company?

4. "Was the plaintiff injured by the negligence of the said defendant, the Norfolk and Western Railroad Company?

5. "Did the plaintiff, by his own negligence, contribute to his own injury?

6. "If so, was the plaintiff's negligence the proximate cause of the injury?

7. "Was the injury complained of the cause of the plaintiff's alleged blindness and incapacity to conduct his busi- (1033) ness?

8. "Was the plaintiff injured in the manner described and alleged in the complaint?"

His Honor refused to submit these issues, except as they are embraced in those submitted, and the defendants' counsel excepted to the refusal of the court to submit the issues as tendered by him. Thereupon the court, upon examination of the opinion of the Supreme Court in this case, and the pleadings therein, submitted the following issues:

2½. "Was the plaintiff rightfully on the train of the defendant, the Norfolk and Western Railroad Company?

3. "Was the plaintiff injured by the negligence of the Norfolk and Western Railroad Company?

4. "Did the plaintiff, by his own negligence, contribute to his injury?"

The defendants' counsel excepted to these issues as submitted by the court.

There was a great deal of testimony introduced by both parties, the bearing and substance of which may be gathered from the charge of the presiding judge and the opinion of *Associate Justice Avery.*

Numerous special instructions were asked for, some of which were given, and others refused, defendant duly excepting to such refusal.

The court charged the jury that the burden was on the plaintiff, on the issue, No. 2½, to satisfy the jury, by a preponderance of evidence, that the plaintiff was rightfully on the train, and if not so satisfied, they should answer the issue "No"; that if they answered that issue "No," it was an end of the case, and they should answer the other issues in favor of the defendants; if they answered (1034) it "Yes," they should consider the issue, No. 3, as to the alleged negligence of defendant, that the burden was on plaintiff to satisfy them, by a preponderance of evidence, that the plaintiff was injured by the negligence of the defendant. If not so satisfied, they should answer it "No"; if they answered "No," they should not consider issue No. 4; if "Yes," they should consider issue No. 4, as to the alleged contributory negligence of plaintiff; that the burden was on the defendant, on issue No. 4, to satisfy the jury, by a preponderance of the evidence, that plaintiff, by his own negligence, contributed to his own injury.

The court further charged the jury, on issue No. 2½, as follows: "If the plaintiff went aboard the train to travel to Mt. Tirzah, intending to pay his fare and having the money to do so, and the train was standing at the usual place for receiving passengers, and he was not directed not to get on, he was rightfully on the train, and you will answer the issue 'Yes.' If the train was not at the usual place for receiving passengers, it was his duty to wait till it pulled up to the usual place, and if he got aboard before the car reached the usual place he was not rightfully aboard the train, and you will answer the issue 'No.' If he was directed to wait till it pulled up, and he did not do so, then he was not rightfully on the train, and you will answer the issue 'No.'" Defendants excepted to this part of his Honor's charge as not being a proper application of the law to the facts, and as misleading to the jury as to what is required to determine the word "rightfully" in the issue.

"The usual place for boarding a train is any place where passengers were accustomed and allowed to get on the train (1035) to the knowledge of the railroad company, and it makes no difference whether it was in front of the depot or not." Defendants excepted to this part of his Honor's charge.

"Even if the car was standing at the usual place for receiving passengers, the plaintiff was not rightfully on the car if he was directed by the conductor, Walker, not to get on, or to wait until the car was pulled up in front of the depot. It was not necessary that the direction not to get on, or to wait until the train pulled up, be given in the shape of a positive command. If, in response to a question by Tillett, the conductor said 'We will pull up to the depot for you,' and that was all that passed between them, still, if the tone or manner in which the statement was made was such as to reasonably give the plaintiff to understand that he was directed or expected to wait till the train was pulled up, then you will answer the issue 'No'; but if the statement was made by the conductor as simple information, in response to a question, and was not intended as a direction or requirement, then no duty was imposed by such statement on the plaintiff to wait for the train to pull up." To this part of the charge the defendants excepted.

Here his Honor fully arrayed the facts contended for by the parties arising upon the evidence and supporting their contentions on this issue.

The court charged the jury as follows on issue No. 3: "It is impossible to operate a mixed or freight train so as to secure the comfort and safety of the passengers to that high degree of assurance that is required in the operation of passenger trains. Jerking and bumping is inevitable in the management of such trains. Railroads are not required to furnish passengers on such trains with the conveniences and safeguards against danger that are re- (1036) quired on passenger trains. It is the duty of the railroad company, in the operation and management of these mixed trains, to exercise all reasonable care and take every reasonable precaution against injury to its passengers which the appliances for that mode of conveyance and used by the defendant on this train would admit of. There is no evidence that the defendant did not have on this train the appliances ordinarily used for mixed trains, and it must therefore be taken that the train was so equipped. If it failed in this duty of reasonable care it was negligent, and if this negligence was the proximate cause of the plaintiff's injury you should answer the third issue 'Yes.' A proximate cause of an injury is doing or omitting to do something, which act or omission a man of ordinary prudence,

under the circumstances, could foresee might probably or naturally result in the injury complained of. This is the first requisite to make the negligent act or omission a proximate cause. The second requisite is that act or omission produced or concurred in producing the injury complained of. It must have been such an act or omission that but for it the injury would not have occurred." The defendants excepted to this part of his Honor's charge.

"As to whether a certain state of facts amounts to negligence is a question of law for the court. Whether the state of facts exists, if not admitted, is a question for the jury to decide. I shall therefore instruct you as to whether certain phases of the facts that you may find from the evidence on this and on the issue of contributory negligence do or do not constitute negligence, it being for you to say whether or not these facts existed. If you find that, in mak-
(1037) ing or attempting to make the coupling, the employees of the railroad company in charge of the train, through failure to apply the brakes soon enough, ran the forward part of the train back against the stationary part, in which was a passenger car, with so great a shock as to throw the passengers, sitting down, violently against the front seat, and to knock the car back along the track ten or fifteen feet, the defendant in so doing was guilty of negligence; and if in consequence of the shock the plaintiff was thrown to the floor so violently as to cause physical injury and suffering, you will answer the third issue 'Yes.'" The defendants excepted to this part of his Honor's charge.

"If you believe the facts to be as stated by the witnesses for the defendant, the defendant was not negligent. If the train was backed at the rate of a slow walk to where the coupling was made, then it was a coupling usual and incident in the management of such a train, and you will answer the third issue 'No'; and even if you should find that the shock of the coupling was of more than usual severity, yet was one that ordinarily occurs in the management of such trains, and the trainmen used every reasonable precaution in applying the brakes, that they applied them as soon and as hard as they reasonably believed would prevent injury to the passengers, then you should answer the third issue 'No.'" Here the court arrayed the evidence relied on by the parties to the support of their contentions on issue No. 3.

The court charged as follows on issue No. 4: "We have now considered the duty which the railroad company owes to the passengers. There is another duty for you to consider. Upon the passenger is imposed the duty of giving reasonable care and attention to his own safety. If he fails in this duty he is negligent, and if this
(1038) negligence is a proximate cause of the injury producing or

concurring with the negligence of the railroad company in producing the injury, then the passenger is said to be guilty of contributory negligence. The plaintiff admits that he was afflicted with rheumatism, so as to impair his power of locomotion. It was therefore necessary for him, and the law required of him, that he exercise a higher degree of care in getting on and entering the car than should have been ordinarily and reasonably exercised by a man who possessed the ordinary power of locomotion. He had the right to travel on the defendant's car, but the extra risk in traveling, caused by his infirmities, was assumed by himself, and for that reason he must look to his own safety with a corresponding amount of vigilance. Not only was he held to extra care by reason of his infirmity, but also on account of the increased risk incidental to traveling on a freight train. He assumed the extra risk and discomfort usual and incident to such mode of travel. An act on his part which may not have been negligence if he was entering a passenger train might be negligence if he was entering a mixed train. The evidence shows that he knew it was a freight train and that it was shifting. When he went to get aboard, it was incumbent on him to display all the caution that the circumstances demanded. If the plaintiff delayed going to the train until by going straight to his seat he did not have time to get seated, and he saw the passenger car, standing alone or with other cars, was detached from the rest of the train, and he made no effort to ascertain the position of the shifting part of the train, and if he had looked up the track he could have seen the shifting part approaching at such a rate of speed as to make it likely there would be a jar before he reached his seat, then he was guilty of contributory negligence; or if he did see the shifting part approaching at such a rate of speed and distance as to make a jar likely, but disregarded it (1039) and entered the car, that would be contributory negligence, and you will answer the issue 'Yes.' If the train was at the usual place for receiving passengers, and the plaintiff was not told that it would pull up in front of the station, and if he looked up the track when ten steps from the front end of the passenger car, and could see the shifting part of the train, and then proceeded directly to the rear end of the car and got on, he was not negligent up to that time; and if he was not negligent after entering the car, and was not intoxicated, then he was not negligent, and you will answer the fourth issue 'No.'" The defendants excepted to this part of his Honor's charge—the last sentence.

"The plaintiff was required to find a seat with all reasonable dispatch, but it was not necessary for him, if he entered the car rightfully, to take the first seat he got to, and his failure to do so was not

negligence. He had the right to select such seat as suited him, but under the circumstances it was his duty to make the selection promptly, but the law required nothing unreasonable or unnatural. The bare failure to drop into the seat he selected as soon as he got to it would not be negligence. If he was standing, waiting at the seat, without any reason, or good reason, for so doing, as, for example, if, when he got to the seat, he was standing up, and turned around to survey the car that he might gratify his curiosity, then he was negligent, and if that negligence contributed to his injury—that is, if the injury would not have happened but for such negligence on his part—you will answer the fourth issue 'Yes.' If, however, he went to the seat he selected, with his little son behind him, and then stopped and turned to let his son pass in before him, he was not guilty of
(1040) negligence; and unless he was negligent in other respects, you will answer the fourth issue 'No.'" The defendants excepted to this portion of his Honor's charge.

"Intoxication is not of itself negligence. To be negligence it must have been one of the proximate causes concurring to produce injury. If you believe that the shock was so violent that it would have thrown the plaintiff to the floor anyway and caused the injury complained of, even if he had not taken a drink, then his drinking, even if he was drunk, was not such negligence as would be a proximate cause of the injury, and you will answer the fourth issue 'No'; but if he would not have been thrown down and received the injury complained of if it had not been for the fact that he had been drinking, then his drinking was negligence, for otherwise the injury would not have occurred, and you will answer the fourth issue 'Yes.'"

The court fully arrayed the evidence relied upon by the parties in supporting their contentions on the issue No. 4. There was a verdict in favor of the plaintiff.

The jury answering "Yes" to issue No. 2½, "Yes" to issue No. 3, and "No" to issue No. 4, both defendants moved for a new trial for errors assigned in refusing to charge the jury as specially requested by both of the defendants, and for giving special instructions asked for by the plaintiff, and for errors in the judge's charge given by the court, and for excluding evidence offered by the defendants and excluded by the court and excepted to on the trial, and for exceptions to issues noted on the trial.

The motion for a new trial was overruled, and the defendants excepted.

(1041) The Lynchburg and Durham Railroad Company moved for judgment *non obstante veredicto.* Motion overruled. The defendant Lynchburg and Durham Railroad Company excepted.

Judgment in favor of plaintiff for $9,000, interest and costs, to which the defendants excepted and appealed.

R. O. Burton, Jones & Tillett and W. W. Kitchin for plaintiff.
W. A. Guthrie for defendants.

AVERY, J. There was no error in refusing to submit the issues tendered by the defendant. Those framed by the court involved the only questions left open for trial. *Tillett v. R. R.,* 115 N. C., 662. In the exercise of a sound discretion the court was at liberty to allow the jury to pass upon the specific question whether the plaintiff was rightfully on the car, but the right of the plaintiff to board the car must have been proven necessarily in order to make out a *prima facie* case of negligence on the part of the defendant, and thus all of the controversy still left open might have been determined by means of the two issues involving the alleged negligence of the defendant and contributory negligence on the part of the plaintiff. What is negligence is a question of law, when the facts are undisputed; but where the facts are controverted, or more than one inference can be drawn from them, it is the province of the jury to pass upon an issue involving it. *Deans v. R. R.,* 107 N. C., 686. A mixed question is then presented, and it becomes the duty of the judge, at the request of counsel, to tell the jury how to apply the law of negligence to the various phases of the testimony, and the office of the jury to make the application of the law, as given by the court, to the facts as found by them.
They determine in this way, by their responses to the issues, (1042) whether negligence or contributory negligence has been shown. When, therefore, the witness was asked to state whether a car was coupled in a negligent manner, the question was calculated to elicit an opinion upon one of the very questions which the jury were impaneled to decide, and the objection to its competency, being made in apt time, was properly sustained. *Smith v. Smith,* 117 N. C., 326; *Wolf v. Arthur,* 112 N. C., 691.

There is no merit in the exception to the refusal of the court, by means of an additional issue, to reopen the question of damages, which was finally settled and determined when this court granted a new trial, limited virtually to two issues. It is needless, therefore, to discuss the point presented by counsel on the argument. It was not error to refuse to allow defendant to show, in diminution of damages already ascertained by a verdict, that the permanent injury to plaintiff's eyesight was due to his failure to have them properly treated after the accident. Such questions could only be considered by the jury in arriving at the *quantum* of damage. The Court considered on the former

hearing all of the questions then presented, and determined to settle all of them, except those specifically mentioned, as they are empowered to do under the recent statute, by a *per curiam* judgment. The Court would have settled the whole case by such judgment had a new trial been refused upon every issue, and its ruling would have concluded the defendants upon all points. Although the judgment left certain questions open for another trial, to the extent that the verdict was undisturbed, it was final—not subject to be set aside by any subsequent action of the court or jury. We must assume, if we had no actual knowledge of the matter, that the defendant had opportunity on a former trial to present to the jury the views of its counsel
(1043) upon the question of permanent injury, and that this Court, upon reviewing the case on appeal, determined that as to that matter it had no reason to complain. The plaintiff filed a petition to rehear, and at his instance the *per curiam* was modified. The defendant rested on its oars, and, having done so, is not entitled to the benefit of a rehearing on another appeal upon questions that are behind us. The defendant's counsel objected to the introduction of the deposition of Dr. Graham, a specialist, in which he gave his opinion as an expert that the loss of eyesight had been caused by the injury to the plaintiff's head, sustained by reason of his falling in the car; and plaintiff's counsel thereupon withdrew it, presumably upon the theory that it was conceded to be irrelevant as to any question before the jury.

The question whether the lessor railway company is answerable jointly with the lessee company operating its road for the injuries due to the negligence of the latter, and if so, what was the extent of such liability, arose in *Logan v. R. R.*, 116 N. C., 940. It was in this court then *res nova*, but the court, after giving the matter involved the careful consideration which it deserved, and upon a full discussion of the law, delivered an opinion which is decisive of the right to recover against the lessor in this case. We find in the argument on behalf of the defendant no reason for receding from the position then taken. In view of the conflict of authority in other States, this Court was left free to be guided rather by the weight of reason than by the number of precedents in reaching a conclusion. If, as already stated, it was the province of the court to determine whether any given act was evidence of a want of ordinary care, and if the loss of control over a train by engineer and brakeman, and consequent injury to a passenger, was due to a failure to apply brakes
(1044) in time, and was properly held by the court to be negligence, it would have been superfluous to add the word "negligent" as qualifying "failure," and it was not an error to omit it. If the

brakeman failed to discharge such a duty, when he had reasonable ground to apprehend that injury would result from such omission, he was clearly culpable, and the defendant companies were answerable for any injury resulting from such negligence. *Blue v. R. R.*, 116 N. C., 955. Where the injury is due to the negligent omission of duty by a brakeman, it is not a mere accident, and the objection to the charge that it made no allowance for accident is not well taken. "A sudden, violent, unexpected and unnecessary movement of a passenger car while passengers are getting on it at a proper time and place is negligence," because those who permit such things to be done when they have power to prevent it by using proper precaution, and have reason to apprehend that passengers may be injured thereby, fail to exercise the care which the law demands as a duty of every carrier company that contracts for the safe carriage of passengers. It is manifestly a want of ordinary care to fail to apply brakes to a moving train when the discharge of so simple a duty will avert all danger to passengers that might result from a collision of cars and the omission to perform it may subject them to peril. If the injury which the plaintiff sustained might have been averted by applying the brakes, and was a natural and probable consequence of the omission to do so, the law imputes it to the carelessness of the company whose servant neglected to perform that duty (Pollock on Torts, star p. 463), and holds the lessor company answerable to the same extent as though the lease had never been made. The jury must have found, under the instructions of the court, that the injury was due to a violent, unnecessary and unexpected collision, caused by the failure to apply the brakes. It was the duty of the plaintiff to provide (1045) by proper care against such shock as was the natural and probable consequence of coupling the cars with care, but the law did not require him to rush into the very first seat he reached, instead of one a little further back, on the opposite side, even though he knew that the train was about to be coupled, nor did it hold him culpable for failing to see that the coupling was about to be effected, when he might have seen it by looking up the road as he embarked on the train. He had a right to assume, and to act on the assumption, that the servants of the company would discharge their duty. *Russell v. Monroe*, 116 N. C., 720. Although he had rheumatism in his lower limbs, he was not negligent in holding with one hand by the back of the seat which he selected till his little child, nine years old, could pass ahead of him, for fear that the unusually rapid running of the engineer or the failure to apply brakes would cause an unnecessarily violent shock. Persons who are old or decrepit are not more culpable for failure to provide against the carelessness of those whose duty it is to provide

for their safety than those who are vigorous and active. All alike may act on the assumption that the servants of a railroad company, whose occupation binds them to a high degree of diligence, will exercise at least ordinary care in looking after the safety of those whom the law places under their protection. It was not error to refuse to instruct the jury that the plaintiff was negligent in carrying in his arms or under his arms two bundles, one of which was, according to the description of a witness, about as large as a hat, and another a little smaller. Though there was conflicting evidence from some of defendant's witnesses, there was abundant testimony, if believed, to warrant the jury in finding that the cars came against each other violently, with such force as to cause a crash and to send the
(1046) passenger car half-way across the street, or ten or fifteen feet.

There was testimony tending to show that an old negro man who was sitting on a seat, with his hands resting on the back of the seat in front of him, was thrown by the collision against the front seat in such a way as to make his nose bleed. Though the testimony was conflicting, the jury must have believed that the servants of the company failed to control the train, and carelessly, because unnecessarily, permitted the cars to come together with unusual and unexpected violence. Under such circumstances railroad companies cannot escape responsibility by showing that an infirm person failed to settle down in the first seat reached, or encumbered himself with bundles or the care of children, so as to impede his movements.

Whether the plaintiff bought his ticket before or after the accident, it is not denied that he got upon the car for the purpose of taking passage on it, and that he did pay his fare subsequently. He was, therefore, in any aspect of the evidence, a passenger. See authorities cited in *Daniel v. R. R.*, 117 N. C., 592. The plaintiff boarded the train while other passengers were getting on, and at a place where the company was accustomed to receive them, and had a right to receive them. *Browne v. R. R.*, 108 N. C., 34. There was no complaint that the question whether the plaintiff was warned to wait till the car should be drawn up in front of the station was not properly left to the jury on the last trial. A careful review of the whole statement shows that there was no error, and the judgment is therefore

Affirmed.

Cited: Ellerbe v. R. R., ante, 1027; *Nathan v. R. R., post,* 1069; *Little v. R. R., post,* 1078; *Russell v. R. R., post,* 1109; *Purcell v. R. R.*, 119 N. C., 737; *Williams v. R. R., ib.*, 750; *Little v. R. R., ib.*, 778; *Johnson v. R. R.*, 122 N. C., 958; *Benton v. R. R., ib.*, 1009; *Ward v. Mfg. Co.*, 123 N. C., 252; *Pierce v. R. R.*, 124 N. C., 93; *Printing*

Co. v. Raleigh, 126 N. C., 522; *Perry v. R. R.,* 129 N. C., 335; *Harden v. R. R., ib.,* 359; *Brown v. R. R.,* 131 N. C., 458; *Denny v. R. R.,* 132 N. C., 343; *Marks v. Cotton Mills,* 135 N. C., 289; *Graves v. R. R.,* 136 N. C., 4; *Carleton v. R. R.,* 143 N. C., 47; *Miller v. R. R., ib.,* 122; *Peterson v. R. R., ib.,* 266; *Taylor v. Security Co.,* 145 N. C., 396; *Suttle v. R. R.,* 150 N. C., 673; *Bullock v. R. R.,* 152 N. C., 67; *Kearney v. R. R.,* 158 N. C., 527; *Thorp v. Traction Co.,* 159 N. C., 36; *Thomas v. R. R.,* 173 N. C., 495.

(1047)

GEORGE W. HINSHAW v. RALEIGH & AUGUSTA AIR LINE RAILROAD COMPANY

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—PASSENGER OBEYING CONDUCTOR—WHEN NEGLIGENCE IS PURE QUESTION OF LAW, AND WHEN NOT—RULE OF THE "PRUDENT MAN"—ERRORS CURED BY VERDICT.

1. A passenger who gets off a railroad car, in obedience to directions from the conductor, is not guilty of contributory negligence unless the danger in getting off at that place and time is so apparent as to deter a man of ordinary prudence from so doing.

2. The fact that a passenger who was injured by getting off a car, in obedience to directions from the conductor, "thought it a bad place and dangerous to get out at," does not render him guilty of contributory negligence, *per se.*

3. To constitute contributory negligence in a passenger, after having been told by the conductor of a train to get off, the danger attendant upon his obedience to such directions must be not only apparent, but *great*—more chances against a safe exit than there are in favor of it.

4. While negligence and contributory negligence are questions of law to be determined by the court without a submission to the jury, yet this is not always to be done. If there is no disputed fact arising from the evidence and no dispute as to the truth of the evidence, and but one conclusion can be deduced from it, then the court should decide the question as upon demurrer, special verdict or case agreed; but where these conditions do not exist, or it depends upon *how* a party acted or did a thing, or for what reason he did it, or for what purpose he had in doing it, a question for the jury is presented.

5. The expressions in *Emry v. R. R.,* 109 N. C., 589, and in other recent opinions of this Court, at variance with the rule of "the prudent man," are overruled.

6. Where a case arises which the judge should decide upon the evidence without submitting it to the jury, but he does submit it to the jury, and their verdict accords with what the judge should have decided, the verdict cures the error.

ACTION tried before *Brown, J.,* at December Term, 1895, (1048) of FORSYTH.

There was a verdict and judgment for $6,000 in favor of plaintiff. Defendant appealed.

The facts are sufficiently set out in the opinion of *Judge Furches.*

Watson & Buxton and Glenn & Manly for plaintiff.

McRae & Day and James B. Batchelor for defendant.

FURCHES, J. The plaintiff was a passenger on defendant's road from Pittsboro to Raleigh, and it was necessary to change cars at Moncure. On the approach to Moncure the car, in which the plaintiff was, stopped on a curved embankment, about three hundred yards from the platform at the station. Here the conductor told the passengers to get off, which they did, at the rear end of the car, the other passengers going in advance of plaintiff. It was about six feet from the bottom of the ditch on the side of the road to the top of the embankment, and two or three feet from the top of the embankment to the platform of the car. The embankment was a little wider than the cross-ties were long, and the car, being on a curve, caused one side of the platform of the car to be a little higher than the other. The plaintiff then weighed about two hundred and thirty pounds, had a small valise in his hand, and as he went to leave the platform of the car he took hold of the guard with his right hand and stepped on the top step, which sprang, and he fell, his hold on the guard broke, and he went to the bottom of the ditch, and received the injury of which he complains. Plaintiff saw the Raleigh train at the station when the train he was in stopped.

(1049) On cross-examination the plaintiff was asked, "Why did you get out then?" Answer: "Because the conductor told me to get out there; otherwise I would have had to stay in the car all day. I had to do one or the other." He was then asked, "Would you obey the conductor if he told you to jump out and kill yourself or risk seriously hurting yourself?" Answer: "I would not if I thought I was going to kill myself or seriously hurt myself." Again plaintiff was asked, "Why did you then get out, if you thought it was dangerous?" Answer: "I had to get out, as the conductor directed me to do, or to remain in the car and miss the Raleigh train, then at Moncure depot. I saw Judge Bryan, Mr. London, Judge Womack and others get off ahead of me at the same place. I put on my overcoat and followed. I did not see or hear anyone else fall."

The following issues were submitted, without objection:

1. "Was the plaintiff injured by the negligence of defendant?" Answer: "Yes."

2. "Did plaintiff, by his own negligence, contribute to his injury?" Answer: "No."

3. "What damage has plaintiff sustained by the negligence of defendant, if any?" Answer: "Six thousand dollars."

Without copying the seventeen prayers for special instructions, we will state the parts of them sufficient to present the questions raised by the assignments of error contained in the case on appeal. The assignments of error are as follows:

1. "For refusal of the court to charge the jury that upon the plaintiff's own testimony there was contributory negligence.

2. "Failure to give the prayers of defendant relating to the second issue.

3. "Errors in the charge of the court, hereinbefore speci- (1050) fied and duly excepted to."

The defendant's prayers for instructions are as follows:

1. "That, when the facts are proved or admitted, then the question of negligence is a question of law for the court.

2. "When the facts are not admitted, and the evidence is conflicting, then it must be left to the jury with proper instructions from the court.

3. "That the evidence of plaintiff shows that he saw and knew the danger which he incurred by getting off the train at the place mentioned by him, and the plaintiff having voluntarily placed himself in a position of danger, he cannot recover in this action.

4. "That the evidence of plaintiff shows that he was negligent and that his negligence contributed to his injury, and he cannot recover."

The court did not give these instructions in the form in which they were asked, but instructed the jury as follows:

"If the car stopped at the place where Hinshaw said it was, and the conductor told the passengers to get off, and the danger in alighting from the car at that place was so obvious that a man of ordinary prudence and caution would not have attempted to get off there, then it was contributory negligence; and if you draw that conclusion from the evidence, you will answer the second issue 'Yes.' If the danger was not so obvious and apparent as to deter a man of ordinary prudence, then it is not contributory negligence, and you will answer the second issue 'No.'" Defendant excepted.

Again the court charged: "It was the duty of plaintiff to use ordinary care and caution to avoid danger and prevent injury to himself, especially as he testified he saw it was dangerous;
and if by ordinary care he could, after seeing danger, have (1051) avoided it, he should have done so; and if under such circumstances he failed to exercise ordinary care, it is contributory negligence; and if you draw that conclusion from the evidence, you should

answer the second issue 'Yes.' " Defendant excepted, and contends that the charge as given did not give the special prayers, in substance, and is erroneous.

It will be perceived that the exceptions and assignments of error raise no question as to the correctness of the charge and the finding of the jury that the plaintiff's injury was caused by the negligence of the defendant. But the contention is that there is error in the instructions upon the contributory negligence of the plaintiff; that the only evidence as to contributory negligence is that contained in the cross-examination of plaintiff, quoted above. Defendant contended that this made it a question of law and the court erred in not so charging, and, of course, in not charging that it was contributory negligence for the plaintiff to leave the car when he did, as he admitted that "he thought it a bad place and dangerous to get out at"; that the court erred in leaving the question of contributory negligence to the jury and the jury had returned an erroneous verdict.

The question as to whether negligence and contributory negligence are questions of law to be decided by the court, or questions of law and fact to be submitted to the jury under proper instructions from the court, has been so thoroughly discussed by this Court in recent decisions it would seem that a lengthy consideration of the subject in this opinion would not be necessary. It seems to be settled by the adjudications in this State that negligence and contributory negligence are questions of law, and in some cases should be decided by the judge. And we are of the opinion that this is one of the (1052) cases where the judge might have done so. The defendant offered no evidence of contributory negligence, except that contained in the cross-examination of plaintiff. And the only thing relied upon by the learned counsel for defendant, in the argument here, is the statement of plaintiff "that he thought it a bad place and dangerous to get out at." In our opinion, this does not constitute contributory negligence, under the circumstances in this case. The car had stopped; the plaintiff's train to Raleigh was then standing at the station, three hundred yards off; the plaintiff was to get off there, or be left; the conductor told him to get off, and he saw other passengers getting off at the place he attempted to get off. What was he to do—remain in the car and miss his connection with the train to Raleigh, or to obey the conductor and take his chances of getting off without damage? The plaintiff thought "it a bad place and dangerous to get out at." But how dangerous? It may be said with truth that there is some danger in getting off the cars at any place. This danger, when the defendant is in no fault, the passenger takes upon himself. Here it is admitted, or found as a fact and not appealed

from, that the defendant was in fault and plaintiff was injured by its negligence. And it is admitted that the danger was greater than it would have been if the defendant had not been in fault and had pulled its car up to the platform at Moncure. But it is not admitted that plaintiff's undertaking to get off defendant's car, under the circumstances in this case, constituted contributory negligence.

There are degrees of danger—slight, great and imminent. To constitute contributory negligence in the plaintiff, after having been told by the conductor to get off, the danger must be not only apparent, but great—more chances against a safe exit than there are in favor of it.

In *Lambeth v. R. R.*, 66 N. C., 494, the plaintiff's intes-
tate was killed by jumping off defendant's train while mov- (1053)
ing at the rate of from two to four miles an hour. And the question was whether this was contributory negligence, which the court answered as follows: "Ordinary care in this case is that degree of care which may have been reasonably expected from a sensible person in the situation of the intestate. He had a right to expect that defendant had employed a skillful and prudent conductor, who would not expose passengers to dangerous risks, and who had experience and knowledge in his business sufficient to correctly advise and direct passengers as to the proper time and manner of alighting safely from the train. * * * If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover. If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under instructions of the manager of this train, then the resulting injury was not caused by contributory negligence or a want of ordinary care." This case was decided by this Court a quarter of a century ago, in which a rule so just and so reasonable is declared that we have no hesitation in applying it to the case now under consideration, and it fully sustains the position that plaintiff was not guilty of contributory negligence. *Watkins v. R. R.*, 116 N. C., 961, and *Burgin v. R. R.*, 115 N. C., 673, are to the same effect.

While we hold that negligence and contributory negligence are questions of law which may be determined by the court, without a submission to the jury in some cases, we must not be understood as holding that this should always be done. What is a contract is a question of law for the court. But if the contract is disputed, this makes a question of fact for the jury. If the execution of the
contract is not denied, but fraud, incapacity or duress are (1054)
alleged and denied, the case must go to the jury. And so

with negligence or contributory negligence. If there is no disputed fact arising from the evidence, and no dispute as to the truth of the evidence, and but one conclusion or inference can be deduced from it then the court should decide the question as upon demurrer, special verdict or as upon an agreed case. But where it depends upon *how* a party acted or did a thing, or for what reason he did it, or what purpose he had in doing it, a question for the jury is presented. To illustrate: Suppose the conductor in this case had not told the plaintiff to get off (for that is the point upon which the case is made to turn); the plaintiff had undertaken to get off, and in doing so got hurt, and the defendant had contended that the plaintiff did not act prudently in doing so; that he went too fast; that he threw his weight too heavily on the upper step, which caused it to spring, and the injury was caused by the imprudence or negligence of plaintiff in this way—the evidence being undisputed—would it be the duty of the court to find these *facts* or conclusions resulting from the facts? We think not; and yet negligence and contributory negligence are questions of law, whether the case is submitted to the jury or not. It does not change the question of law that the case is submitted to the jury. It is as much the duty of the court to decide and instruct the jury as to what the law is as it is his duty to decide the law when it is not submitted to the jury. The province of the judge and of the jury are distinct: the judge is to declare the law and the jury are to find the facts, the inferences and conclusions arising from the facts, where inferences and intentions are necessary to be found, and to apply them to the law as declared by the judge.

Negligence is the opposite of prudence; they and many (1055) other words can only be understood by comparison and contrast, like height and size. You say a man is tall, and you mean by this that he is taller than men generally are. You say a man is large, and you mean that he is larger than the average man. So when you say a man is negligent, you mean that he is not as prudent as men generally are. When you speak of a negligent act of a party, you compare that act in your mind with what a prudent man would have done under the same or similar circumstances. So a court or jury, in passing on the question of prudence or negligence, has necessarily to compare the act or conduct with that of the ideal prudent man. Shearman and Red. on Neg., sec. 519. We do not mean to say that there are not cases where the negligence is so apparent that it is the duty of the court to pronounce it negligence, as it is the duty of the court in many instances to pronounce a transaction fraudulent. But still the law of negligence is based upon the law of comparison.

If the doctrine of negligence is based on the idea of comparison

why should it be improper for the court to give this rule to the jury by which they may determine the question of fact, as well as of law, whether the party has been guilty of negligence or not? This was the practice at *nisi prius* for many years and until recently.

There are expressions to be found in *Emry v. R. R.*, 109 N. C., 586, and in other recent opinions of this Court which are not in harmony with the views here expressed. But it is more a rule of practice than of law, or, at least, it is not a rule affecting property rights. And we think these recent expressions as to this rule are at variance with earlier opinions, the text writers and adjudications of many of the other States of the Union, and such opinions as are in conflict with this opinion are overruled. Therefore we conclude that if this was a case which should have been submitted to the jury, there (1056) was no error committed by the court in the instructions given, and none in refusing to give those asked for. And if it is a case the judge should have decided without submitting it to a jury, he should have decided it as the jury did, and the verdict cures the error, if there was any. *Vincent v. Corbin*, 85 N. C., 108; *Thornburgh v. Mastin*, 93 N. C., 258; *Glenn v. R. R.*, 63 N. C., 510. The judgment must be

Affirmed.

Cited: Ridley v. R. R., ante, 1006; *Willis v. New Bern, ante*, 138; *Styles v. R. R., post*, 1090; *Russell v. R. R., post* 1111; *Sheldon v. Ashe*, 119 N. C., 610; *McCracken v. Smathers, ib.*, 620; *Little v. R. R., ib.*, 778; *Turner v. Lumber Co., ib.*, 400; *Hodges v. R. R.*, 120 N. C., 556; *White v. R. R.*, 121 N. C., 488; *Commission Co. v. Porter*, 122 N. C., 698; *Mfg. Co. v. R. R., ib.*, 887; *Johnson v. R. R., ib.*, 958; *Rickert v. R. R.*, 123 N. C., 258; *Morrison v. R. R., ib.*, 418; *Asbury v. R. R.*, 125 N. C., 576; *Neal v. R. R.*, 126 N. C., 641; *Bryan v. R. R.*, 128 N. C., 394; *McDougald v. Lumberton*, 129 N. C., 202; *Allison v. R. R., ib.*, 341; *Thomas v. R. R., ib.*, 395; *Cogdell v. R. R., ib.*, 400; *Coley v. R. R., ib.*, 411; *Orr v. Telephone Co.*, 132 N. C., 694; *Whitson v. Wrenn*, 134 N. C., 90; *Morrow v. R. R., ib.*, 99; *Graves v. R. R.*, 136 N. C., 10; *Extinguisher Co. v. R. R.*, 137 N. C., 284; *Holland v. R. R., ib.*, 371; *Brewster v. Elizabeth City, ib.*, 394; *Ruffin v. R. R.*, 142 N. C., 127; *Hairston v. Leather Co.*, 143 N. C., 520; *Dortch v. R. R.*, 148 N. C., 580; *Morarity v. Traction Co.*, 154 N. C., 590; *Fulghum v. R. R.*, 158 N. C., 558; *Woodie v. Wilkesboro*, 159 N. C., 356; *Thompson v. Construction Co.*, 160 N. C., 392; *Carter v. R. R.*, 165 N. C., 252; *Tate v. Mirror Co., ib.*, 284.

CALVIN WOOD v. SOUTHERN RAILWAY COMPANY

CASE ON APPEAL—CERTIORARI—LIMITING CARRIER'S LIABILITY—WAIVER OF CONDITIONS IN A CONTRACT—THE CODE, SEC. 412 (2).

1. A case on appeal which states the usual formal parts, and adds, "Here the clerk will copy the evidence," or "judge's notes," is sufficient, although it is a better practice to make out a case with more care, and to set out the evidence more fully than the judge's notes, taken in the hurry of a trial, usually do.

2. The Code, sec. 412 (2), requires the judge, where there is an appeal, to file his notes of the evidence, or so much thereof as shall be necessary to present the exceptions of the appellant.

3. A case on appeal, after stating the formal parts, added, "Here the clerk will copy the *judge's notes.*" The copy of the case served on appellee changed this to "Here the clerk will copy the *evidence.*" This variance held immaterial.

4. Where a *certiorari* is moved for, upon suggestions of a diminution of the record, and it sufficiently appears to the court that the matter which would be certified in obedience to the writ is already substantially before the court, the writ will be denied.

5. A common carrier may limit his liability as such by reasonable stipulations in a special contract made upon sufficient consideration; but as such limitations are restrictions upon common-law rights, they are not favored by the law, and must be reasonable to be valid.

6. A stipulation may be part of a contract, but not a part of the obligation of the contract.

7. A condition precedent, in a contract of carriage or bill of lading, to the effect that a shipper must give *written* notice of any claim for damages to the carrier's agent before removing the freight from place of destination is waived by such agent's assurance to the shipper that he need not sue the carrier, as he would be paid for the damages he claimed and of which he had given oral notice to such agent.

8. While a stipulation in a bill of lading, to the effect that a shipper shall give written notice of damages claimed before removing freight, is reasonable, and it is best that such stipulations should be always literally complied with, still the want of a liberal compliance will not defeat the shipper's claim for damages in all cases, but the courts will look to see if in the case before it there has been a substantial compliance with or waiver of the stipulation, and whether the carrier has in fact been put to a disadvantage by the shipper's failure to strictly comply with the stipulation.

(1057) ACTION brought by the plaintiff, Calvin Wood, against the defendant, the Southern Railway Company, for the recovery of damages for alleged injuries to certain live stock, viz., eighty-seven head of yearling cattle, while being transported in its care from

Marion, N. C., to Culpeper, Va., tried before *Bryan, J.*, at Fall Term, 1895, of MITCHELL.

The cattle were shipped under a special contract or bill of lading, which, among other things, contained the following (1058) clauses:

"That whereas the Southern Railway Company and connecting lines transport live stock only at certain tariff rates, except when in consideration of a reduced rate the owner and shipper assume certain risks specified below: now, in consideration of said railroads agreeing to transport the above-described live stock at the reduced rate of $75 per car load, 20,000 pounds, to Culpeper, Va., and a free passage to the owner or his agent on the train with the stock (if shipped in carload quantities), the said owner and shipper does hereby assume and release the said railroad from all injuries, loss and damage or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak or escaping, or injuring itself or themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, and from all other damages incident to railroad transportation which shall not have been caused by the fraud or gross negligence of the railroad companies. And it is further agreed that, as a condition precedent to the right of the owner and shipper to recover any damages for any loss or injury to said live stock, he will give notice, in writing, of his claim therefor to the agent of the railroad company actually delivering said stock to him, whether at the point of destination or at any intermediate point where the same may be actually delivered, before said stock is removed from the place of destination above mentioned or from the place of delivery of the same, and before said stock is intermingled with other stock."

The plaintiff was examined as a witness on his own behalf, and testified that he shipped cattle by the defendant railroad, about 6 February, 1895, from Marion, N. C., to Culpeper, Va., and they should have reached their destination within twenty-four (1059) hours from time of shipment; that upon reaching Culpeper some of the cattle were dead from starvation, exposure and confinement, and the rest in bad condition. When the cattle arrived at Culpeper the plaintiff gave oral notice to the defendant's agent, who was the person named in the bill of lading as the proper agent to be notified of a claim for damages. This oral notice was given at the time the cattle were delivered to plaintiff by the defendant's agent. At the time of the notice the defendant's agent told plaintiff not to sue defendant, and insisted that plaintiff could get his damages from defendant without a suit. Plaintiff also testified as to the amount of damage or loss he sustained. The plaintiff then offered in evidence

the contract and bill of lading and bill of expenses, and rested his case.

His Honor, *Judge Bryan,* intimated that the plaintiff was not entitled to recover upon his own showing, the proof failing to show that plaintiff had given notice in writing, as provided in said contract.

The plaintiff insisted that the conduct and declarations of the defendant's agent at Culpeper, to the effect "that the defendant company would pay the damages without suit against the company," relieved the plaintiff from the obligation resting upon him to serve the notice stipulated for in the contract. The plaintiff further insisted that the evidence showed such gross negligence upon the part of the defendant that it could not by contract provide against it.

(1060) His Honor still intimating that the plaintiff could not recover, the plaintiff submitted to a nonsuit and appealed.

Battle & Mordecai for plaintiff.
G. F. Bason and A. B. Andrews, Jr., for defendant.

FURCHES, J. There has not been that care in preparing this case on appeal that there should have been. And the first matter we are troubled with is an objection to the record and an application for a writ of *certiorari.* The case served on defendant was very short, consisting of that part of the case embraced in the first paragraph of the case, down to the words "judge's notes." The copy prepared by appellant and served on appellee did not contain this expression ("judge's notes"), but instead contained this, "Here clerk will copy evidence."

The only evidence introduced was the written contract, or bill of lading, and the testimony of the plaintiff, Calvin Wood; and the only means the clerk had of knowing what Calvin Wood's evidence was was the judge's notes, taken on the trial and filed with the clerk.

It was admitted by defendant that if plaintiff's case on appeal had said "The clerk will copy the judge's notes of Calvin Wood's evidence," that would have been sufficient.

The Code, sec. 412 (2), requires the judge, in case of appeal, to file his notes of the evidence, or so much thereof as shall be necessary to present the exception; and this being a submission to a nonsuit, upon an intimation of the court that plaintiff was not entitled to recover, upon all the evidence, it was necessary that the court should file with the clerk all the notes of evidence taken before him, which it seems he did. It was not contended that the judge's notes

(1061) were improperly or incorrectly copied, if it was proper to copy them at all; nor was it claimed that there was any other

evidence or notes of evidence introduced on the trial, except what appeared in the transcript of record, as made out and certified to this Court. This being so, there was no purpose to be served by a *certiorari.* If it issued, there was nothing for it to bring back, except what is already here. So the motion for a *certiorari* is denied, and the question is whether the case, as made out and served on defendant, is sufficient to authorize the clerk to copy the judge's notes of the evidence as a part of the case on appeal. And we are of the opinion it was. There is no substantial difference, that we can see, between saying "The clerk will here copy the evidence of Calvin Wood" and saying that "Here the clerk will copy the judge's notes of the evidence of Calvin Wood," when the law had required these notes to be filed for the benefit of the appellant, and there was no other record of this evidence. It is true, as we have said, it would have been better if the case had been made out with more care and the evidence set out more fully than the judge's notes, taken in the hurry of the trial, show it to be; and this neglect has probably produced, to some extent, the trouble we have had in considering this appeal. But be this as it may, we consider it our duty to treat this evidence as a part of the case on appeal, and to determine upon the record, as certified to us, whether the plaintiff is entitled to a new trial or not.

This brings us to a consideration of the case upon its merits; and the only point really presented for our consideration is as to whether what was said by the plaintiff to the agent of the defendant at Culpeper, and what the agent said to him in reply, was a sufficient compliance with the requirements of the contract, as to notice of plaintiff's claim, and a waiver of a strict compliance with the requirements of the contract. The bill of lading—the contract (1062)—provides as a condition precedent that "he (plaintiff) will give notice, in writing, of his claim for damages to the agent of the railroad company actually delivering said stock to him * * * before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same, and before said stock is intermingled with other stock." There was no notice, *in writing,* served on the agent of plaintiff's claim. But plaintiff testified that "I told cattle agent at Culpeper I should have to sue the company. He said I need not do that, and insisted that I could get my money without it." With this evidence the plaintiff closed his case, and the court "intimated that plaintiff was not entitled to recover, upon his own showing, the proof failing to show that plaintiff had given the notice *in writing,* as provided in said contract." The plaintiff further insisted "that the evidence showed such gross negligence upon the part of the defendant that is could not by contract provide against

it." "His Honor still intimating that plaintiff could not recover, plaintiff submitted to a nonsuit and appealed."

This presents the question for our consideration, whether the notice the plaintiff gave the agent at Culpeper, and what the agent said to him in reply, relieved the plaintiff from that stipulation in the contract that the notice must be made *in writing*. As it was not contended in this Court but what the evidence of the plaintiff, incontradicted and unexplained, made a case against the defendant of gross negligence, unless the defendant is protected from liability for this negligence by the failure of plaintiff to put his demand *in writing*, the plaintiff was entitled to recover, "upon his own showing."
(1063) And the court put its ruling and judgment expressly upon this point—that the notice was *not in writing*.

A common carrier cannot relieve itself from liability for gross negligence by contracting that it shall not be liable for such negligence. Such contract would be against public policy and void. Lawson Contract of Carriers, 50, 51, and *Lee v. R. R.*, 72 N. C., 236. But such carrier may limit his liability by special contract, made upon a sufficient consideration. Lawson, *supra*. It is held to be a reasonable stipulation, in a contract for the transportation of cattle, to require a demand in writing for damages upon delivery at the place of destination, before the cattle are removed. *Selby v. R. R.*, 113 N. C., 588. It would be best that there should always be a literal compliance with this and all such stipulations in contracts. But it is not always that the law will relieve a contracting party from liability because the other party has *not literally* complied with some stipulation in the contract, but will look for the reason of this stipulation to see whether it has been substantially complied with or waived by the other party, and whether the plaintiff is likely to be benefited and the defendant damaged by reason of a failure on the part of plaintiff literally to comply with the stipulation and to give the notice in writing. Such stipulations contained in a contract are a part of the contract, but they do not contain any part of the obligation of the contract. They are conditions in the nature of estoppels, and when enforced operate to prevent the enforcement of the obligations of the contracts. Such restrictions, when reasonable, will be sustained; but as they are restrictions of common-law rights and common-law obligations of common carriers, they are not favored by the law. Lawson, *supra*, 114, 115.

The object of such provisions in contracts like this is that
(1064) the defendant may have notice of the shipper's claim for damage in time to investigate the matter before the cattle are carried off and scattered, so that it cannot do so, or cannot do so with the same facility and satisfaction that he could at the place of de-

livery. Lawson, *supra,* 149. Verbal notice gives the defendant the same opportunity to make the necessary investigation that a written notice would. There is no statute requiring such contracts to be in writing, and the only benefit it can be to the defendant or the plaintiff to have it in writing is to more effectually preserve the evidence of the notice. But that reason does not exist here, as it is not denied that plaintiff gave the agent of defendant, at Culpeper, who was the person named in the contract as the party to be notified, verbal notice of his claim at the time of delivery of the cattle; and this agent told plaintiff not to sue the defendant, and insisted that plaintiff could get his money without suit. This seems to have been a waiver of the requirement that notice should be *in writing. Roberson v. Kirby,* 52 N. C., 477.

A party purchased a ticket from Wilmington, N. C., to Old Point, Va., and return, with a written condition that it should only be a good return ticket upon its being stamped by defendant's agent at Old Point. The purchaser did not go to Old Point, but presented the ticket to defendant's agent at Norfolk, explained the matter to him, and he stamped it. In an action for damages by the holder of the ticket, alleging that defendant refused to receive this ticket in payment of fare, this Court held that the action of defendant's agent at Norfolk was a waiver of the stipulation that it should be done by the agent at Old Point. *Taylor v. R. R.,* 99 N. C., 185.

Where a policy of insurance provided that no other policy should be taken upon the property insured without notice to that company and its consent endorsed thereon, and made a viola- (1065) tion of this stipulation a forfeiture of the policy, and the insured afterwards took out another policy with the knowledge and consent of defendant's agent, who procured the first policy to be taken, but without notifying the defendant and getting its consent *endorsed,* as required by the first policy, this Court held that the action of the agent was a waiver of this requirement of notice to defendant and its endorsement (*Grubbs v. Ins. Co.,* 110 N. C., 108); or, at least, it was sufficient evidence of waiver to entitle the plaintiff to have the question submitted to the jury. *Ib.; Hornthal v. Ins. Co.,* 80 N. C., 71; *McCraw v. Ins. Co.,* 78 N. C., 149.

A party shipped cattle under a written contract, with a stipulation that the shipper should not be entitled to damages unless he gave *written* notice to defendant's agent who delivered the cattle to plaintiff at or before the delivery. The cattle reached their destination late at night, when plaintiff notified the agent *verbally* that he would not receive them except under protest, and that he claimed damages, when the agent made no objection to the form of the demand, but as-

sured him that it was not necessary to go to the company's office that night. From that time he gave his attention to the stock, and with the agent's consent the stock was that night removed to plaintiff's farm, several miles in the country, and three days after he gave notice in writing. This was held to be a waiver of the requirement that the notice should be in writing. Lawson, *supra,* 150.

Therefore, upon reason and the authorities cited, we are of the opinion there is error, and that plaintiff is entitled to have the nonsuit set aside, the case restored to the docket, and a

New Trial.

Cited: Hinkle v. R. R., 126 N. C., 940; *Mfg. Co. v. R. R.,* 128 N. C., 283; *Bank v. Deposit Co., ib.,* 373; *Thomas v. R. R.,* 131 N. C., 591; *Parker v. R. R.,* 133 N. C., 341; *Austin v. R. R.,* 151 N. C., 139; *Kime v. R. R.,* 153 N. C., 400; *Phillips v. R. R.,* 172 N. C., 89.

(1066)

H. M. NATHAN v. CHARLOTTE STREET RAILWAY COMPANY

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—ISSUES—NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE—PARTIAL NEW TRIAL.

1. Where the question of negligence, contributory negligence, and whether injury might have been avoided, notwithstanding the contributory negligence of the person injured, all arise, it is proper to submit three distinct issues involving these propositions separately; and where the evidence justifies it, and plaintiff requests that the issues be thus submitted, it is error to refuse to do so.

2. While it is competent for the Supreme Court to direct a new trial as to some issues, leaving the verdict to stand as to others, where in the exercise of a sound discretion, such a course is deemed proper, and it seems that the judge at *nisi prius* may pursue a similar course, still a party cannot, as a matter of right, enter a motion for a new trial on only part of the verdict. Such a motion will be considered as a motion for a new trial of the whole case, with an appeal to the discretion of the judge to leave the verdict undisturbed as to some of the issues.

3. The granting or refusal of a motion for a new trial for newly discovered evidence, made in the Supreme Court, is a matter of discretion for which the Court will give no reason.

ACTION tried before *Timberlake, J.,* at October Term, 1895, of MECKLENBURG.

The action was originally brought against the said Charlotte Street Railway Company and the Charlotte Consolidated Construction Company, but at the close of the evidence the plaintiff entered a *nol. pros.* as to the last-named defendant.

The plaintiff tendered the following issues:

1. "Was the plaintiff, Nathan, injured by the negligence of the Charlotte Street Railway Company?

2. "Did the plaintiff, Nathan, by his own negligence, con- (1067) tribute to his injury?

3. "Notwithstanding the contributory negligence of the plaintiff, Nathan, might the injury have been avoided by the exercise of reasonable care on the part of the Charlotte Street Railway Company?

4. "What damage has the plaintiff, Nathan, sustained?"

The defendant objected to the submission of the third issue. The objection was overruled, and the defendant excepted. The court thereupon submitted the issues as tendered by the plaintiff and above set forth. The jury responded in the affirmative to the first, second and third issues, and to the fourth issue "Six hundred and fifty dollars."

The defendant moved for judgment upon the verdict, notwithstanding the finding upon the third issue, contending that the third issue was immaterial and not raised or presented by the pleadings. This motion was overruled, and the defendant excepted. The defendant then submitted the following motion, in writing, to-wit:

"The defendant makes the following motion, upon the verdict rendered by the jury:

"1. That the verdict upon the third issue be stricken out, because (first) this issue is not raised by the pleadings; (second) there was no evidence produced on the trial that made it proper to submit this issue to the jury, and, of course, there was no evidence to sustain this finding, except the evidence that tended to sustain the finding upon the first issue. This being true, the finding on the third issue is a mere reiteration of the finding on the first issue, and its effect as to entitling the plaintiff to recover is destroyed by the finding on the second issue.

"2. The defendant further moves for a new trial on the third issue alone, because this issue, if considered as involving facts other than those involved in the first issue, was not raised (1068) by the pleadings, and there was no evidence in the cause which rendered it proper to submit an issue in regard to defendant's negligence, except the first issue."

The defendant expressly restricts his motion to the third issue and to the judgment which should be rendered upon the verdict, and does not except to the finding of the jury upon the first, second and fourth issues.

These motions of the defendant were overruled, and to the ruling on each of them the defendant excepted.

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

Jones & Tillett for plaintiff.
Burwell, Walker & Cansler for defendant.

AVERY, J. Where the testimony raises the question whether there was any negligence on the part of the defendant intervening after the alleged contributory negligence of the plaintiff, it is better to leave out of the first and incorporate only in the third issue (as they are usually drawn) the inquiry whether the plaintiff's negligence was the proximate cause of the injury. This would make the ordinary form of the three issues in such cases as follows:

1. "Was the defendant negligent?

2. "Did the negligence of the plaintiff contribute to cause the injury?

3. "Notwithstanding the negligence of the plaintiff, could the defendant by the exercise of reasonable care have avoided the injury?"

Where the testimony raises the question whether a culpable act of the defendant intervening after the act constituting the alleged contributory negligence was the proximate cause of the in-
(1069) jury, in the sense that it was an omission to discharge a legal duty, the performance of which would have averted it, it would be manifest, if the point had never been passed upon before, that an issue involving that specific inquiry would be one raised by the general allegation that the injury was caused by the defendant's want of reasonable care and the defendant's denial thereof. In contemplation of law, the injury is not attributed to the wrongful act unless it is shown to be the immediate and proximate cause. So that, the allegation by the plaintiff that the injury was due to the defendant's carelessness, and the denial of that, coupled with the averment by defendant that the contributory negligence of the plaintiff was the cause, necessarily involves the question whether the defendant negligently omitted to avail itself of the last clear chance to avoid the accident by the performance of a legal duty. But in *Baker v. R. R., ante,* 1015, it was held not only that the court might submit such an issue under pleadings like those in the case at bar, but that if the plaintiff could show that the refusal of the court to submit it the court deprived him of the opportunity to present some view of the law arising out of the evidence to the jury, then it would be no longer discretionary with the judge whether he would permit it to be passed upon, but would become the right of the plaintiff to demand that it should be. In *Tillett v. R. R., ante,* 1031, it was held to be within the sound discre-

tion of the court to submit or refuse a specific issue involving the question whether the plaintiff was a passenger, because "the plaintiff's right to board the train must necessarily be shown in order to make out a *prima facie* case of negligence." Prior to that time, the power of the court, as a general rule, to determine whether one, two or three issues should be submitted, in cases like that before us, had been repeatedly recognized in a long line of cases. *Pickett* (1070) *v. R. R.*, 117 N. C., 616; *McAdoo v. R. R.*, 105 N. C., 140; *Lay v. R. R.*, 109 N. C., 410; *Denmark v. R. R.*, 107 N. C., 185; *Scott v. R. R.*, 96 N. C., 428. There was no error, therefore, in refusing to strike out that issue.

The defendant "restricts his motion" for a new trial "to the third issue and to the judgment which should be rendered upon the verdict, and does not except to the findings of the jury upon the first, second and fourth issues." While there is abundant testimony to warrant the submission of that issue by the court and, if believed, the finding of the jury in response to it, it is needless, in view of the peculiar nature of the motion, to collate or discuss it. In *Tillett v. R. R., supra,* the ruling in the same case, when formerly before the Court on appeal (115 N. C., 602), was reaffirmed, and it was held, as in many cases previously decided, to be within the sound discretion of the appellate Court to determine whether a new trial should be restricted to one or more or all of the issues passed upon by the jury. *Holmes v. Godwin,* 69 N. C., 467; *S. c.*, 71 N. C., 309; *Burton v. R. R.*, 84 N. C., 201; *Boing v. R. R.*, 91 N. C., 199; *Lindley v. R. R.*, 88 N. C., 547. In the same way it has been held that the granting or refusal of a new trial by the appellate Court for newly discovered evidence is an exercise of discretion for which the Court will give no reason. *Clark v. Riddle, ante,* 692; *Sledge v. Elliott,* 116 N. C., 712; *Brown v. Mitchell,* 102 N. C., 347.

In *Merony v. McIntyre,* 82 N. C., 105, it was held error in the *nisi prius* judge to grant a partial new trial upon a suggestion that by improper influence the jury had been induced to change their verdict upon one of the issues. The Court there held that while as a general rule the Court might grant a partial new trial upon the inquiry of damages or upon a single issue, where the evidence (1071) bearing upon it is separable from and does not hinge upon that bearing upon the other issues, it was nevertheless always within the sound discretion of the Court, where a new trial was granted, to make it general instead of partial. When, therefore, the defendant's counsel restricted their request to a single issue, they appealed to the discretion of the Court to open the verdict only in part. Fairly interpreted, the motion meant that if the judge concluded that the ends of

justice would be best subserved by granting a new trial upon all of the issues, they did not wish him to interpose. *Non constat* but that the judge would, upon an appeal to his discretion, without attempting to impose a limit to its exercise, have set aside all of the findings. In this view of the matter his ruling must be treated as a refusal to disturb the verdict at all, unless left at liberty to set aside the whole of it. While the trial judge may work out, of his own accord, or even on suggestion of one of the parties, the same result, the appellate Court will never recognize the right of a party to demand, without regard to the views of the Court, that such findings of the jury as are favorable to him shall remain undisturbed, while only another or others which are prejudicial to him shall be reviewed on appeal from the refusal of a motion for a new trial. The motion of counsel must be for a new trial, and while he may suggest or ask that it be partial, he cannot demand it as a right, and by his motion attempt to restrict the action of the Court to one or more issues without forfeiting his right to have the refusal of the motion reviewed. There was no error.

Affirmed.

Cited: Willis v. New Bern, ante, 137; *Russell v. R. R., post,* 1109; *Sondley v. Asheville,* 119 N. C., 609; *Rittenhouse v. R. R.,* 120 N. C., 547; *Herndon v. R. R.,* 121 N. C., 499; *Strother v. R. R.,* 123 N. C., 200; *Benton v. Collins,* 125 N. C., 90; *Hall v. Hall,* 131 N. C., 186; *Turner v. Davis,* 132 N. C., 189; *Hawk v. Lumber Co.,* 149 N. C., 16; *Rushing v. R. R., ib.,* 163; *Burnett v. Mills Co.,* 152 N. C., 41; *Chrisco v. Yow,* 153 N. C., 436.

(1072)

J. F. LITTLE v. CAROLINA CENTRAL RAILROAD COMPANY

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—DUTY OF ENGINEER.

1. While an engineer is required to solve all reasonable doubts in favor of saving life, he is not required to provide against what he has no reasonable ground to anticipate. The legal obligation is to take proper precaution to guard against what is the usual or justly expected consequence of one's acts—not against unexpected, unusual or extraordinary results.

2. One who attempts to walk across an elevated trestle, so high as to make it dangerous to jump to the ground, is negligent, and if injured by a train while crossing, the jury should find that his injuries were the result of his contributory negligence.

3. Where an engineer, seeing a person on a high trestle, reduced the speed of the train, but, upon such person's getting off of the track and into a place which he had seen others occupy with safety while trains passed, the engineer in-

creased the speed of the train, it is error to refuse to call the attention of the jury to the question whether the position occupied by such person had proven a place of safety for others, and whether the engineer desisted from his efforts to stop the train because he reasonably supposed there was no longer any danger of causing an injury.

ACTION tried before *Bryan, J.*, and a jury, at January Term, 1896, of UNION.

The Court submitted the following issues:

1. "Was the plaintiff injured by the negligence of the defendant?

2. "Did the plaintiff contribute to his injury by his own negligence?

3. "Notwithstanding the negligence of the plaintiff, could the defendant have avoided the injury to the plaintiff by the exercise of ordinary care?"

The plaintiff testified, in his own behalf, as follows: "On 19 January, 1894, came to Monroe and walked home on railroad track, one and a half miles this side Beaver Dam. I was going down (1073) track to cross trestle; looked back and saw no train. I could see back three-quarters mile. As I got near middle of trestle saw some hands. I heard them holler and saw them motion their hands. I looked back and saw train coming, about fifty yards from me—may be one hundred yards. I was very near midway. I made for the side, took seat on cap sill, squatted down and put my arms around guard rail. I had not heard it blow; can hear it blow two miles in still weather. It was very still day. Train passed by and struck me on head. It made a wound four inches long; scraped the skull; a little hole up in head. No way to get off unless I jumped off. Trestle forty or fifty feet high. It didn't stop. If it slacked up I could not tell it. It frightened me pretty badly when I saw train coming. I was hurt pretty badly; could walk; had pain in head twelve months constantly; occasionally. It gave me headache every time I rode horseback or did any jarring work. I couldn't hear as well as I did before; could not hear well then."

Cross-examined: "I got on track between rails at Monroe; when I got to the trestle I looked back. I can read; saw printed notice on board notifying persons not to go on trestle. I was scared bad. The place I got on was about one and a half feet from end of cross-ties. I had just time to get on. I think it was front part of train that struck me. It was a short train. If I had thrown my head back I would not have been hit. Not certain about the distance the train was from me when I first saw it. I was facing track; might have been looking towards Monroe. I couldn't work for about two months. I had had headache before. Dr. Ashcraft treated me; he said I could

get a doctor if necessary. I had Drs. Green and Dees. Have
(1074) paid Dr. Dees two dollars; nothing to Dr. Green."

Redirect: "I don't know how much I owe Dr. Green. Ashcraft had nothing to do after I went to Green and Dees. After I squatted it was about one-quarter minute before train struck me. If the train had blown when I could have first seen it I could have got off."

B. M. Medlin, for plaintiff, testified: "Live one-half mile from trestle. It is not under one hundred yards long; between fifty and sixty feet high. I passed it every month; sometimes walked over; at that time no other crossing; many people crossed there; foot log washed away. Cap sill stuck out nearly two feet from track. A man could swing down. Cross-ties six or eight inches apart. A man can be seen on trestle one thousand one hundred and fifty yards. Two signboards—one at each end of trestle. I measured the rails. There are 115 rails, thirty feet each."

Cross-examined: "The signboards are twelve or fifteen feet from end of trestle. One could tell that a person was between the signboards. Have seen train pass when hands at work on trestle. Don't know that I ever saw any of the hands get on cap sill. From cap sill to top of rail about two feet; from end of cross-tie to cap sill eighteen inches or two feet. A man, by squatting down on cap sill, looks like might be safe, but I don't know."

Redirect: "At 1,100 yards I can tell that a boy is on trestle, coming towards me."

J. F. Little recalled: "I was in between the rails when I saw the train."

I. C. Neimyer, in behalf of defendant, testified: "I recollect the occurrence. I was engineer. Three-quarters mile from curve to trestle. I saw somebody on the track; could not tell which part, whether
on trestle or not. Between one-quarter and one-half mile, saw
(1075) a man on trestle; he walked from middle of track on trestle and stepped off on to cap sill. I applied brakes to reduce speed for trestle, which was twenty miles an hour. I saw then that he as out of my way. If I had retained my brake I would have stopped if he had been in my way. I relieved the brake, seeing he was out of my way, which brought me to fifteen or twenty miles per hour. I knew the bridgemen were working on trestle. I pass them almost daily on cap sill. I looked out; had my head out of cab window. Engine did not strike him. I went on. I thought he was one of the men working on the trestle. Men at work on trestle generally get out on cap sill when train passes. They are perfectly safe. I do not know plaintiff. He was looking towards me when I passed. He was between

one-quarter and one-half mile from me when I saw him going to cap sill. I was not required to blow for that trestle. I did not blow."

Cross-examined: "I gave no notice of approaching trestle. I did not think it was necessary to blow. I did not know who the man was. He did not act to me like he was scared. I would have stopped if he had not been out of my way. I was about one hundred yards from trestle when I saw he was on cap sill, out of my way. He was on right hand from me when he got off. If I had known I hit him I would have stopped. I don't know whether it was Little or not."

Redirect: "I told Mr. Moncure that the man was not struck by engine."

MacRae & Day for plaintiff.
F. I. Osborne for defendant.

AVERY, J., after stating the case: It was conceded and settled in *Clark v. R. R.*, 109 N. C., 430, that one who attempts to walk across an elevated trestle, so high that it is dangerous to jump (1076) from it to the ground, is negligent, and that where he is injured by a train while crossing, it is the duty of a jury to find, in response to an issue involving the question, that he contributed by his own carelessness to cause the injury. *Pickett v. R. R.*, 117 N. C., 616; *Baker v. R. R., ante,* 1015. In the case at bar, as in *Clark v. R. R., supra,* the only question presented is whether there was any intervening negligence on the part of the defendant, or, in other words, whether, notwithstanding the admitted carelessness of the plaintiff, the defendant's engineer, after the plaintiff had exposed himself to danger, might have averted the accident by the exercise of ordinary care. The engineer saw the plaintiff on the trestle in time to have stopped the train without peril to those on board and to have avoided the accident. For this reason the court instructed the jury to respond in the affirmative to the third as well as to the second issue.

But the plaintiff testifies that when he looked back and saw the train approaching, he, in obedience to a signal from a railroad hand, moved to one side, sat down upon a cap sill and put his arms around a guard rail. The plaintiff further testified that the passing train struck him in the forehead and inflicted a painful wound, but admitted that if he had held back his head he would have escaped uninjured.

The engineer testified that he saw that the plaintiff was on the trestle when his train was between a quarter and a half mile from him, and on perceiving his situation immediately applied the brakes, and could and would have stopped the train before reaching the point

where plaintiff then was if he had not seen the plaintiff step upon the cap sill. The engineer says that he was running at the rate
(1077) of twenty miles an hour, and by applying the brakes reduced the speed, on seeing that Little was on the trestle, but when the latter took refuge upon the cap sill he relieved the brakes and made no further efforts to stop. The engine passed Little, according to the engineer's account, without injuring him. He was seen by and was looking at the engineer as the engine passed him. As a reason for relieving the brakes when Little was seen to step on the cap sill, the engineer testifies that the train hands were at the time working on the trestle and were in the habit of moving out on the cap sill when a train approached, as they could thereby easily avoid collision. The cap sills projected a foot and a half.

The defendant asked the court to instruct the jury, in substance that if the engineer had seen that others who had taken refuge from passing trains on the cap sills had escaped unhurt, and if, acting upon the reasonable belief that the plaintiff was in a place of safety, he relieved the brakes when he would, but for such belief, have stopped the train before reaching the point on the trestle where the plaintiff was stricken, they should answer the third issue in the negative. There was error in refusing to submit this proposition to the jury. It was the duty of the engineer to stop the train if it appeared to him that the natural and probable consequence of relieving the brakes and allowing the train to continue its course would be injurious to the plaintiff. While an engineer is required, when placed in such a situation as was Neimyer, according to his testimony and that of other witnesses, to resolve all reasonable doubts in favor of saving life (*Clark v. R. R., supra*), that rule does not impose upon him the duty of providing against what he has no reasonable ground to believe would happen.

The legal obligation is to take proper precaution to guard
(1078) against what is the usual or justly expected consequence of one's acts—not against unexpected, unusual or extraordinary results. *Tillett v. R. R., ante,* 1031; *Blue v. R. R.,* 116 N. C., 955; *Emry v. R. R.,* 102 N. C., 209; *Russell v. Monroe,* 116 N. C., 720; *Thompson v. Winston, ante,* 662.

The court ought to have called the attention of the jury to the question whether the cap sill had proven a safe place of refuge for others, and whether the engineer desisted from the effort to stop the train in time to prevent a collision because he entertained the reasonable belief that the plaintiff was no longer in danger. In refusing the instruction that would have presented this view of the evidence there was error, which entitles the defendant to a

New Trial.

Cited: Styles v. R. R., post, 1089; *Purcell v. R. R.,* 119 N. C., 738; *Williams v. R. R., ib.,* 750; *Harris v. R. R.,* 132 N. C., 165.

CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY v. CHESTER AND LENOIR NARROW-GAUGE RAILROAD COMPANY

RAILROAD COMPANIES—LEASED RAILROAD—OPERATION OF—RECEIVERS, LIABILITY OF.

1. While debts due by an insolvent railroad company cannot be offset against debts due to the receivers of such company, debts contracted by receivers are valid counterclaims against debts due to them.

2. The receivers of a lessee railroad company must apply the income and revenue received from the operation of a leased railroad in accordance with the covenants of the lease so long as they operate it, and the claims of the lessor company for rent, accrued while its road was so operated, is a valid setoff against a claim for supplies and materials furnished by such receivers.

APPEAL by the defendant, the Chester and Lenoir Narrow- (1079) gauge Railroad Company, from the order of *Judge J. G. Bynum,* dated July, 1894, and the order made by his Honor, *Judge W. R. Allen,* at chambers, on..... December, 1894, in CATAWBA.

The action was for appointment of a receiver and to cancel a lease and compel the defendant to take back its road. The receivers of the Richmond and Danville Railroad Company intervened with a claim for supplies and materials furnished to the defendant road while it was being operated by said receivers under a lease from the plaintiff company. The defendant interposed as a counterclaim a claim for rent due from the receivers of the Richmond and Danville Railroad Company under the covenants contained in the lease to the plaintiff company. Judgment was rendered for the intervenors, and defendant appealed.

F. H. Busbee for plaintiff.
A. G. Brice and Edmund Jones for defendant.

CLARK, J. It is true that for debts due to receivers of a railroad company debts due by the company cannot be used as a counterclaim. To permit that would much embarrass and in many cases defeat the very object of the receivership, which is to keep the railroad in operation as "a going concern," when otherwise it would (1080) be strangled and its operations brought to an end by the pressure of corporation debts. But against debts due to receivers, debts

contracted by such receivers are a valid counterclaim and set-off. The receivers of the Richmond and Danville Railroad Company operated the line of the defendant corporation for nearly eighteen months after their appointment, and paid the first rental that accrued. The Richmond and Danville receivers, so far as they operated the defendant's property and actually collected and received the income and revenue therefrom, were bound to apply said income and revenue in accordance with the covenants of the lease made by the defendant corporation to the Charleston, Columbia and Augusta Railroad, and which covenants were assumed by the Richmond and Danville Railroad when it leased the Charleston, Columbia and Augusta Railway system. This very point has been thus decided between the same parties by *Simonton, J.*, in the United States Circuit Court (63 Federal, 21). To the same purport is Gluck and Boek Receivers, 272, where it is said: "Receivers taking charge of a leased road will be equitably and legally chargeable with the payment of rent under a lease for such time as they continue to occupy the property demised." The Richmond and Danville receivers cannot recover for the supplies and material furnished the defendant or its receivers without accounting for the earnings from the Chester and Lenoir road which came into their hands, and showing that the earnings had been applied in accordance with the terms of the lease.

The judgment below is set aside and the cause remanded, that the account may be restated, in which case the Richmond and Danville receivers must show that they have applied the earnings from the Chester and Lenoir road, while operated by them, in accordance with the covenants of the lease (marked "Exhibit B"), and that
(1081) their claim, or part of it, is still unpaid, after such application of the earnings; and in the account the receivers must also show that they surrendered the Chester and Lenoir road in as good a condition as they (the receivers) received it, with the same amount of supplies and material on hand, or be chargeable with the deficiency as an offset to their claim against the defendant, unless, of course, the amount of supplies turned over and the condition of the road, if there has been any deterioration in their hands, still equal the quantity of supplies and the condition of the road when the contract of lease was executed by the Richmond and Danville Company. The cause is remanded, that an account may be restated in accordance with this opinion.

Error.

DUFF MERRICK v. INTRAMONTAINE RAILROAD COMPANY

STREET RAILWAYS—USE OF STREETS OF CITY—ADDITIONAL SERVITUDE—RIGHTS OF ABUTTING PROPERTY OWNERS.

1. The construction of a street passenger railway upon the surface of a street does not impose any additional servitude upon property abutting thereon, so as to require the condemnation of the rights of the owners in such property, provided the railway is so constructed as not to shut the abutter out or off with embankments. (*White v. R. R.*, 113 N. C., 610, distinguished.)

2. Street railways, being for the general convenience of the public, an injunction will not be granted against the construction of a street railway on a street at the suit of an abutting property owner, where it does not appear that the plaintiff would be irreparably endamaged or that the defendant is insolvent.

APPLICATION for injunction to restrain defendant from (1082) constructing and operating its railroad on certain parts of Montford Avenue, in Asheville, heard before *Graham, J.*, at chambers, in Asheville, on 3 May, 1895.

A restraining order was issued, and defendant appealed.

J. H. Merrimon for plaintiff.
J. S. Adams for defendant.

FAIRCLOTH, C. J. Upon examination of the record we assume that the city of Asheville is duly incorporated, with the usual municipal powers, and that the defendant is a corporation, with certain powers given by Private Laws 1895, ch. 29.

We also assume from the record that Montford Avenue is a public street, laid out by and under the control of said municipal corporation; also, that the owners of the lots abutting on said avenue have at least proprietary interests in said street. The defendant is authorized by its charter to build a street railway on said avenue by permission of said city of Asheville, which permission has been granted, so far as the city can do so in law.

This is the real question: Can the city authorize the building of a street railway on one of its streets without condemnation or consent of the adjacent lot owners? The plaintiff denies such authority and relies on *White v. R. R.*, 113 N. C., 610, in which it was held that the use of a street for an ordinary steam railroad is not a legitimate use of the street for public purposes, and neither the (1083) Legislature nor city can authorize such a railroad to be con-

structed and operated thereon, against the abutting proprietors' will, without compensation in damages.

The distinction between a steam railroad and a street railway has not been heretofore presented to this Court. The test seems to be, from the best authorities, whether it is a thoroughfare with distant terminus, or is it a mere local convenience within the corporate limits?

"The land taken for streets in cities and boroughs is in the exclusive possession of the municipality, which may use the footways as well as the cartways for any urban servitude without further compensation to the lotowners. Nor does the construction of a street passenger railway upon the surface of the street impose any additional servitude upon the property fronting on the street so occupied." *R. R. v. R. R.*, 167 Pa. St., 70. The other authorities cited and sustaining the above view are: Roads and Streets (Elliott), 558; Cooley Const. Lim., 683; Dillon's Mun. Corp., 868 (4th Ed.); *Kennelly v. Jersey City,* 30 Atlantic, 531; *Limburger v. R. R.*, 30 S. W., 534.

Kennelly's and *Limburger's cases, supra,* apply the principle of horse cars to electric street cars. If the street railway should be so constructed—for instance, if it should shut out or shut off the abutter with embankments, and thus materially impair his rights, this would seem to be an additional burden and subject the company to damages.

The right to an injunction without an allegation of irreparable injury, or of insolvency of the defendant, was not urged, and we will put our decision upon the ground taken by counsel. Street railways being for the general convenience, and it not appearing how (1084) the plaintiff would be damaged, we think the defendant should be allowed to proceed and the restraining order vacated upon the facts now presented.

Reversed.

Cited: Hester v. Traction Co., 138 N. C., 290; *Thomason v. R. R.*, 142 N. C., 331; *Griffin v. R. R.*, 150 N. C., 315; *Butler v. Tobacco Co.*, 152 N. C., 420; *Kirkpatrick v. Traction Co.*, 170 N. C., 478.

L. J. STYLES v. RECEIVERS OF RICHMOND AND DANVILLE RAILROAD COMPANY

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—RULE OF THE LAST CLEAR CHANCE TO AVOID AN INJURY—LIABILITY OF MASTER FOR INJURIES TO SERVANT—DISOBEDIENCE OF SERVANT.

1. In all the cases decided by this Court in which the omission to improve the last clear chance to prevent injury is held to be a proximate cause, the liability of the defendant railroad companies is made to depend upon the

question whether their servants negligently omitted to stop the train after plaintiff had placed himself in a perilous position. The same rule has been invariably applied to the injury of animals exposed on the track, and the rule so established is approved and affirmed.

2. While an employee may not be culpable for obeying the orders of a vice principal, he is guilty of negligence if he does an act involving danger in disobedience to such orders. He cannot recover for an injury resulting from such disobedience. To hold otherwise would be unjust, unreasonable and therefore contrary to law.

3. A section hand got off of the track to avoid an approaching train, and in doing so stepped upon some loose earth that had accumulated from time to time in a cut; the dirt gave way and he fell on the track and was injured by the train. It was error to instruct the jury, under these circumstances, that the giving way of the dirt was the proximate cause of the injury and that the railroad company was liable for damages. By no conceivable act could the defendant's engineer have rendered the earth solid after plaintiff got upon it, and the defendant was only liable if its engineer neglected to use reasonable precautions to prevent an injury after he saw the perilous position of plaintiff.

CLARK, J., dissented.

ACTION tried before *Graham, J.*, at Spring Term, 1895, (1085) of HAYWOOD.

Ferguson & Ferguson for plaintiff.
G. F. Bason and J. M. Moody for defendant.

AVERY, J. The court instructed the jury that "if the plaintiff stepped from the track on to the embankment in time to avoid a collision with the train, and the bank gave way on account of being loose dirt which had slid into the road from time to time and been permitted to remain on the bed, then the giving way of the bank would be the proximate cause of the injury, and the defendant would be liable in damages for the injury." This portion of the charge being excepted to, the question is presented whether, if we concede that the defendant was negligent in allowing the loose earth which had fallen down from the sides of the cut and extended to the margin of the track at this particular place to remain there, and also that the plaintiff had been careless in coming back into the cut before the westbound train passed, the mere fact that the plaintiff stepped upon the loose earth in time to avoid collision, if it had not given way, would render the defendant liable, whether the engineer saw (1086) or could or could not by reasonable care have seen him in time to stop the train, and notwithstanding the latter's previous want of care. The defendant did not have the last clear chance, under any definition of the rule given by this Court, unless he could by keep-

ing a proper lookout have seen the plaintiff's condition in time, with the appliances at his command, to have stopped the train and prevented the injury. The leaving of the earth in the cut was a fact accomplished, and if the plaintiff went into the cut contrary to the command of his superior (the section boss) he was guilty of contributory and concurrent negligence. This instruction was not conditioned in any way upon the question whether the jury found that the plaintiff was negligent or whether the want of care on the part of the defendant intervened as an operative cause after his carelessness. So that, though the jury may have reached the conclusion that the plaintiff went back into the cut contrary to orders, and also that the engineer could not by the exercise of ordinary care have discovered his perilous position after he took refuge on the pile of loose earth, they were still required, under this instruction, to find for the plaintiff upon the question of proximate cause. Was the plaintiff guilty of contributory negligence if he disobeyed express orders in returning into the cut before the westbound train had passed through? The westbound train was already an hour late, and the order of his superior, if the jury believed the testimony of the section boss, required the plaintiff to remain east of the cut till the train passed. Any instruction as to what was the proximate cause must have been given in full view of the possibility that the jury might believe the testimony of the section master. If he was believed, the order contemplated that the
(1087) plaintiff should at all events remain east of the cut till the train had passed.

The correctness of this instruction depends upon the definition of what is called the last clear chance, and we are therefore constrained to discuss that doctrine again. The principle, as first formulated in *Davies v. Mann,* 10 M. and W. (Exc.), 545, and first laid down in this State, in *Gunter v. Wicker,* 85 N. C., 310, was stated in the latter case as follows: "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 on the part of the defendant, an action will lie for damages." Ever since that time this Court has applied the principle only in cases where, after the negligent act of plaintiff was a fact accomplished, the defendant had an opportunity or chance to exercise care which, if improved, would have averted the accident. An illustration of the doctrine would be clearly shown here if the jury had believed that the engineer, after seeing the plaintiff's perilous condition on the loose earth, could by the use of the appliances at his command have stopped the train. But the leaving of the loose earth, which constituted the defendant's first negligent act, was also a fact accomplished before the plaintiff started

back through the cut. The defendant had no opportunity to prevent loose earth from following a natural law in giving way when a man threw his weight suddenly upon it. By no conceivable act or omission on his part could the earth have been held stationary after the plaintiff got upon it, and he was negligent in exposing himself to danger, unless the defendant omitted to do some act which, "*notwithstanding the previous negligence of the plaintiff,*" would have prevented his being injured. But how the defendant could have caused the earth to remain stationary after the antecedent act of the plaintiff in exposing himself, it is impossible to conceive. It is an elementary principle that no person can be made to respond in (1088) damages for a tort unless it is shown that the injury was caused by some wrongful act on his part, or might have been prevented, in spite of all other operative causes, by the discharge of some legal duty which he omitted to perform. The rule, as stated by Judge Cooley (in his work on Torts, pp. 70, 71), is quoted, both in *Clark v. R. R.,* 109 N. C., 430, 449, and in *Pickett v. R. R.,* 117 N. C., 616, and is as follows: "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.*" In its application to the case at bar, if the jury found that the negligent leaving of the loose earth "only became injurious" to the plaintiff because he went into the cut contrary to the orders of his superior, then, nothing more appearing, the plaintiff's carelessness was the operative cause. But, though he was negligent in going through the cut at the time or in the manner of his going, as the jury found the evidence to be, yet, if the engineer discovered or might by keeping a proper lookout, have ascertained or had reason to believe that the plaintiff was in peril in time to stop the train before reaching him at his place of refuge, the carelessness of the plaintiff only became injurious by reason of this subsequent omission of the defendant's servant, notwithstanding the previous want of care on the part of the plaintiff. What did the defendant do, or omit to do, that might have prevented the loose earth from moving?

In *Davies v. Mann,* 10 M. and W., 545, the defendant was held liable because, after the plaintiff had tied his ass and left him exposed in the highway, the defendant's coach driver could by proper diligence have stopped the coach in time to avert a collision (1089) and consequent injury. In *Pickett's case, supra;* in *Deans v. R. R.,* 107 N. C., 686; in *Clark v. R. R., supra;* in *Little v. R. R., ante,* 1072, and *Russell v. R. R., post,* 1098, and in every other opinion delivered by this Court in which the doctrine that the omission to prove

the last clear chance to prevent an injury is held to be a proximate cause the liability of the defendant railroad company is made to depend upon the question whether its servants negligently omitted to stop its train after the plaintiff had placed himself in a perilous position. The same rule has invariably been applied in the numerous cases where an action has been brought to recover for injury to an animal exposed on the track. *Bullock v. R. R.*, 105 N. C., 180; *Carlton v. R. R.*, 104 N. C., 365; *Wilson v. R. R.*, 90 N. C., 69; *Snowden v. R. R.*, 95 N. C., 93; *Randall v. R. R.*, 104 N. C., 410, and other cases cited in *Pickett v. R. R.*, 117 N. C., at p. 616. This case is not analogous to that of *Little v. R. R., ante,* 1072, where it was held that the court ought to have instructed the jury, when requested to do so, that it was not negligence in the engineer to fail to stop his train after he saw that the plaintiff had taken refuge on the cap sill of a trestle where the railroad hands had been in the habit of going and escaping all harm from the passing train. The loose earth was left in the ditch negligently—not as a place of refuge for persons exposed. If the engineer could have stopped his train after seeing plaintiff's exposed condition, it was his duty to do so, and his fault to omit to discharge his duty. But he has no power then to stop the earth from moving, and his master incurred no legal liability for his failure to do so.

(1090) The rule has been laid down, in *Russell v. R. R., post,* 1098, that where the testimony is conflicting it is the duty of the court to instruct the jury, upon request of counsel, whether, in any given phase of the evidence, a party charged with carelessness has in fact been negligent. There was testimony to support the theory that the plaintiff had exposed himself, contrary to the command of his superior, who was charged with the duty of directing the time and manner of making inspections. The plaintiff laid the foundation for the claim that he was not culpable in exposing himself when he offered testimony tending to show that the section master was a vice principal (*Logan v. R. R.*, 116 N. C., 940); but while he might have been without fault in incurring risk at the command of such a superior, he was not free from culpability if he exposed himself contrary to his orders. To hold, on the one hand, that the plaintiff would be free from culpability in exposing himself to danger which he had reasonable ground to apprehend, because he did so in obedience to the order of a superior, who had the power to discharge him, and, on the other, that he would be likewise blameless if he should ignore orders, exercise his own judgment and thereby subject himself to peril, which he had equal reason to apprehend as a natural and probable consequence of his act, would be unjust, unreasonable and therefore contrary to law. Where a conductor warns a passenger not to incur the

risk of getting off a train, he is culpable for disregarding the admonition (*Tillett v. R. R.*, 115 N. C., 662); but if the conductor advises or directs a passenger to enter or debark from a car, unless it is obviously perilous to do so, the direction excuses an act which might otherwise have been, in contemplation of law, negligent. *Hinshaw v. R. R., ante,* 1047; 2 Shearman and Red., sec. 519, and note on p. 55. Upon the same principle, the act of the plaintiff in going into the cut, if in violation of orders, would be more culpable, because (1091) the warning of a superior, whose duty it was to look after his safety, as well as that of the passengers and crew on the train, afforded reasonable ground for apprehension on his part that danger might follow disobedience.

There being one phase of the evidence, at least, in which the plaintiff would be deemed negligent, the question of proximate cause or last clear chance depended on the findings upon and inferences drawn from the testimony. If, notwithstanding the negligence of the plaintiff, the jury find that the engineer saw or might by proper vigilance in keeping a lookout have seen the plaintiff, and would have had reason to believe, from his previous knowledge of the condition of the cut and of the surroundings, that he would be subjected to peril if the train should continue to move forward, it was negligence to fail to use all available appliances to stop it before reaching the point where the plaintiff had taken refuge upon the loose earth. It was the province of the jury ultimately to decide (*Russell v. R. R., supra*) whether the engineer exercised reasonable care or such as the ideal prudent man would have exercised under such circumstances. There was testimony tending to show that the engineer might have stopped the train after the plaintiff's condition could have been seen and understood by him. Was the engineer in the habit of passing through the cut? Did he know that the earth which had slid off the embankment was insecure as a footing for one seeking safety from a passing train? If in the exercise of such care as would have characterized a prudent man in the management of his own affairs he would have had reasonable ground to believe that to persist in the effort to pass the plaintiff would be to subject him to peril, then the defendant company was answerable for his negligent failure to avail himself of the last clear chance to avoid the injury. These are questions (1092) which may arise on another trial, and the jury must be left to determine whether, under all the circumstances, the engineer might by the exercise of proper care have seen that he was in peril and stopped the train in time to avert the accident.

For the error in charging that the leaving of the loose earth in the

cut was deemed, in law, the proximate cause of the injury the defendant is entitled to a

New Trial.

CLARK, J., dissenting: The last liability, or "last clear chance," as it is called, was with the defendant. Take the analogous case of a man walking on the railroad track at night, and who is run over by reason of the engine having no headlight. *Troy v. R. R.*, 99 N. C., 298. There the walking on the railroad track at night is contributory negligence, and the negligence of the defendant in not carrying a headlight began before the act of the plaintiff, but it was a continuing neglect, and continued after the contributory negligence of the plaintiff, and was the proximate cause of the injury, for if there had been a headlight the plaintiff could by the exercise of due diligence have been seen in time to have prevented the injury, or the plaintiff would have seen the engine in time to have gotten off the track. Here the contributory negligence, if it was such, in going back through the cut when the train had failed to appear, was not the proximate cause of the injury. The plaintiff stepped off the track in full time to avoid being hurt, and his being in the cut was not, *per se*, the cause of the injury, but it was the treacherous condition of the earth which the defendant had allowed to slide down and fill up the side
(1093) ditches. When the plaintiff, like a prudent man, stepped off the track, he stepped upon this man trap which the negligence of the defendant had prepared for him. As in the case of the engine running without a headlight, the negligence of the defendant began before the contributory negligence of the plaintiff, but it was a continuing negligence and supervened effectively after the contributory negligence of the plaintiff, and but for such negligence continuing till after the act of the plaintiff the attempt of the latter to save himself by stepping off the track on to the side would have been successful. This negligence of the defendant was therefore the "last act," or, in other words, the "proximate cause" of the injury. The mere going into the railroad cut, however, could not in fact be contributory negligence. They are not, *per se*, dangerous places, like trestles. The court therefore committed no error in the instruction excepted to, which was, "If the plaintiff stepped from the track onto the embankment in time to avoid a collision with the train and the bank gave way on account of being loose dirt, which had slid into the road from time to time and been permitted to remain on the bed, then the giving way of the bank would be the proximate cause of the injury, and the defendant would be liable in damages for the injury." It was the duty of the defendant to have this cut, through which the plaintiff, as its track

walker, had to pass, in a safe condition. Its failure to do so was the proximate and effective cause of the injury. The evidence is: "The loose dirt had fallen in the cut and filled it up over the ends of the cross-ties, and in many cases over the rails, * * * and made a kind of embankment of loose earth. There was no place fixed for a track walker to get out of the way of a passing train." The plaintiff testified that, the train being late, he was walking through the cut again to see that everything was safe. He saw the train, fifty yards off, and got out on the bank, which, being in a defective (1094) condition, slid down, carrying the plaintiff under the car wheel, his leg being cut off close to the hip and other severe injuries being inflicted. There is sufficient interval between the walls and the track, but the loose earth had slid in, filling it up to the ends of the cross-ties. Soon after this accident the cut was cleaned out, and witnesses testified that a man now stepping off the track in the cut would be perfectly safe from any passing train. The section foreman testified that he told the plaintiff to walk through the cut and back, before the train came, to see that the track was safe, and that he gave the plaintiff no instruction what to do if the train was late. The train being late, the plaintiff went through the cut again to see if all was safe, and on returning was hurt, as above stated. The conduct of the plaintiff shows neither contributory negligence nor disobedience of orders, but a faithful and intelligent compliance with the spirit of his instructions, which were to see that the cut was safe before the passage of the train. His duty was to stand at the mouth of the cut, to wave the engine down if the cut was not safe. And how could he do that, when the train was over an hour late, except by again patrolling the cut? He had done this, and was returning to his post when the injury occurred, not from being in the cut, which was wide enough for his safety, but by the treacherous condition of the soil, which had slid in, and which the defendant had negligently permitted to remain in close and dangerous proximity to the track. From the evidence, the cut required frequent inspection, and, the train being detained, the plaintiff was in the discharge of his duty and disobeying no express orders when again passing through the cut. It was the duty of the defendant to provide a safe place for its employees to work, and the cut, as then filled up, was unsafe for a track walker who might be met in the cut, while inspecting the track, by a (1095) belated train, as plaintiff was. The plaintiff had no knowledge of the danger, this being at night and his first tour of duty at that cut. It was in evidence that the plaintiff took every precaution in patrolling the cut, by stopping again and again to listen. In *Owens v. R. R.*, 88 N. C., 502, it was held that the railroad was liable

for injury to an employee caused by the sliding in of the dirt in a cut, if (as in the present case) the employee was not guilty of contributory negligence.

The court properly instructed the jury, "If the plaintiff was instructed to watch the cut, and after waiting at the east end for a considerable time and finding the train did not come, and knowing the condition of the weather and the condition of the cut and its liability to landslides, he went through the cut to the west end, and then stopped and listened again, and, not hearing the engine, he again entered the cut, and from time to time stopped and listened for the train, and proceeded towards the east end, and about the middle of the cut the train came upon him and he attempted to get out of the way, as alleged, and, owing to the steepness of the bank of loose dirt and its soft condition, due to the excessive rains, he was thrown under the train and injured, as alleged, then he was not guilty of contributory negligence."

The other exceptions are without merit.

Cited: Lloyd v. R. R., ante, 1014; *Sheldon v. Asheville,* 119 N. C., 610; *Johnson v. R. R.,* 122 N. C., 958; *Graves v. R. R.,* 136 N. C., 11.

(1096)

S. J. SCHULHOFER v. THE RICHMOND AND DANVILLE RAILROAD COMPANY

ACTION IN TORT OR EX CONTRACTU—JURISDICTION OF JUSTICE OF THE PEACE—ELECTION OF PLAINTIFF—PRACTICE.

When an action brought before a justice of the peace can be maintained either for breach of a contract or in *tort* for negligence, and the complaint can be fairly construed as based on either form, the courts, in favor of jurisdiction will regard the cause of action to be *ex contractu.*

APPEAL from a justice of the peace, heard before *Robinson, J.,* at Fall Term, 1895, of HAYWOOD, upon the complaint and demurrer, as follows:

Plaintiff complains that he had shipped to him from Savannah, Ga., on 3 December, 1891, three horses, from Younglove & Goodman, on the defendant's line of railroad; that the defendant, the Richmond and Danville Railroad Company, carelessly and willfully permitted the said stock to remain in an open stock car, exposed to the rain and wind and cold from Sunday evening till late in the morning of Monday, without notice to the plaintiff or his agent, and that by reason of such exposure and neglect one of the plaintiff's horses took sick and died, and that the plaintiff and consignor paid the freight on said

stock, amounting to $34.25, to defendant's agent at Waynesville; also the feed of the stock while in transit. It was defendant's contract to deliver said stock in good condition; and by reason of defendant failing to comply with the contract, and on account of the neglect and by failing to properly care for and shelter said stock, the plaintiff has been greatly damaged, to-wit, $190.

The defendant demurred to the jurisdiction of this court, (1097) and said that if the stock described in this action were damaged, which defendant denied, it is in the nature of a tort and did not arise under contract. His Honor, being of opinion with the defendants, sustained the demurrer and gave judgment dismissing plaintiff's action, to which judgment plaintiff excepted and appealed.

Ferguson & Ferguson for plaintiff.
G. F. Bason and J. M. Moody for defendant.

CLARK, J. The cause of action could be sustained either for damages for breach of the contract of safe delivery or in tort for negligence. The plaintiff, having brought the action before a justice of the peace "for $190, due by contract," evidently elected to sue *ex contractu.* When the action can be fairly treated as based either on contract or in tort, the courts, in favor of jurisdiction, will sustain the election made by the plaintiff. *Brittain v. Payne, ante,* 989; *Bowers v. R. R.,* 107 N. C., 721; *Stokes v. Taylor,* 104 N. C., 394.

The judgment dismissing the action is
Reversed.

Cited: Sams v. Price, 119 N. C., 574; *Parker v. Express Co.,* 132 N. C., 130; *White v. Eley,* 145 N. C., 36; *Mitchem v. Pasour,* 173 N. C., 488.

(1098)

CYNTHIA RUSSELL v. CAROLINA CENTRAL RAILROAD COMPANY

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—PROVINCE OF COURT AND JURY, RESPECTIVELY—APPROACHING CROSSINGS.

1. It is negligence for an engineer of a moving train to fail to give some signal of its approach to a crossing of a public highway or a crossing habitually used by the public.

2. A person approaching a railroad crossing should diligently look out for approaching trains. A failure so to do constitutes contributory negligence; but a failure to be on the lookout because of the omission of the servants

of the railroad to give the usual and proper signals is not contributory negligence.

3. A person who drives up to a railroad crossing where gates are kept, which it is the custom of the railroad company to have closed when danger to the passage of vehicles may be expected, is not negligent if he drive through such gates, when open, without stopping to look or listen for the approach of a train. The same rule applies where it is the custom of the railroad company to keep sentinels at crossings to warn people of anticipated danger.

4. The relative rights and powers of the court and jury in actions involving questions of negligence and contributory negligence may be defined thus: (a) Where the facts are undisputed, and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether the injury was caused by the negligence of one or the concurrent negligence of both of the parties. (b) Where the testimony is conflicting upon any material point, or more than one inference may be drawn from it, it is the province of the jury to find the facts or make the deductions. (c) It is the duty of the judge to instruct the jury, when requested to do so, whether in any given phase of contradictory evidence, or in case an inference fairly deducible from the testimony, or any aspect of it, should be drawn by them either of the parties would be deemed culpable in law. (d) Where the testimony is conflicting, or fair minds may deduce more than one conclusion from it, it is the province of the jury, under instructions from the judge, to determine whether either of the parties failed to exercise reasonable care or to use such diligence as a prudent man in the conduct of his own affairs would have exercised under all the surrounding circumstances. (e) It is not the duty of the judge, without special request, to instruct upon every possible aspect of the evidence or as to every conceivable deduction of fact which may be drawn from it.

(1099) ACTION tried before *Timberlake, J.*, at August Term, 1895, of UNION.

Verdict and judgment for plaintiff. Defendant appealed.

The following issues were submitted to the jury, and agreed to, except the third, which was objected to by the defendant, upon ground that there was no evidence to support it, to-wit:

1. "Was the plaintiff injured, as described in the complaint, by the negligence of the defendant railroad company?" Answer: "Yes."

2. "If so, did plaintiff contribute to her injury by her own negligence?" Answer: "No."

3. "Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury?"

4. "What damage, if any, has the plaintiff sustained?" Answer: "One thousand dollars."

The court told the jury, if they found the first issue "Yes" and the second issue "No," not to answer the third issue, and hence there was no response thereto.

Defendant asked for following special instructions:

1. "The burden is on the plaintiff to show that the negligence of the defendant was the proximate cause of the injury she received, and unless she shows this by a preponderance of the evidence she cannot recover, and the answer to the first issue should be (1100) 'No.'

2. "If the plaintiff, or her husband, by the exercise of her senses, could have seen or heard the approaching train, and failed to do so, and her injury was caused thereby, it was negligence on her part, and she cannot recover, and the answer to the second issue should be 'Yes.'

3. "Under the circumstances of the case, as shown by the evidence, it was the duty of the plaintiff and her husband to stop, look and listen, to tell whether a train was approaching, and if she failed to do so, and her injury was caused thereby, this is contributory negligence, and she cannot recover, and you will answer the second issue 'Yes.'

4. "Although the engineer may have failed to give the blows for the crossing, still it was the duty of the plaintiff and her husband to *stop,* look and listen before attempting to cross the track, and if she failed to do so, and her injury was caused thereby, she cannot recover, and the answer to the second issue would be 'Yes.'

5. "That if the plaintiff, or her husband, before reaching the crossing on the Georgia, Carolina and Northern Railway, could have seen or heard the approaching train, and failed to do so, and her injury was caused thereby, this would be contributory negligence on her part, and she could not recover, and your answer to the second issue should be 'Yes'; and this would be so even if the defendant did not give the blow for the crossing.

6. "That if the plaintiff, or her husband, at any time after passing the crossing on the Georgia, Carolina and Northern Railway, had stopped the buggy, looked and listened, and could have seen or heard the approaching train, and failed to do so, and her injury was caused thereby, this would be contributory negligence, and she (1101) cannot recover, and your answer to the second issue will be 'Yes'; and this would be so even if defendant did not blow for the crossing.

7. "When a railroad crosses a public road, on a level or at a grade, the railroad has the right of way, and persons traveling on the public road must yield precedence to the train; and if the plaintiff, or her husband, by the exercise of ordinary care, could have seen or heard the train at any point far enough from the crossing on the Carolina Central Railroad to have stopped the horse before reaching the crossing and avoided the collision, and failed to do so, this would have been contributory negligence, and plaintiff could not recover, and you should

answer the second issue 'Yes'; and this would be so even if defendant did not blow for the crossing.

8. "That if the view of the line of railroad was partially obstructed from the public road, the plaintiff and her husband traveling in a top buggy, top up, with side curtains, the opportunity to turn from the road from the Georgia, Carolina and Northern crossing to the Carolina Central crossing unsafe, the distance being about 290 feet, it was the duty of the plaintiff and her husband to exercise a high degree of care before making either crossing, and to take every prudent precaution to avoid a collision—stop, look and listen—even if no regular train was expected to pass, or if the railroad had not given notice of its approach; and if plaintiff and her husband failed to do so, and her injury was caused thereby, she cannot recover, and you should answer the second issue 'Yes.'

9. "If you answer the second issue 'Yes,' you need not answer the third issue.

10. "If you answer the first issue 'No,' you need not answer the second and third issues.

11. "That if the defendant road blew for the road crossing, you will answer ..... issue 'No.'

(1102) 12. "That if the defendant gave any signal of its approach to the crossing sufficient to alarm the plaintiff of its approach, you will answer the first issue 'No.'

13. "That if the jury believe the engineer was keeping a proper lookout, and after he discovered the plaintiff used every effort that he could with the appliances at his command to avoid the collision, and was unable to do so, you will answer the third issue 'No.'

14. "It was not the duty of the engineer to stop and look out on the track of the Georgia, Carolina and Northern Railway farther than he was traveling in its direction, viz., at the junction switch of the Carolina Central Railroad and the Georgia, Carolina and Northern Railway; that it was his duty and that of his fireman to keep a proper lookout on the Carolina Central Railroad, so far as their duties would permit, and if they did so, and could not and did not see the plaintiff's buggy until it crossed the Georgia, Carolina and Northern, seventy-eight to ninety yards from the Carolina Central crossing, and when they saw that the buggy did not stop, and at that time they were so near the Carolina Central crossing that then the engineer could not stop his train with the appliances at hand, and that he made every effort that could be made with the appliances at hand, the plaintiff could not recover, and it would be the duty of the jury to answer the third issue 'No.' "

In lieu of the special instructions asked by the defendant, the court charged the jury as follows:

For No. 1: Given exactly, with the addition that the third issue should be answered "No."

For No. 2: "If the plaintiff, or her husband, by the exercise of their senses, could have seen or heard the approaching train, and failed to do so, and her injury was caused thereby, it was contributory negligence on her part, and the answer to the second issue should be 'Yes.' "

For No. 3: "Under the circumstances of this case, as shown by the evidence, it was the duty of the plaintiff and her husband to look and listen, to tell whether a train was approaching, and (1103) if she failed to do so, and her injury was caused thereby, this was contributory negligence, and you will answer the second issue 'Yes.' "

For No. 4: "Although the engineer may have failed to give the blows for the crossing, still it was the duty of the plaintiff and her husband to look and listen before attempting to cross the tracks, and if she failed to do so, and her injury was caused thereby, she is guilty of contributory negligence, and the answer to the second issue should be 'Yes.' But if you should further find that if the engineer had rung the bell or sounded the whistle at a reasonable distance from the crossing, and he failed to do it, and the locality and position of plaintiff was such that she could have heard said signal if it had been given, and would not have attempted to cross, notwithstanding she did not look and listen, in this event the proximate cause of plaintiff's injury would be defendant's negligence, and you will answer the third issue 'Yes.' "

For No. 5: Given exactly as requested, except the clause "and she cannot recover" was stricken out.

For No. 6: "That if the plaintiff, or her husband, at any time after passing the crossing on the Georgia, Carolina and Northern Railway, had looked and listened, and could have seen or heard the approaching train, and failed to do so, and her injury was caused thereby, this would be contributory negligence, and your answer to the second issue will be 'Yes'; and this would be so even if defendant did not blow for the crossing."

For No. 7: "When a railroad crosses a public road, on a level or at a grade, the railroad has the right of way, and persons traveling on the public road must yield precedence to the train; and if the plaintiff, or her husband, by the exercise of ordinary care, could have seen or heard the train at any point far enough from the crossing on the Carolina Central Railroad to have stopped the horse be- (1104) fore reaching the crossing and avoided the collision, and failed to do so, this would be contributory negligence, and you should

answer the second issue 'Yes'; and this would be so even if defendant did not blow for the crossing. Yet those in charge of trains are bound to give reasonable warning, so that a person about to cross may stop and allow the train to pass; and if you should further find said warning was not given, as before explained, and, further, that if it had blown plaintiff would have heard it and not attempted to cross, your answer to the third issue would be 'Yes.' "

For No. 8: Given exactly, except the clause, "she cannot recover," just at the close, was stricken out.

Nos. 9, 10, 11 and 12 were refused.

Nos. 13 and 14 were given.

For No. 15: Given exactly, with the addition, "provided, further, you find that the signal was given at a reasonable distance from the crossing."

The court also gave the following instructions, asked for by plaintiff:

"The law devolves upon the defendant company the duty to give due and proper signals when approaching crossings, so as to warn travelers of the approach of their trains; and if in this case the defendant failed to give such signal at a reasonable distance from crossing, either by blowing the whistle or ringing the bell, the defendant was guilty of negligence; and if such failure was the proximate cause of plaintiff's injury the jury should answer the first and third issues 'Yes.'

"The law devolves upon the defendant company the duty to keep a diligent outlook for travelers in operating its trains when approaching public crossings, and especially is this true in cities and populous towns, where a higher degree of care is required than when
(1105) in the open country; and if in this case the defendant company failed to keep such lookout, and such failure was the proximate cause of plaintiff's injury, the jury should find the third issue 'Yes.'

"Even if the jury should believe the plaintiff was careless in exposing herself, yet if she would not have gone on the crossing but for the negligence of the engineer in failing to give proper signal, if he did so fail, defendant would still be liable for damages resulting from the collision, and you should answer the third issue 'Yes.'

"If the defendant's engineer could, by the use of appliances he had at hand, after he saw and realized plaintiff's peril, have so checked his speed as to have avoided injury, without endangering his train or persons on it, and he failed to do so, the jury should answer the third issue 'Yes.'

"If the defendant's engineer could, by the exercise of a vigilant

outlook, have seen plaintiff's danger in time to check his speed and avert the danger, with the appliances he had at hand, without danger to his train or persons on it, and failed to keep such outlook and to discover plaintiff's peril, and such failure was the proximate cause of plaintiff's injury, the jury should answer the third issue 'Yes.'

"If the jury should find the first issue 'Yes,' or the third 'Yes,' or both 'Yes,' you will consider what damage, if any, plaintiff has sustained, and in passing upon this you may properly take into consideration any and all losses they may find from the evidence the plaintiff is likely to sustain in future resulting from loss of time, loss from inability to perform physical or mental labor, loss of capacity to earn money, and practical suffering of body and mind, which are the immediate and necessary consequences of her injury. There is no evidence of any expenditure for medicine or doctors' bills, and you will not consider this."

After recapitulating the evidence and giving fully the contentions of both parties, the court charged the jury as follows: (1106)

On first issue: "If you find that the engineer failed to give the signal, either by blowing the whistle or ringing the bell, at a reasonable distance from the crossing, such as described by the witnesses, this would be negligence, and you would answer the first issue 'Yes.' If you find the signal was given at a reasonable distance, then you will answer the first issue 'No.'" Defendant excepted to this charge.

On second issue: "The law imposes on the plaintiff the duty to look out for the approach of the trains and to observe all reasonable precautions before attempting to cross the track, and if you find that she did not look and listen to ascertain if a train was coming, and observe all reasonable precautions to avoid danger, you will find the second issue 'Yes.' If she did look and listen, and observe all reasonable precautions, you will find that issue 'No.'" Defendant excepted to this charge.

On third issue: "If you find the first and second issues 'Yes'—that is to say, if you find plaintiff failed to look and listen and observe reasonable precautions before crossing—and further find that the engineer failed to give the signal, as before explained in these instructions, still, if you further find that if he had given such signal she would have heard same and would not have attempted to cross, defendant's negligence would be the proximate cause of plaintiff's injury, and you will find the third issue 'Yes.'" Defendant excepted to this charge.

On third issue: "If you find the first and second issues 'Yes'—that is to say, if you find plaintiff failed to look and listen and observe all reasonable precautions before crossing—and further find that the

engineer failed to give the signal, as before explained in these instructions, still, if you further find that the engineer saw said plain-
(1107) tiff in time to check his speed and avert the danger, with the appliances at hand, without danger to his train or persons on it, then the defendant failed to use reasonable care and prudence, and you will answer the third issue 'Yes.'" Defendant excepted to this charge.

On third issue: "If you find the plaintiff failed to look and listen, and the defendant failed to give the signal as before explained, and further find that if such signal had been given she would not have heard it without looking and listening, and would have gone on, you will answer the third issue 'No,' unless, as before explained, you should find that the engineer saw plaintiff in time to check his speed, avert the danger, and failed to use reasonable care and prudence." Defendant excepted to this charge.

On third issue: "If you find that, after seeing plaintiff, the engineer used reasonable care and prudence to stop the train, you will find the third issue 'No,' unless you should find, as before explained, that if proper signals had been given plaintiff could have heard the train and not attempted to cross, notwithstanding her failure to look and listen." Defendant excepted to this charge.

On fourth issue: "You will allow a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the necessary and immediate consequences of her injury." Defendant excepted to this charge.

The court fully explained to the jury which instruction applied to the different issues, and told them not to consider the third if their answer to the first should be "Yes" and to the second "No."

Defendant moved for a new trial: "For error in the court for admitting incompetent testimony and refusing to admit compe-
(1108) tent testimony, as appears from exceptions in this statement; for error of the court in giving instructions excepted to by defendant in this statement; for error of the court in refusing to give instructions asked for by defendant." And defendant further excepted to the submission of the third issue.

Frank I. Osborne for plaintiff.
McRae & Day for defendant.

AVERY, J. It is the duty of an engineer in charge of a moving train to give some signal of its approach to the crossing of a public highway over a railway track or to a crossing which the public have been habitually permitted to use; and where he fails to do so, the rail-

way company is deemed negligent and answerable for any injury due to such omission of duty. *Hinkle v. R. R.*, 109 N. C., 472; *Randall v. R. R.*, 104 N. C., 410; *Gilmore v. R. R.*, 115 N. C., 657.

On the other hand, it is ordinarily the duty of a person who is approaching a crossing of a railway track, though not at the time fixed by the schedule for the passing of any train, to make diligent use of his senses in order to discover whether there is reason to apprehend danger of a collision, and the failure to do this usually constitutes contributory negligence; and where the injury might have been averted by taking such precaution, the plaintiff cannot recover. But where a plaintiff does listen and look, and is induced to go upon the track because of the failure of the railroad company to give a signal at the usual place in approaching a crossing, the ensuing injury, in case of a collision, is attributed to the omission of the Company to warn such person of danger, and not to his carelessness. *Hinkle v. R. R., supra.* And even where the plaintiff exposes himself to dan- (1109) ger, if he is induced to incur the risk because of the failure to sound the whistle or ring the bell at the usual place, the omission to listen and look is deemed excusable or not culpable, because he is misled by the conduct of the company. *Alexander v. R. R.*, 112 N. C., 720, 734. A person is careless when he neglects to provide against danger that he has reasonable ground to apprehend, or against deleterious consequences that are the natural or probable result of his act. *Tillett v. R. R.; ante,* 1031.

A person who drives up to a crossing in a town or city, where it is the custom to close the gates so as to prevent the passage of vehicles when trains are approaching and to open them when there is no danger, is not negligent if he drives through such gate, when open, without stopping to look or listen. The same rule applies where the company is accustomed to keep a sentinel on post to give warning of danger and a person is induced to drive upon the track because the watchman is not on duty. The plaintiff had a right to expect that the company would not omit to give the usual alarm, and was not culpable for acting upon that supposition. *Hinkle v. R. R., supra.*

The three issues are not in the form suggested and declared in *Nathan v. R. R., ante,* 1066, to be ordinarily best. But this is not the ordinary case of negligence on the part of a defendant, intervening as an operative cause of injury after the carelessness of a plaintiff.

The question whether the plaintiff had been thrown off her guard by the omission to give the signal was preliminary to and very distinct from the inquiry whether the engineer might by reasonable care have discovered that she was in danger in time to have averted the accident, notwithstanding her previous carelessness. Here, if the jury be-

(1110) lieved that the plaintiff was induced to expose herself by the failure to give the alarm, it was their duty to find in answer to the first issue that the injury was due to the defendant's negligence, and, in response to the second issue, that she was not culpable for exposing herself to danger. The question whether under any given circumstances it would have been a prudent precaution to stop, as well as listen and look, in order to acquire more accurate information as to the peril of going upon the track, is a mixed one, and it is the peculiar province of the jury to pass upon it. In *Gilmore v. R. R., supra,* the Court held that it was for the jury, in view of all the testimony as to the surrounding circumstances, to say whether it was imprudent for the plaintiff to venture upon the track with his team. This ruling, it is contended, is in conflict with the principle laid down in *Emry v. R. R.,* 109 N. C., 589, and it must be admitted that this is true. If the rule of the prudent man is not to be given as a guide to the jury, then, where a case is submitted to them because the evidence is conflicting, or for the reason that more than one inference can be drawn, it follows as an inevitable conclusion that the court must anticipate every hypothetical phase which might arise out of the contradictory testimony and all of the varying deductions which might be drawn, and tell the jury beforehand whether, in any aspect presented by a possible finding of fact, the conduct of a party charged with negligence would come up to or fall short of the legal standard of the ideal prudent man. In every instance where the trial judge fails to work out and present all possible combinations of fact, or all inferences fairly deducible from the evidence, the jury must be left, despite the ironclad rule laid down in the leading opinion in *Emry's case,* to determine whether
(1111) the facts as found by them were characteristic of a prudent or imprudent man. But *Gilmore's case* was one where more than a single inference was deducible, and it was held to be the office of the jury not only to make the deductions, but to apply the rule of the prudent man to them after they were made. This ruling is utterly irreconcilable with that in *Emry's case.* But while in *Tillett v. R. R., ante,* 1031, *Emry's case* was conceded to be authority upon this point, the later case of *Hinshaw v. R. R., ante,* 1047, can be construed in no other way than as overruling *Emry's case.*

The substance of the rule, as stated in *Emry's case,* was that when the facts were controverted, or the inferences to be drawn from them were doubtful, the just must find the facts or draw the inferences, and "the court must instruct them as to the law applicable to the same." The court cannot instruct upon a state of facts not yet found, and unless the judge, of his own motion, or with the aid of counsel, can anticipate every conceivable aspect of the testimony upon which a ver-

dict might be based, there must be left some hypothetical phase of it which, if adopted, would leave the jury with no better or other guide than that furnished by the standard of the ideal prudent man. In overruling *Emry's case* this Court substitutes, necessarily, the rule prevailing in England and adopted by the Supreme Court of the United States and the courts of almost all of the States for that therein laid down.

The relative rights and powers of the court and jury in the trial of actions raising issues as to negligence and contributory negligence may be defined as follows:

1. Where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether an injury has been caused by the negligence of one or the concurrent negligence of both of the parties.

2. Where the testimony is conflicting upon any material point, or more than one inference may be drawn from it, it (1112) is the province of the jury to find the facts or make the deductions.

3. It is the duty of the judge to tell the jury, at the request of counsel, whether in any given phase of contradictory evidence, or in case an inference fairly deducible from the testimony or any aspect of it should be drawn by them, either of the parties would be deemed in law culpable.

4. Where the testimony is conflicting, or fair minds may deduce more than one conclusion from it, it is the province of the jury, after hearing such instructions as may be submitted by the court for their guidance, to determine whether either of the parties charged with negligent omission failed to exercise reasonable care or to use such diligence as a prudent man in the conduct of his own affairs would have exercised under all of the surrounding circumstances.

5. It is not the duty of the *nisi prius* judge to instruct, without special request, upon every possible aspect of the evidence or as to every conceivable deduction of fact which may be drawn from it. *Morgan v. Lewis,* 95 N. C., 296; *Brown v. Calloway,* 90 N. C., 118.

While we see no error in the instruction given in relation to the third issue, it is not material to discuss it. The jury, under the instruction given, must have concluded that the defendant negligently omitted to give the signal, and that the plaintiff was not culpable, and hence have deemed it unnecessary to respond to the third issue. The judgment is

Affirmed.

Cited: Styles v. R. R., ante, 1089; *Willis v. New Bern, ante,* 138; *Turner v. Lumber Co.,* 119 N. C., 400; *Sheldon v. Asheville, ib.,* 610; *McCracken v. Smathers, ib.,* 619; *Mayes v. R. R., ib.,* 769; *Little v. R. R., ib.,* 778; *Mesic v. R. R.,* 120 N. C., 491; *Pernell v. R. R.,* 122 N. C., 847; *Norton v. R. R., ib.,* 935; *Powell v. R. R.,* 125 N. C., 374; *Printing Co. v. Raleigh,* 126 N. C., 522; *Bradley v. R. R., ib.,* 738; *Haltom v. R. R.,* 127 N. C., 257; *Butts v. R. R.,* 133 N. C., 83; *Cowles v. Lovin,* 135 N. C., 491; *Graves v. R. R.,* 136 N. C., 10; *Extinguisher Co. v. R. R.,* 137 N. C., 284; *Stewart v. R. R., ib.,* 690; *Ramsbottom v. R. R.,* 138 N. C., 41; *Marks v. Cotton Mills, ib.,* 404; *Cooper v. R. R.,* 140 N. C., 220, 225, 227; *Brown v. Durham,* 141 N. C., 253; *Ruffin v. R. R.,* 142 N. C., 127; *Hodgin v. R. R.,* 143 N. C., 96; *Dermid v. R. R.,* 148 N. C., 190; *Farris v. R. R.,* 151 N. C., 487; *Jenkins v. R. R.,* 155 N. C., 204; *Osborne v. R. R.,* 160 N. C., 312; *Johnson v. R. R.,* 163 N. C., 447; *Alexander v. Statesville,* 165 N. C., 531; *McAtee v. Mfg. Co.,* 166 N. C., 456; *Clark v. Wright,* 167 N. C., 649; *Buchanan v. Lumber Co.,* 168 N. C., 45; *Lloyd v. R. R., ib.,* 649.

(1113)

STATE v. GABRIEL THOMAS

MURDER—HUSBAND'S CHASTISEMENT OF WIFE—EVIDENCE OF MALICIOUS INTENT.

1. The recent decisions of this court upon the distinction between murder in the first and second degrees and manslaughter reviewed and distinguished by AVERY, J.

2. On an indictment for murder the omission of the judge to explain to the jury the application of the testimony to the theory of murder in the second degree is error.

3. Where a husband beat his wife and she died in consequence—her neck being broken somehow in the scuffle—and during the beating the husband said he would "take something and kill her," but in fact used no deadly weapon in killing her, the use of the expression, under the circumstances, is not evidence of such a specific premeditated intent to take life as will constitute murder in the first degree.

CLARK, and MONTGOMERY, JJ., dissent.

INDICTMENT for murder, tried before *Greene, J.,* at Fall Term, 1895, of PAMLICO.

The prisoner was indicted for the murder of Louisa Thomas, his wife. The evidence was as follows:

Daniel Simmons testified: "On 12 July last, near the mouth of Trent Creek, I was fishing. Prisoner and his wife passed us in a boat.

I spoke. They went down, stopped, and fished a little, then went to Mason's Point, fastened the boat to a poplar stake, on Bay River. George Jones and I passed them, and they came back. We fastened our boat and went to fishing. Directly I heard a screaming down at Mason's Point, looked around and heard a beating, like striking with a fishing pole. This went on for five or ten minutes. I heard an argument between the prisoner and his wife; heard him say, 'If you don't hush I will take something and kill you.' Directly after that I heard a heavy lick. I looked down that way and saw him in the boat; could not see her. After I missed her, he struck two more heavy licks. Immediately after he struck those licks he stooped (1114) down, picked his wife up and threw her overboard. Then he stood up in the boat, looked around a minute or so, unloosed his boat and came down where we were. George Jones, Malinda Russell, D. Best and Ed. Russell were there with me. George Jones and myself were in one boat and the others in another, as far apart as from here to the door. The wind was northeast. The prisoner was northeast of us. When he came up, he said something about 'the darling of his, all the friend he had, being overboard.' Malinda Jones asked him if he killed Laura. He said, 'No, I have not put my hands on her.' She said, 'Did I not hear you beating her?' He said he did not put his hands on her. This was on Friday, about 5 o'clock P. M. On Saturday following, between 11 and 12 o'clock, the body was taken up. We went down to the place. The stake had been moved. We found her where the stake had been moved. This was the place where they were the day before. She was dead. I did not notice her condition."

On cross-examination the witness stated that the prisoner asked him to go and help get her up. "When he first came to us he said he would knock her in the head. I was half-mile from the prisoner at the time. I have heard it said to be half-mile from Mason's Point to the mouth of Trent Creek."

George Jones testified: "On 12 July, 1895, I was at the mouth of Trent River, in a boat. Prisoner and his wife were in a boat at Mason's Point, half a mile away. I was fishing; heard a screaming down the river. After the screaming, I stopped and looked down that way and saw his wife go overboard into the river. Prisoner was standing in the boat at the time. Then he left the stake and came to Malinda Russell's boat, which was 50 yards from where I was. As soon as he got there he complained that he had lost all the (1115) friend he had; applied to Daniel Simmons to get his wife up. Simmons said, 'You will have to get an officer.' I called Simmons' attention to it, and he said, 'Yes, I saw it.' "

D. Best testified: "I was near the mouth of the Trent, fishing; heard screaming down the river. Prisoner's wife kept crying. Heard him say, if she did not hush he would knock her in the head. During the time she was crying there were two in the boat. Prisoner came up to us and asked Simmons to help him get his wife up; that she had fallen overboard. Simmons said he would have to get an officer."

Malinda Russell testified: "I was at Swindell's Bay; could see Mason's Point, half a mile away; heard a woman scream—burst out crying. Prisoner told her if she did not hush he would knock her in the head, or burst her head, I don't remember which."

Dr. Redding testified: "I am a practicing physician, since 1842. Examined the body on 15 July; found it lying on platform. She was dead. I made a partial *post-mortem* examination; neck was broken. I made incision from base of skull. The bones of the neck were dislocated. This would produce instant death. Her lungs had collapsed; no water in the body. She could not have been drowned; she was dead before she went into the water. It is possible for a fall to dislocate the neck. I don't think a fall from the boat would be sufficient to produce the dislocation."

H. R. Simmons testified: "I was at Mason's Point, on south side, on the day mentioned. Prisoner and his wife were opposite Mason's Point, in the boat—canoe, about twenty-four feet long and (1116) two feet deep. The bait gave out. I went ashore, and while there I heard a screaming up the river. Wind was northeast when I went ashore. Prisoner was at stake, and when I came out he was gone."

His Honor charged the jury as follows:

"The burden of proof is upon the State to satisfy you beyond a reasonable doubt that prisoner feloniously slew the deceased. Prisoner is not required to show his innocence, and the fact that he has not gone on the witness stand or introduced any evidence is not to receive any consideration in your deliberations. The State is required to satisfy the jury, beyond a reasonable doubt, of the guilt of the prisoner; and if the State has so satisfied you, then your next inquiry is as to what degree of crime has been committed—whether murder in the first degree, murder in the second degree, or manslaughter. The jury are instructed that, under our statute, the prisoner cannot be found guilty of murder in the first degree unless the jury are satisfied from the evidence, beyond a reasonable doubt, not only that he is guilty of feloniously killing the deceased, but it must further appear from the evidence, beyond a reasonable doubt, that such killing was done willfully, deliberately and with premeditation; that is, that it was done intentionally and with prior deliberation; and unless all

these appear from the evidence, beyond a reasonable doubt, the jury cannot find murder in the first degree. While the law requires, in order to constitute murder of the first degree, that the killing shall be willful and premeditated, still it does not require that the willful intent, premeditation or deliberation shall exist for any length of time before the crime is committed. It is sufficient if there was a design and determination to kill, distinctly formed in the mind at any moment before or at the time the blow was struck; and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that prisoner feloniously struck and killed deceased, as charged in the indictment, and that before or at the time the blow was (1117) struck he had formed in his mind a willful, deliberate and premeditated purpose and design to take the life of the deceased, and that the blow was struck in furtherance of that design and purpose, and death ensued from the effect of the blow, then he would be guilty of murder in the first degree. To constitute murder in the first degree there must have been an unlawful killing, done purposely and with premeditation and malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time which constitutes the distinctive difference between murder in the first degree and murder in the second degree. Deliberation and premeditation are essential in order to constitute murder in the first degree; it matters not how short the time, if the party has turned it over in his mind and weighed and deliberated upon it. Manslaughter is the unlawful and felonious killing of another without any malice and without any mature deliberation whatever. If two persons fight upon a sudden quarrel, and one slays the other, having the passion suddenly aroused, and without malice, it is manslaughter. If the jury should believe from the evidence that the prisoner and deceased were engaged in a sudden quarrel and fight, and that the prisoner slew the deceased, then it would be manslaughter."

The prisoner prayed the court to charge the jury that the denial of the prisoner of the charge of killing his wife at the time he went up to the boat should be taken as evidence in his favor. This was given. The prisoner prayed the court to charge the jury that if they believed the evidence to be true it would not justify a verdict (1118) of murder in the first degree. This was refused, and prisoner excepted.

There was a verdict of guilty of murder in the first degree, as charged in the indictment. The prisoner moved to set aside the ver-

dict, on the ground that it was against the weight of evidence. The motion was overruled, sentence of death was pronounced, and the prisoner appealed.

Attorney-General for the State.
No counsel contra.

AVERY, J. Following the courts of Pennsylvania in the interpretation of a statute substantially in the same words, this Court construed the act of 1893 as imposing upon the State, where a conviction is asked for murder in the first degree, the burden of proving, beyond a reasonable doubt, not simply actual malice or a killing with a deadly weapon, from which malice would be presumed, but, in addition, that the killing was done in pursuance of "a deliberate, premeditated and preconceived design on the part of the prisoner to take the life" of the deceased. *S. v. Fuller,* 114 N. C., 885. In *S. v. Norwood,* 115 N. C., 789, which next came up for review, it was settled that if the prisoner once formed "the fixed design to take life" it was immaterial how soon after deliberately determining to do so the purpose was carried into execution. The prisoner in that case confessed to her mother that she wished "to get rid of" her baby, because it would prove such a bother to her the next spring, and she was "thinking how she would get rid of it," when it began to cry, and she stuck a pin down its throat and it strangled. The next indictment under this statute (*S. v. McCormac,* 116 N. C., 1033) was one where there was circumstantial testi-
(1119) mony tending to show the deliberate preparation of two pistols in the early part of the night (prisoner and deceased both having spent the night, till the killing was done at 2 o'clock in the morning, at the same house). It was further in evidence that, just before the killing, a witness stepped out into the yard, leaving a lamp burning in the piazza, where the prisoner and deceased were, and that thereupon the light was extinguished by the prisoner, when, after walking off as if about to leave, he turned suddenly and shot the deceased, saying, as he fired, "Guess that will do you," and that he laid one of the pistols at the feet of the dead man, exclaiming as he did so, "I reckon you will let me alone now." Except the testimony of the prisoner, there was no evidence tending to show that at the time of the shooting there was any quarrel or dispute in progress, or that the deceased was talking with or even looking toward the prisoner. The court held that it was not error to submit to the jury, with proper instructions, the question whether the testimony was sufficient to show beyond a reasonable doubt that the killing was done deliberately and after premeditation. The Court held also that it was not necessary

to show that the purpose to kill was conceived before that evening, spent at the house where the killing was done. In *S. v. Covington,* 117 N. C., 834, the prisoner said, in his confession to a comrade: "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. *I aimed to shoot him,* and this must have been when I shot him through the neck." The prisoner had broken into the store of the deceased, and it was shown that the wound in the neck was fatal. There was no other evidence of the circumstances attending the killing, except the confession, and it was held that it was not error to instruct the jury that the prisoner was either guilty (1120) of murder in the first degree or not guilty. The ruling rested upon the ground that, according to the confession, which was the only evidence, the prisoner "aimed" to kill, and formed the design to do so, not in the heat of passion aroused by a combat, but when the deceased had acknowledged that he was vanquished and with the manifest motive of concealing the crime of breaking into the store. In reviewing these cases we find different combinations of facts and circumstances, which, if believed, warrant a jury in finding that there is a "fixed or deliberate, premeditated and preconceived design" to take life, and they illustrate the application of the abstract rule. But this Court has never as yet ventured to give a more specific definition of the mental process which the Legislature intended to describe by the use of these words than the general one given in *Fuller's case.* It is inaccurate to say that, whenever there is an intent to kill, the homicide belongs to the class of murders in the first degree; because it often happens that one of the parties to a fight conceives the purpose in the heat of the combat to take the life of his adversary, and carries it into execution by the use of a deadly weapon, and yet the offense is only manslaughter at most, and may be excusable homicide. *S. v. Wilcox, post,* 1131. But in order to meet the requirements of the statute the State must show what is called a "specific intent." Wharton says (1 Criminal Law, sec. 377): "The general definition of the Pennsylvania and cognate statutes does not affect the common-law distinction between murder and manslaughter. It simply divides murder into two classes; murder with a *specific deliberate intent* to take life being murder in the first degree; murder without such an intent to take life being murder in the second degree * * * Whenever, then, in the case of *deliberate* homicide there is no *specific intention* (1121) to take life, it is murder in the second degree." The word which marks distinctly the two degrees is "premeditated," the definition of which, in *S. v. Snell,* 78 Mo., 243, quoted with approval by Wharton, in 1 Criminal Law, sec. 380, note, is "thought beforehand for any length of time, however short." "To say that murder was of

the first degree, simply because it was intended at the moment (said Freeman, in his note to *Whiteford v. Commonwealth,* 18 Am. Dec., 781) would be to construe the words 'deliberate and premeditated' out of the statute." "It is a perversion of terms (said the Court over which *Chief Justice Cooley* was presiding, in *Nye v. People,* 35 Mich., 16) to apply the term 'deliberate' to any act which is done on a sudden impulse." "An intent to kill may exist in other degrees of unjustifiable homicide, but in no other degree is that intent formed into a *fixed purpose* by deliberation and premeditation." *Com. v. Jones,* 1 Leigh, 610. This intent is defined by others as a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences. *Atkinson v. State,* 20 Tex., 522. "The fixed resolve to kill (say the Court of California, in *People v. Foren,* 25 Cal., 361), which belongs to murder in the first degree, is something different from the *minor quality of intention,* which lacks the marked and distinguishing characteristics of deliberation or *cold premeditation.*" The same state of mind is described as "a cool state of the blood," in *S. v. Carter,* 70 Mo., 594.

Where the killing is not done by lying in wait, poisoning or in any of the specific ways pointed out in the statute, and the test of its classification as murder in the first degree is the question whether there has been premeditation and deliberation, the prosecuting officer cannot rest the case for the State and rely upon proof of the previous
(1122) existence of actual malice any more than he can upon the proof, or admission even, of the constructive malice (as in *Fuller's case, supra*) that is presumed from killing with a deadly weapon.

The Supreme Court of Alabama, in *Fielder v. State,* 51 Ala., 348, illustrates the change that has been inaugurated by such statutes as ours, when they approve, as a modern definition of murder in the second degree, as distinguished from those more specifically described and those where there is premeditation and deliberation, a definition that would have answered for the common-law offense, viz., "the unlawful killing of a reasonable person, with malice aforethought, either express or implied." The common-law offense included those homicides effected by poisoning, lying in wait, or torture, and recognized no distinction between such revolting acts and the killing where one, under the influence of passion, engendered by the grossest insult, slays another with a deadly weapon. The innate sense of justice implanted in the breast of every good man demanded that a distinction should be drawn between cases where there was actual though not legal provocation and those where a fixed purpose was shown, whether from malignity or a mercenary desire for money.

"Aside from murder in the commission of the enumerated felonies (says Wharton, 1 Criminal Law, 391), the rule is that where the deliberate intention is to take life, and death ensues, it is murder in the first degree; where it is the intention to do serious bodily harm, and death ensues, it is murder in the second degree; where the intellect is so confused, by drink or stimulants, or by undue and yet not homicidal passion, as to be incapable of deliberation (sections 379 and 389), and where the killing is done in the attempt to commit any other unlawful act than those enumerated in the (1123) statute, but with no design to take life, though the slayer would be guilty of murder at common law, it is now only murder in the second degree." Wharton, *supra*, secs. 389-392; *S. v. Johnson*, 40 Conn., 136; *Com. v. Hagerty*, Lewis, C. L., 403; *S. v. Ellis*, 74 Mo., 207; *S. v. Kittovsky*, 74 Mo., 247; *Newbury v. Com.*, 98 Pa. St., 322; *S. v. Robinson*, 20 W. Va., 713. In order to constitute deliberation and premeditation, something more must appear than the prior existence of actual malice or the presumption of malice which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt, that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill in furtherance of such purpose or motive. *Anthony v. State*, 10 Tenn. (Meigs), 272; *S. v. Sharp*, 71 Mo., 218; *S. v. Jones*, 1 Houston Cr. Law (Del.), 21; *S. v. Boyle*, 58 Iowa, 524.

It is the province of the jury to pass upon the proof of intent, and the prisoner had no cause to complain that the court told the jury "that it was sufficient to constitute murder in the first degree that here should be a design and determination to kill, distinctly formed in the mind at any moment before or at the time the blow was struck," if the killing was in any phase of the testimony of that grade of homicide. If it were conceded that the vague threat of the prisoner "to knock his wife in the head if she did not hush crying" was sufficient to be submitted to the jury as evidence of a specific purpose to kill, distinctly formed in the mind, there would be another difficulty, in that the court failed to define murder in the second degree or to apply the testimony to the theory that such was the nature of the offense committed, and charged the jury in such a way as (1124) might well have produced the impression on their minds that they must convict of either murder or manslaughter. They could not convict of manslaughter, because the specific instructions to the jury upon that point were that if they "should believe from the evidence that the prisoner and deceased were engaged in a sudden quarrel and

fight, and that the prisoner slew the deceased, then it would be manslaughter." There being no actual evidence of a fight between the prisoner and deceased, the jury were left to grope in the dark as to their duty in case they were not satisfied by the State beyond a reasonable doubt that the prisoner acted upon a fixed purpose to kill, distinctly formed in his mind. If they concluded that there was a quarrel or argument, and in the heat of sudden passion, engendered by disagreeable language, which would not have been provocation sufficient to bring the offense within the definition of manslaughter, the crime, under the construction given by our Court and elsewhere, was murder in the second degree. *S. v. Fuller,* 114 N. C., 902; *S. v. Lewis,* 74 Mo., 224; *S. v. Ellis* and *S. v. Kittovsky, supra; S. v. Boyle, supra,* at p. 524. Every killing which is embraced in the definition of murder at common law must be classified as a murder in the second degree, unless, on the one hand, it is done in the heat of passion, excited by some act, such as an assault, which at common law was sufficient to reduce the offense to manslaughter, or is done carelessly, but not recklessly; or, on the other, is either the result of a fixed and premeditated purpose distinctly formed in the mind, or falls within the classes specifically declared in the statute to constitute murder in the first degree.

(1125) Wharton, *supra,* secs. 377-388. In section 388 Wharton says that where there is a specific intent, not to kill, but to do great bodily harm, it is not murder in the first degree, but in the second degree, and killing by one insensible from drink, or in the attempt to produce abortion, are mentioned as illustrations. *Ib.,* secs. 389, 390.

The physician who was examined for the State testified that her death was not caused by drowning, but ensued instantly when her neck was in some way broken. He further testified that the lungs were collapsed and there was no water in the body, from which facts he inferred that she was not drowned. It does not appear that the *post-mortem* examination disclosed evidence of any wounds or bruises upon her person, or that there was testimony tending to show any injury other than the fatal wound in the neck. If there was such evidence it was incumbent on the State or the judge to send it up, since the charge was excepted to on the ground that the whole of the testimony did not tend to show that the prisoner was guilty of murder in the first degree. The witnesses were a half-mile away, across the water, and while they testified that they heard cries and the noise of blows—the water being a better medium for conveying sound than the air—none of them undertakes to say with accuracy what instrument, if any, other than his hands, the prisoner used to cause death. True, one of them saw her go overboard, in the struggle with the prisoner, and another

heard a sound like striking with a fishing pole, but he did not pretend to state that he saw any such instrument used, or, if used, it did not appear what were its dimensions, so that the court could pass upon the question whether it was a deadly weapon. There is no evidence, therefore, that a deadly weapon was used at all. For aught that appears in the evidence, it may be true that the prisoner struck the blows, the sound of which was heard, with his fists, and knocked her down upon the end or side of the boat, so as to break her neck.

True, there was evidence tending to show that he continued to (1126) beat her for several minutes. There was testimony, also, that the two were engaged in an argument before the killing, and amongst people in their humble walk in life argument is sometimes used in the sense of quarrel or dispute. Counsel might well have insisted that the jury ought to be allowed to say whether they inferred from the testimony that the prisoner's anger was suddenly aroused by a dispute. While the common law, in the advance of civilization, has ceased to protect husbands who administer moderate chastisement to their wives, we cannot divest ourselves of that knowledge of human nature and of the customs amongst certain classes of people who sometimes still insist upon asserting the common-law right of correction as they did in the time of Blackstone. It is not inconsistent with some phases, if with any aspect of the evidence, to infer that the unfortunate and (to persons of more refined tastes and higher culture) apparently brutal killing was done not in the furtherance of any fixed purpose, but under the influence of anger engendered by a dispute. The vague threat, made while administering the correction, is one that would, if it can be relied upon to prove anything, show that many a mother who, in fact, harbored no such design, intended to kill her child, had she not been diverted from her purpose. It is a matter of common observation that such coarse expressions are often used at every stage in the administration of what is deemed wholesome correction by ignorant parents. We are not prepared to hold that his saying, when he first came, that "he would knock her in the head," or, later when she was crying, that he would "take something and kill her" if she did not hush, were such evidence of a specific intent to take life, when in the subsequent killing no deadly weapon is shown to have been used, nor does it appear that there was evidence that she had received any wound that must have been inflicted by any such instrument.

There must be evidence, said the Supreme Court of Pennsyl- (1127) vania, whose construction of the statute we have heretofore followed (*S. v. Gadberry,* 117 N. C., 811), that the time defendant did the act he thought of his purpose to kill the deceased and had time to think he would execute it. *Com. v. D——,* 58 Pa. St., 9. In a Dela-

ware case (*S. v. Hamilton,* Hous. Cr. Cases, 101), where the guilt of the defendant depended upon what constituted premeditation and deliberation, the evidence was that the defendant and the only witness were in a room, drinking, when the defendant, after striking his wife and sending her into the next room, passed into the latter room several times and struck her on the head with his fist, and that she died, several days after, from the effects of the blows. The Court held that the jury were properly instructed to convict of murder in the second degree if they found that she died of the repeated blows. So that, in any aspect of the evidence, there was error, to take the view most favorable of the charge, in omitting to explain to the jury the application of the testimony to the theory of murder in the second degree, when the prisoner's counsel was maintaining that the prisoner ought to be convicted of no higher crime. For this error there must be a

New Trial.

CLARK, J., dissenting: The prisoner prayed the court to charge the jury that "if they believed the evidence to be true, it would not justify a verdict of murder in the first degree." This the court refused to do, and such refusal, being excepted to, raises the only exception in the record. It does not appear that the entire charge was sent up, and it is to be presumed, under the former rulings of this Court, that only so much of the charge was sent up as was (1128) necessary to point that exception. The charge, as sent up, bears out this view, as it shows that the judge submitted the case to the jury in the three aspects of murder in the first and second degree, and manslaughter—there being no evidence of self-defense—and he sends up that part of the charge as to what constitutes murder in the first degree, in full (it not being necessary to send up the full charge as to murder in the second degree or manslaughter). The charge as to murder in the first degree is not excepted to, and, indeed, presents no just ground for exception.

The only exception being that the judge should not have submitted the aspect of murder in the first degree to the jury, if there was any evidence on that aspect of the case sufficient to be presented to the jury, when taken most strongly against the prisoner, the judgment below should be sustained.

The evidence was that the prisoner and his wife were in a boat; that she was screaming and he was beating her with something which sounded like beating with a fishing pole; that he was heard to say to her, "If you don't hush I will take something and kill you." Two other witnesses heard the prisoner say he "would knock her in the head." "Directly after that, a heavy lick was heard; then two more heavy licks; then the prisoner stooped, picked his wife up and threw

her overboard; then looked around a minute or so, unloosed his boat and came down where" the witnesses were. He said to them that his wife had fallen overboard. When asked if he had killed her, he said, "No, he had not put his hands on her, and denied having beaten her." Another witness testified that when he first passed the prisoner and his wife, apparently before he commenced beating her, the prisoner said he would knock her in the head. The *post-mortem* examination showed that the wife's neck was broken and that her death had instantaneously resulted therefrom. It would seem that surely this was evidence sufficient to go to the jury on the charge of murder (1129) in the first degree. The man declares he will knock his wife in the head; he then begins beating her with a fishing pole; he threatens, if she does not hush, he will kill her, and that he will knock her in the head; then three heavy blows are heard, possibly with the paddle; at any rate, the woman's neck is broken; the husband throws her body overboard, denies having done so, and even having beaten her, and when the body is found it is shown that the violence used on the woman was sufficient to break her neck. Here there are repeated threats to kill, a killing with some heavy and deadly instrument, and a subsequent concealment. Surely this was evidence sufficient to go to the jury of murder in the first degree. And the sole matter complained of by the appellant is that the judge left that aspect of the case to the jury.

It may be that the evidence as a whole would be sufficient, with some persons, to mitigate the aspect of the crime to a lesser offense. It may be urged that it was a palliation if the prisoner killed his wife because she was arguing with him. If this could be true, still, whether that was the cause of the killing was a matter of fact for the jury. It may be, also, that the threats used by the prisoner, and his brutal conduct, in a person of his condition, did not mean as much as such words and conduct by others. But the jury, not the court, are to pass upon that. It is the province of the jury alone to draw such inference of fact. There is no technical construction to be placed upon such words or conduct, if used by people in a certain condition of life, which makes their meaning a matter of law to be determined by the court below, and therefore subject to be reviewed here, for we cannot review or weigh the evidence. Our province is simply to correct errors of law. There being threats to kill, no provocation (1130) shown, a cruel beating, then heavy blows, a killing by violence sufficient to break the victim's neck, a concealment and denial of the crime, and all this by a man, upon his wife, presumably his inferior in strength—whether all these amounted to murder in the first degree, in the second degree, or manslaughter, was eminently a matter for the jury to determine. To have refused to submit the phase of murder in

the first degree would have been a grave invasion of the province of the jury. The jury have said, by a unanimous verdict, that there was no reasonable doubt, upon the evidence, of the prisoner having been guilty of the crime of murder in the first degree. The presiding judge, who also heard the evidence, as well as the jury, and who, like the jury, had the benefit of the bearing of the witnesses, and hence a far better opportunity to form a correct idea of the truth of the transaction than this Court, reading the testimony on paper, possibly could have, refused to set the verdict aside. We cannot, without essaying to weigh the evidence, declare that the verdict upon the evidence was wrong, or that the judge erred in his discretion in refusing to set the verdict aside. Our province is limited by the record to the consideration of the single question whether there was any evidence of murder in the first degree to go to the jury, and there our duty and our legitimate power end. A man who brutally kills his wife is not such a favorite of the law that we should presume, contrary to all precedent, that error was committed by the court below in a matter not clearly appearing on the record and not complained of by the prisoner or his counsel by any exception.

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: S. v. Dowden, post, 1153; *S. v. Finley, post,* 1172; *McCracken v. Smathers,* 119 N. C., 620; *S. v. Booker,* 123 N. C., 726; *S. v. Rhyne,* 124 N. C., 852, 854, 857; *S. v. Truesdale,* 125 N. C., 698; *S. v. Foster,* 130 N. C., 669; *S. v. Bishop,* 131 N. C., 761, 763; *S. v. Cole,* 132 N. C., 1092; *S. v. Lipscomb,* 134 N. C., 693; *S. v. Banks,* 143 N. C., 658; *S. v. Spivey,* 151 N. C., 685; *S. v. Stackhouse,* 152 N. C., 808; *S. v. Cameron,* 166 N. C., 383; *Lawrence v. Nissen,* 173 N. C., 361.

(1131)

STATE v. J. S. WILCOX

MURDER IN FIRST AND SECOND DEGREE—MALICE, WHEN PRESUMED AND HOW REBUTTED—DEMURRER TO EVIDENCE ALLOWED IN SUPREME COURT—LAWS 1893, CH. 85.

1. The common-law principle that, on trials for murder, malice is presumed from the killing with a deadly weapon, and the prisoner has the burden to rebut malice, is modified by chapter 85, Laws 1893, only to the extent of making the killing, when nothing else appears, murder in the second degree instead of murder in the first degree.

2. The prisoner must satisfy the jury of the facts and circumstances relied upon to rebut malice, but he is not held to satisfy them beyond a reasonable doubt.

3. If, upon the whole testimony, it is manifest that the presumption of malice has been rebutted, and in no aspect of the testimony, if believed as a whole can the prisoner be guilty of murder in the second degree, the court should so instruct the jury, and direct them not to convict of a higher offense than manslaughter. *E converso,* the court may instruct the jury, when the testimony so warrants, that no evidence to reduce the homicide to an offense below murder is before them.

4. Where the whole evidence appears in the transcript on appeal, and the Attorney-General does not object a demurrer to the evidence may be entered in the Supreme Court. If such demurrer is sustained, a *venire de novo* will be ordered.

5. Deceased, without any provocation, assaulted the prisoner with a deadly weapon, driving prisoner sixty or eighty steps and then knocking him down. While prostrate on the ground, and while being beaten by deceased with a club, the prisoner shot and killed deceased with a pistol. The killing under such circumstances, was not murder in any degree, nor would the killing have been murder if prisoner had stood his ground in the beginning of the assault upon him and then shot deceased, and it was error in the court not to so instruct the jury.

INDICTMENT for murder, tried before *Boykin, J.,* at Spring (1132) Term, 1895, of PASQUOTANK.

There was a verdict of guilty of murder in the second degree. Defendant appealed.

Attorney-General for the State.
J. H. Sawyer, D. L. Russell and E. F. Aydlett for defendant.

MONTGOMERY, J. The prisoner, at Spring Term, 1895, of Pasquotank Superior Court, was convicted of murder in the second degree, and the judgment of the court was that he be imprisoned in the State penitentiary for a term of fifteen years. The prisoner having admitted that he killed the deceased with a pistol, the law presumes that he acted with malice, and the burden is shifted upon him to show, not beyond a reasonable doubt, but to the satisfaction of the jury, if he can, that the facts and circumstances on which he relies to show mitigation or excuse or justification are true. These he can show from the whole evidence, as well that offered by the State as that offered by himself. And the act of 1893 (chapter 85), which divides murder into two degrees, modifies this principle of the law only to the extent of making the killing, nothing else appearing, murder in the second degree, instead of murder in the first degree, as was the case before the statute. But in the trial of cases where this doctrine of legal presumption is applicable it may happen that, when the whole of the proof is in, it is manifest that, looking at it as a whole and in its every aspect and as to every inference that could be fairly drawn

from it, the presumption has been completely rebutted. A part of the testimony may prove simply a homicide, and yet, afterwards, upon the whole state of facts being made known, there is left no (1133) doubt that matters of justification or excuse or mitigation have been shown. In such a case it therefore appears that in no aspect of the testimony, in which it may be believed as a whole, can the prisoner be guilty of murder in the second degree, and the court ought to tell the jury that, in every view of the whole testimony, the presumption has been rebutted, and that they must not convict of a higher offense than manslaughter, just as the court would have power to tell them that no mitigating or excusing or justifying circumstances had been shown to reduce the degree of the offense charged, when no such testimony had been, in fact, introduced. *S. v. Miller,* 112 N. C., 878. "As malice is a presumption which the law makes from the fact of killing, it must necessarily be a matter of law what circumstances will rebut the presumption." *S. v. Matthews,* 78 N. C., 523.

It was understood, upon the argument of this case, that the whole of the testimony introduced below was before this Court, and the Attorney-General did not desire to interpose objection to the entering here for the first time by the prisoner's counsel a demurrer to the evidence. The testimony is as follows:

For the State:

Mrs. Sarah Sherlock: "I am mother of the deceased, and he was killed on 22 October, 1894. My child ordered Wilcox out; he would not go; my child stepped aside to get the stick, and while he was doing this Wilcox stepped to the door and drew his pistol. (Just before this both parties were in the house, at a table, where deceased had the registration books of his township.) As Wilcox dropped out of the door, with his pistol, Brothers walked to the door and met Wilcox, who was standing at the door. My son, Brothers, kept on repeating, 'Get out,' and Wilcox would not go, but drew his pistol and (1134) pointed it at him. They moved off the steps a short distance in the yard, and I heard the licks of the stick on the pistol. Then Wilcox shot him. I was standing on the piazza and saw him shoot. They were standing face to face. After he was shot, my child hit him with a stick. Then Wilcox fell to the ground and prepared to shoot again, and shot him twice on the ground. My son was hitting him between second and third shots, while he was on the ground. My son had not struck defendant till after he was shot. He was hitting on the pistol. A colored man came that morning, before Wilcox did, and asked if that was the place to register. When defendant came up he looked angry, and slightly spoke to me. Son was then in cotton

patch. When my son and defendant came to the house they passed the door and went on, talking, and came in at the front door. Son kept his registration books at the door. He was registrar. Son read the oath to colored man and told him he had not been in the county long enough to vote, and that it was not worth while for him to register. Wilcox asked for certificate of colored man. My son said he was not going to give any certificate until the one that wanted it asked for it, and had already given Shannon, the first colored man, a certificate. Then Wilcox wanted to see the registration books. Son said, 'No, you don't see the book any more while I have got it.' Wilcox had been there the Saturday before. Then my son ordered Wilcox out second time; then began the matters I have before stated. Wilcox wanted Noah Shannon's certificate, which had been given."

Cross-examined: "It was 10 o'clock in the day when Wilcox got there. I was standing on the porch when he got there. Saw them as they came from the cotton patch. They all entered at front door. My son kept registration books on table, and people came there to register, and he allowed them to register at the table in the hall. Son came in first, then Wilcox, and colored man stayed (1135) on porch. Table right at door, inside house; club but a short distance from door, in the house. The stick had been in closet for years; was a young man's; don't know who put it there." (Stick exhibited.) "I gave John Cartwright stick. It had stains of blood on it. I gave it to Cartwright unthoughtedly. Do not desire to deprive defendant of any evidence. I saw blood on defendant while they were fighting. Wilcox asked to see book; my son shut it up and told him to leave. Then Wilcox went to piazza and my son went to closet and got the stick. Wilcox backed to the door and drew his pistol. My son had not then got the stick. Defendant then standing at the door, with pistol pointing at him. Son had stick in his hand, hanging down, till he got to Wilcox; then son began to strike on pistol, holding stick upright before him and moving it back and forth, and defendant was trying to shoot him while my son was coming to him, but did not shoot; he was waiting to get him out the door. Wilcox backed from door, with pistol presented, and my son following, waving stick in front of him and striking pistol till they got near a green, grassy patch in yard; then Wilcox fell down, because he wanted to. My son had not struck him then. Defendant shot my son before he fell. My son was not hitting Wilcox with stick before he shot him. I thought he fell down so that he might shoot my son. I did not make any statement about this matter to Frank Godfrey just after it happened. The inquest was at my house. I was not sworn. Did not tell Godfrey that my son went out with stick and knocked Wilcox

down. I did not tell Ellis that I could not control my son that day; that he got stick and rushed out and knocked Wilcox down, and then defendant shot, and that it was all my son's fault. Did not tell
(1136) White that my son rushed out with stick and knocked Wilcox down while he was retreating, and that he was beating him while down, when Wilcox shot him. The colored man that was there did not see difficulty."

Dr. W. J. Lumsden: "I was one of the physicians that made *post-mortem* examination. Saw Brothers same day he was shot, and found three wounds on him—one on right arm, few inches below shoulder; one was a superficial wound of abdomen, and the other a penetrating wound in the abdomen; fresh wounds, made at same time. Clothes burnt by powder. Brothers killed by penetrating wound in abdomen."

Cross-examined: "Assuming that the jury find as facts that Wilcox was lying on the ground and Brothers was standing over him, or nearly over him, when the pistol was fired, and the ball from the pistol struck Brothers at the point where it entered the abdomen, what course, in your opinion, would the ball take?" Answer: "Upward and backward. We found that the range of the ball was upward and backward. This was the fatal wound; cannot say what position parties were in when the other abdomen wound was made. The ball that made the wound in the arm entered three inches below shoulder joint and passed out about two inches lower down the arm. If Wilcox was retreating and Brothers following, waving the stick perpendicularly in front of him, the ball could not have entered and made the wound on the arm. The arm must have been well elevated and drawn back at the time the wound was made for such wound to have been inflicted. Defendant and deceased about same size and height. Blows given, with the stick exhibited, on the head must have been serious; something must have given way. If Brothers hit a fair blow, don't see how it could have helped fracturing the skull. Don't think
(1137) the fatal ball could have taken the course it did if Wilcox had been on the ground and Brothers in piazza. Wilcox must have been lying down."

Defendant's evidence:

S. P. Wilson: "On Monday before homicide, Wilcox and myself at Brothers', and Wilcox asked him to put down his full name, and Brothers did so. We asked Brothers to correct mistakes he had made in registering Cicero Cale. Said he would not unless Cale was there. Wilcox said: 'Don't see why you should refuse to correct this matter.' Brothers said to Wilcox: 'You have come here for a row and if I've got to have a row with you I am going to have a d—d big one.' Wilcox said: 'I did not come for any row, and don't want

any. I have always looked on you toting fair.' Brothers said: 'Mr. Wilcox, any time you want to look over the books you can come and do so, but I don't want you to come bulldozing.' Wilcox said: 'You misunderstood me; I did not come here for any trouble or to bulldoze you.' Then they parted, friendly. Brothers' house was the place of registration for that township.''

J. S. Wilcox: ''Am forty-nine years old; know Noah Shannon and Brothers. Monday, 22 October, between 10 and 11 o'clock, I went to Brothers' house. Dave Games was there, talking to Mrs. Sherlock. Spoke to her, and Games and I went to cotton field after Brothers; met him and spoke about some peas. When we got to house Brothers entered back door of kitchen. Games and I went to front door of house. After Brothers got through with Games I spoke to him. Brothers told Games he had not been there long enough to register. I said: 'Johnnie, I'd be much obliged if you'd give me Shannon's certificate.' He said: 'Shannon must come after it himself.' I said: 'The other day you told me to come and look over the book any time and get certificates.' He said: 'You leave here; (1138) I've granted you as many privileges as I am going to.' I asked him who was in authority there, he or Mr. Sherlock, his mother's husband. He said: 'Mr. Sherlock, but I am man enough to move you, you God d—d s— of a b—.' Then he rushed to the closet, got the stick and advanced towards me with it drawn. I was retreating, and as I got to the steps I threw up my hands to ward off the licks, and he struck me on the wrist. He followed me up; I was retreating, and from stumbling over something, or from a lick I received, I fell. He was beating me over hand and arms all the time with stick; split my hand three inches; hit me over the head and knocked me down; struck me several times over the head. Shot him first after I stumbled or was struck. He struck me four times with stick; lick on head knocked me down. He continued to beat me with stick while I was down, and I shot again. I got pistol out when I came near falling first time.'' (Identified stick.) ''He was hitting me with big end. My face and eyes covered with blood, and I did not see him when I shot last time. My horse was at gate, and I was trying to get to horse and leave. I was at piazza steps when he first hit me; was fifteen or twenty steps away from piazza when I drew pistol, and sixty or eighty steps when he last knocked me down. Was arrested Monday and gave bond. Was rearrested that evening and gave bond. Games left Brothers' place first, and was getting his horse when Brothers got stick. I was deputy sheriff. Was at door when he told me to leave, and as he rushed for stick I commenced to retreat, and was going off the piazza steps when he came up and struck me, and did not then have

pistol in my hand. Been carrying pistol about my person as deputy sheriff. Was indicted for killing Jennings, but did not kill him, and was acquitted. Did not threaten to shoot Newby and my son."

(1139) Dave Games: "Was at Brothers' that morning. Wilcox and I went after Brothers; met him, and I told him I wanted to register. We went back to house. Brothers went in the back door and Wilcox and I in the front door. Brothers told me I had not been there long enough, and I started to get my horse. As I left piazza Wilcox asked him for certificate for Shannon. When I got to fence heard racket; looked around and Brothers was hitting Wilcox, who was walking backward and throwing up his hands, and Brothers was hitting at him with a stick. Brothers knocked him down, and while he was down Wilcox shot one time. Wilcox then got up and backed back. Brothers began to strike Wilcox again, while he was retreating; he did not get very far before Brothers knocked him down again, and then defendant shot him again, and Brothers was standing right over him, with stick drawn, when he shot. Brothers slapped his hands to his stomach and threw stick down. This was last shot. White lady standing in piazza, saying something, when fuss was going on, but I can't tell what she was saying."

Cross-examined: "Heard two shots only. Did not get on my horse till last shot. Then I left and went to Weeks' and told some of them about it, but did not say that I did not know who did the shooting. Don't know whether Brothers hit Wilcox with stick while he was down or not." (Games' examination before magistrate read, which was, in substance, the same.)

Jennie Perkins: "Was at Mrs. Sherlock's that day. Heard licks. Mrs. Sherlock said: 'Johnnie, don't have any fuss.' This was after I heard licks. Then I heard other licks; then pistol went off. Only heard two shots."

John Cartwright: "Defendant married my sister. I went to Mrs. Sherlock's and got the stick, and there was blood on big end of stick.

(1140) She said Brothers told Wilcox to leave; that Brothers went to closet, got the stick, and she told Johnnie not to have any fuss; that Wilcox was at piazza, and Brothers went there and hit him with the stick. She pointed out a bunch of flowers in yard and said: 'There is where the fight was.' Then she cried and said: 'Oh, if Johnnie had minded me, there would have been nothing of it.' The bunch of flowers was halfway between house and gate. Some blood there."

F. M. Godfrey: "I acted as coroner in this matter. Mrs. Sherlock was sworn and made a statement before me. She said Wilcox was down on the ground when he shot Brothers. William Pailin was

present and said, 'She is not in a condition to give testimony,' and she then stopped and went away. I think she knew what she was talking about." Cross-examined.

H. C. Markham: "I was one of the jurors, and Mrs. Sherlock said that Wilcox wanted to look at the book, and Brothers told him he could not do it, and to get away, and he refused to leave; that Brothers went to the closet, got the stick and made for Wilcox, and Wilcox retreated towards door and Brothers began to strike at him, Wilcox retreating; that Wilcox did not draw his pistol till Brothers struck him; that shooting was done out there" (pointing to the green bunch in the yard); "she was crying."

M. T. Sawyer: "Saw Mrs. Sherlock next day after shooting. She said if she had known Wilcox she would not have told him Brothers was in the field; that she told her son not to have any fuss. She was crying."

W. H. Ellis: "Was at Mrs. Sherlock's Tuesday at 2 o'clock, and she said Wilcox came there yesterday and killed her boy. She said it was on account of them devilish books—on account of a darkey who wanted a certificate that Johnnie would not give him; that John hit first lick; if he had minded her, there would have been nothing of it; that he followed Wilcox 'out yonder to that green spot (1141) and knocked him down, and that's where Wilcox shot him'; that John followed Wilcox from piazza and was beating on him."

William Morris: "Saw defendant soon after difficulty. He showed me his wounds; said it pained him."

Dr. Griggs, after describing wounds, said they indicated a severe thrashing with a stick or club, like one exhibited. Defendant had transverse wounds across his head 2½ inches long; another on right side of head, above right ear; in rear another wound; there was fourth wound on head; back of left arm was bruised, hand severely cut, between thumb and finger, wound 2½ inches long, tearing skin; large bruise on right shoulder, discoloration about neck and face.

The State, in reply:

George A. Scott: "Saw Games going towards Brothers' the morning of fight. Wilcox passed after him. Saw Games returning, riding very fast, and said Wilcox and the man that registers were fighting and shooting; don't know who was doing the shooting."

Cross-examined: "Saw defendant after the fight; he was badly bruised; blood on his face and head, so that he could scarcely see; so much blood on his head I could not see wound, and he said Brothers was beating him as hard as he could when he shot him. This was about ten minutes after the fight.

Dr. Lowry: "Helped make *post-mortem* examination. There was penetrating wound on the abdomen and another superficial one."

"If the jury shall find as a fact that Brothers had been standing on the piazza step and Wilcox on the ground below, and Wilcox shot the deceased and the ball struck at this point when it entered
(1142) the abdomen, could the penetrating wound in the abdomen have been made?" Objection, and objection overruled. Exception by defendant (his second exception).

Witness answered: "Yes." Objection to answer, and objection overruled. Defendant excepted (his third exception).

Dr. McMullan: "If the parties had been facing each other, and Brothers was waving the stick from side to side, the wound in the arm could have been made by defendant with the pistol. Was at inquest. Mrs. Sherlock was so prostrated she was incapable of making a coherent statement. She could understand and answer any ordinary question."

Dr. Wood testified as to the location and nature of the wounds on defendant, and said they must have been made with a club or stick.

We will now examine the testimony from the standpoint of the demurrer, and determine whether or not, in any aspect of the whole testimony, the prisoner is guilty of murder in the second degree. Such examination, for the end we have in view, must be made, not by weighing or comparing or contrasting the testimony which is favorable to the prisoner and then drawing a conclusion of probabilities or preponderancy, but in critically analyzing and arranging all of the testimony which is unfavorable to the prisoner, and then to consider its legal effect, when compared and studied, with the rest of the testimony, with the view of determining whether or not, upon the whole, and from any and every point of observation of the whole, the presumption of malice has been rebutted. For the purposes of this discussion, then, no amount of testimony favorable to the prisoner, however much of such may appear, can be considered by us if there is any sufficient proof, from any aspect of the whole testimony, to be submitted to the jury, upon which the prisoner ought to be con-
(1143) victed of murder in the second degree. It may be safely said, however, that the whole of the testimony in this case tends to prove that the fight was a sudden one; secondly, that the prisoner was where he had a right to be; third, that his conduct was proper up to the time of the actual collision; fourth, that the deceased was the aggressor, and with a deadly weapon; fifth, that there was no proof that the pistol was prepared by the prisoner; and, sixth, that the shot which killed the deceased was fired while the prisoner was lying on the ground and being beaten by the deceased with a stick or club, a

deadly weapon; and, seventh, that the whole of the testimony offered by the defense is favorable to the prisoner. The only witness for the State who saw the fight and the shooting, whose testimony alone, of all the witnesses, is unfavorable to the prisoner, was the mother of the deceased. We are not disposed to harshly criticise the testimony of this witness, for we are mindful of the relation between her and the deceased. Her excitement at the time of the homicide, and her grief following, and especially manifested on the day of the coroner's inquest, must have been intense.

The testimony of this witness, whatever else it may tend to prove, shows that the deceased, without the least provocation, made a sudden and violent attack on the prisoner with a deadly weapon—a stick so large as to be called a club by the witness; that the deceased, violently and forcibly, with this deadly weapon, drove the prisoner before him out into the yard, sixty or eighty steps from the porch, and that the pistol was fired while the prisoner was prostrate on the ground and being beaten by the club in the hands of the deceased; and the stick was seen by her to be bloody after the fight, and that there was blood seen by her on the prisoner during the time the fight was going on.

Under this testimony, viewed from the whole, the prisoner was not guilty of murder in the second degree. If the jury (1144) had believed her testimony to be true, and all the witnesses besides swore falsely, the killing, at most, would not be murder in any degree. Even if the prisoner had been willing to fight, and could have escaped the threatened assault of the deceased, armed with a deadly weapon, had he so desired, but chose to stand his ground and shoot, and had shot and killed the deceased in the beginning of the assault in the doorway, the offense would not have been murder in the second degree. *S. v. Kennedy,* 91 N. C., 572. Certainly the driving and forcing of the prisoner by the deceased, in the manner described, even by this witness, to the spot where the homicide took place, but aggravated the assault and gave greater provocation to the prisoner. This witness said nothing about the injuries of the prisoner but that he was badly beaten. The physician who saw and examined the wounds said: "He had transverse wounds across his head two and a half inches long, another on right side of head, about right ear; in rear another wound; there was a fourth wound on the head; back of the left arm was bruised; hand severely cut, between thumb and fingers; wound two and a half inches long, tearing skin; large bruise on right shoulder; discoloration about neck and face." It makes no difference when these wounds were inflicted, whether before or after the prisoner fell upon the ground, for, under the circumstances of this case, there was no element of murder in the act of the prisoner. In

S. v. Ingold the court below instructed the jury that "if the prisoner willingly entered into the fight, and during its progress, however sorely he might be pressed, stabbed the deceased, as described by the witnesses, his offense, at least, would be manslaughter," but upon appeal this Court said, supposing there was evidence to raise this point, the offense, according to all the authorities, "was excusable homicide."

(1145) But we are not considering now whether the prisoner fought willingly or not, or whether the facts in this case make the killing of the deceased by the prisoner excusable on the ground of self-defense. That may be for a future trial. There was testimony, however, going to show that the killing was justifiable on the ground of self-defense, and none, taken in connection with the whole evidence, that was sufficient to be submitted to the jury to convict the prisoner of murder in the second degree, and the court ought to have instructed the jury that in every aspect of the testimony the presumption of malice had been rebutted.

New Trial.

Cited: S. v. Thomas, ante, 1120; *S. v. Booker,* 123 N. C., 726; *S. v. Rhyne,* 124 N. C., 852; *S. v. Huggins,* 126 N. C., 1056; *S. v. Kinsauls, ib.,* 1096; *S. v. Medlin, ib.,* 1130; *S. v. Foster,* 130 N. C., 670; *S. v. Capps,* 134 N. C., 628; *S. v. Lipscomb, ib.,* 695; *S. v. Banks,* 143 N. C., 657; *S. v. Houston,* 155 N. C., 434.

STATE v. HENRY DOWDEN.

MURDER IN FIRST AND SECOND DEGREES—PREMEDITATION.

1. The killing with a deadly weapon raises a presumption of murder in the second degree, under chapter 85, Laws 1893.

2. Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. But where the intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree.

(1146) INDICTMENT for murder, tried before *Meares, J.,* at February Term, 1896, of the Circuit Criminal Court of HALIFAX.

The prisoner was indicted for the murder of M. M. Dodd, a locomotive engineer of the Seaboard Air Line, at Weldon, N. C., on 22 February, 1896. The prisoner was found guilty of murder in the first degree, and the judgment of the court was duly prayed, and

the prisoner was sentenced by the court to be hanged on 17 March, 1896.

The prisoner introduced no testimony, and no exceptions were taken on the trial to any of the rulings of the court, and no prayers for instructions were offered or asked for by the prisoner's counsel.

The portion of the charge discussed in the opinion is as follows: "When one human being kills another, the law calls it 'homicide.' There are various degrees of homicide, viz., murder, manslaughter, justifiable and excusable homicide; and the degree of the homicide must be determined by the attending circumstances. The highest and most heinous form or degree of homicide is that of murder. When a person of sound mind kills another human being with malice aforethought, either expressed or implied, it is a case of murder. You will bear in mind that malice is an essential ingredient of the crime of murder. There can be no murder where the killing is unaccompanied by malice." (The court here fully explained the difference between expressed malice and implied malice.) "Where a homicide has been committed, and the accused is indicted and charged with the crime of murder, and the accused, on his trial, admits the killing, or the State fixes the killing upon the accused, beyond a reasonable doubt, then the burden shifts from the prosecution to the accused of showing what is the degree of homicide—whether it be a case of murder or of manslaughter, or justifiable or excusable homi- (1147) cide; that is to say, it devolves upon the accused to show such mitigating circumstances attending the killing, if there be any, as will reduce the degree of homicide from murder to manslaughter, or to justifiable or excusable homicide; but in doing so, the accused is allowed to avail himself of all of the testimony introduced upon the trial of the case, as well that which has been introduced by the State as that which has been introduced by himself; and if neither the testimony introduced on the trial by the accused nor that introduced by the State will show any mitigating circumstances attending the killing, then it is a case of murder."

The facts connected with the killing are contained in the testimony of Peter Neilson, who testified that he was a locomotive fireman, in the employment of the Seaboard Air Line, and that he worked and ran upon the same engine that the deceased, M. M. Dodd, who was an engineer, was in charge of at the time he was killed; that the hour of departure for his train was at 4:35 o'clock A. M.; that at 4:20 o'clock on the morning of 22 February last the engine of which the deceased had charge, and on which the witness belonged as fireman, together with the train to which it was attached, was standing under the railroad shed at Weldon, and the Atlanta special train, which had just arrived, was standing alongside of his train; it was yet before day-

break. At that time the prisoner came upon the engine to warm, the witness being at work on the cab of the engine. The witness said nothing to the prisoner at first, but allowed him to warm for a few minutes, and then the witness told the prisoner to get off. In a few moments witness observed that the prisoner had taken his seat, whereupon he said to the prisoner: "Damn it, get off; I have no time to fool with you." Just at that time M. M. Dodd, the deceased,
(1148) who had been down upon the ground, oiling the engine, came upon the engine and told the prisoner, in a peaceable and quiet manner, to get off, and then took hold of the prisoner's coat sleeve and led him four feet, to the getting-off place on the side of the engine, and the prisoner went down upon the ground. The prisoner made no resistance whatever, and said nothing, and the deceased was not mad and the prisoner not mad, apparently; and there was no quarrel between them. The prisoner, in a moment after getting off the engine, said: "Hello, mister! I have dropped my hat; I want your light." Then the deceased turned to that side of the engine where the prisoner was standing, and held the light, and said to the prisoner, "There is your hat; pick it up and go off," and the deceased turned from where he was holding the light and stepped back on his side of the cab, and was raising his hand to take hold of the injector, when the pistol fired. The deceased exclaimed, "Oh!" and jumped through the engine window—was speechless, and died in a few minutes. It was probably ten or fifteen seconds from the time the deceased took hold of prisoner's coat sleeve and led him to the place to get off and the firing of the pistol. Witness was not looking at the man at the time the pistol was fired; his back was turned towards him at that moment. When the prisoner came upon the engine the witness took him to be a tramp; and while the prisoner was warming, in the light of the fire, the witness observed that the prisoner was wearing a gold watch chain, with a charm fastened to the chain, and the charm was a pitcher; and the prisoner also had a red handkerchief around his neck and wore a hat with a hole in it. When the deceased was shot and fell to the ground the witness immediately ran to the telegraph office, a few yards distant, and gave the same description
(1149) of the man who fired the pistol and killed the deceased as he had given here; and in fifteen or twenty minutes afterwards the prisoner was arrested, and he then had on his person the watch with the chain and charm, and the red handkerchief around his neck, and the hat and coat, just as the witness had described him to the telegraph operator a few minutes before. The witness swore most positively to the identification of the prisoner as the person who came upon the engine, as before described by him, and

who fired the pistol and killed the deceased, in the manner described by him. He swore that he entertained not the slightest doubt about it; that when the prisoner was arrested he denied that he had any pistol, and that he was immediately searched and they found a pistol hanging on the inside of a leg of the prisoner's pants, considerably lower down than the pocket; that when the deceased took hold of the prisoner's coat sleeve and told him to get off, the witness remarked that this place was worse for tramps than Chicago. The prisoner appeared to be sober. The watch and chain, with the charm attached to it, were introduced as evidence and identified as the same referred to by the witness and which were taken from the person of the prisoner at the time of his arrest.

Charles Bland, a State's witness, testified that he had been acquainted with the prisoner for three or four years, in Raleigh. Witness is a porter on the Atlanta special train. He saw the prisoner on the train at Bolling, six miles from Weldon, the morning Mr. M. M. Dodd was killed. When the train reached Weldon the prisoner was riding on the steps of the car. He saw the prisoner get off the steps of the car and go upon Mr. Dodd's engine. In a few moments afterwards witness heard a pistol shot, and came out of the car where he was, and saw the deceased lying on the ground.

There was other testimony corroborative of the witnesses whose testimony is given above.

Attorney-General and McRae & Day for the State.
Argo & Snow for defendant. (1150)

AVERY, J. Counsel for the prisoner contended that the charge of the court came within the condemnation of the ruling in *S. v. Fuller,* 114 N. C., 885, in that the definition of murder in the first degree was left in doubt and uncertainty, and the jury were liable to be misled by inconsistent propositions of law contained in different portions of it.

It is probable that the instruction would have been more clearly understood by the jury had the judge told them in the outset that, the killing (which, according to all of the testimony, was done with a deadly weapon) being proved or admitted, the law presumed malice, and the burden is shifted upon the prisoner to show that he was not guilty of *murder in the second degree.* The instruction that the burden shifted upon the prisoner to rebut the presumption that he was guilty of murder, without specifying the grade, is not to be commended as a formula, and, without the clear explanation subsequently given, would have been misleading. The distinction between

the instruction excepted to in this case and that held to be erroneous in *Fuller's case* can be easily drawn and readily comprehended. In *Fuller's case* the trial judge told the jury that where the fact of killing with a deadly weapon was proved or admitted, premeditation might "be presumed from the use of the deadly weapon, unless the contrary appeared." Other instruction given was in conflict with that proposition, and the jury were left to act upon either of two irreconcilably antagonistic views of the law, one of which might have misled them into returning a verdict of murder in the first
(1151) degree, when the facts found by them warranted only a verdict of murder in the second degree, while the other proposition submitted by the court, if acted upon, would have led them to a just conclusion. The prisoner was entitled to a new trial, because it was manifest that the jury might have found him guilty of the higher crime, solely because they were misled as to the law. In the case before us the judge told the jury that the burden shifted, upon proof of killing with a deadly weapon, as to the question whether the homicide was murder or was mitigated to manslaughter, or was only a justifiable or excusable slaying. Subsequently, however, and after defining manslaughter, the judge stated that there were two degrees of murder, and explained the distinction between the two, as follows:

"The crime of murder has been graded by the law of this State into murder in the first degree and murder in the second degree.

"Every murder which is committed by lying in wait, or poisoning, or by torture, or any other kind of wilful, deliberate and premeditated murder, or any murder committed in the attempt to commit a felony or in the perpetration of a felony, is deemed to be a murder in the first degree. All other kinds of murder are in the second degree. You will understand that it is an essential ingredient of the crime of murder in the first degree that the killing must be done with deliberation and premeditation. When there is no premeditation in the commission of the murder, for that very reason it is murder in the second degree. What does the law mean by the word "premeditation"? The word "premeditate" means to think beforehand, as where a man thinks about the commission of an act and concludes or determines in his mind to commit the act; he has thus premeditated the commission of the act. The law does not lay down any
(1152) rule as to the time which must elapse between the moment when a person premeditates or comes to the determination in his own mind to kill another person and the moment when he does the killing, as a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination to kill the deceased, and then at some subsequent period, either imme-

diate or remote, does carry his previously formed determination into effect by killing the deceased. If there be an intent to kill, and a simultaneous killing, then there is no premeditation. In determining this question of deliberation and premeditation, it is competent for the jury to take into their consideration the conduct of the prisoner, before and after as well as at the time of the homicide, and all the circumstances connected with the homicide.

"It is for the jury, and not the court, to decide what is the degree of murder in all cases where the jury have come to the conclusion that the case under consideration is one of murder. Our act of Assembly grading the crime of murder also makes it the duty of the jury which tries and sits upon the case to determine, if it be a case of murder, whether it be murder in the first or second degree.

"The court also instructs you that when the state contends for and asks at your hands for a verdict of guilty of murder in the first degree, as the State does in this case, the law makes it incumbent upon the State to satisfy the jury beyond a reasonable doubt that this is a case not only of murder, but of murder in the first degree."

The first part of the charge left the question of what was included under the term "murder" an open one, and if that and the latter portion of it had been given, one immediately after the other, there would have been no inconsistency between them. The killing with a deadly weapon did raise a presumption that the homicide was murder, but in the second degree. The specific instruction, (1153) subsequently, left no room for doubt in the mind of an intelligent juror that it was incumbent on the State to prove premeditation and deliberation, and that on the failure to do so the prisoner could be found guilty of no higher offense than murder in the second degree.

If the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution, there was sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *S. v. Thomas, ante,* 1113; *S. v. Norwood,* 115 N. C., 790; *S. v. Covington,* 117 N. C., 834; *S. v. McCormac,* 116 N. C., 1033. This Court has not followed the intimations of some of the courts of other States, that in order to constitute deliberation there must be evidence of a definite design, formed on some occasion previous to the meeting at which the killing was done, and cherished up to and at the time of putting it into execution.

The court properly told the jury that where the intent to kill was formed simultaneously with the act of killing the homicide was not murder in the first degree. This was but another mode of expressing the rule that there must be a preconceived and definite purpose to kill, the question of the time that elapses between the determination to kill

and the killing being immaterial. There was no error, and the judgment is

Affirmed.

Cited: *S. v. Booker,* 123 N. C., 726; *S. v. Rhyne,* 124 N. C., 856, 857, 869; *S. v. Foster,* 130 N. C., 670; *S. v. Bishop,* 131 N. C., 761, 769; *S. v. Daniels,* 134 N. C., 680; *S. v. Hunt, ib.,* 688; *S. v. Lipscomb, ib.,* 694; *S. v. Clark, ib.,* 714; *S. v. Potter, ib.,* 733; *S. v. Barrett,* 142 N. C., 568; *S. v. Banks,* 143 N. C., 658; *S. v. Stackhouse,* 152 N. C., 808; *S. v. Murphy,* 157 N. C., 617; *S. v. Shelton,* 164 N. C., 517; *S. v. McClure,* 166 N. C.; 327; *S. v. Cameron, ib.,* 383; *S. v. Foster,* 172 N. C., 988.

(1154)

STATE v. WADE LOCKLEAR, PATRICK LOCKLEAR AND G. W. LOCKLEAR

MURDER, UNDER ACT OF 1893, CH. 85.

1. Upon a trial for murder there was evidence tending to prove that the prisoner stood behind a tree and shot deceased. There was also evidence that deceased had a gun beside him when his body was found, and that the report of more than one gun was heard about the time it was supposed the deceased was shot. Upon this evidence the trial judge was not warranted in instructing the jury that there was no evidence from which they could bring in a verdict of murder in the second degree.

2. Prior to chapter 85, Laws 1893, the law was that where the killing was admitted or proved to have been done with a deadly weapon malice was presumed, and it was murder, nothing else appearing. It devolved upon the prisoner, under such circumstances, to show facts in extenuation, mitigation or excuse. This rule, under the act of 1893, applies to murder in the second degree, but not to murder in the first degree.

3. To constitute murder in the first degree, under the act of 1893, the killing must have been done "by lying in wait or with deliberation and premeditation." That the killing was so done is not presumed by the law, but is a fact which must be established by proof, the burden of proof being on the State.

CLARK and MONTGOMERY, JJ., dissent.

INDICTMENT for murder and being accessory before the fact, tried before *Hoke, J.,* at October Term, 1895, of ROBESON.

The bill of indictment charged Wade Locklear with the murder of Burdie Bullard, and Patrick Locklear and G. W. Locklear with being accessories before the fact.

Attorney-General for the State.

E. K. Proctor, Jr., Shepherd & Busbee and French & Norment for defendants.

FURCHES, J. The prisoner Wade Locklear is indicted for (1155) the murder of Burdie Bullard, and the prisoners Patrick Locklear and G. W. Locklear as accessories before the fact. So the guilt of Wade must be established before Patrick and G. W. Locklear can be found guilty. The fact that Burdie Bullard was killed by a gunshot wound through the head was not disputed, but there was no direct testimony as to who did it, nor as to the circumstances under which it was done. It was a case of cirumstantial evidence.

There was a great deal of evidence introduced on the trial to show that the deceased was killed on Friday evening, and that on Sunday, a week before, he had a fuss and a fight with the prisoners, and that they had threatened to kill him. There was evidencee that a man was seen going in the direction of where the deceased was found dead, with a gun in his hand, just before the report of a gun was heard, supposed to be the shot that killed the deceased; that the clothing this man was wearing resembled that of the prisoner Wade Locklear, though the witnesses who testified to this stated that they did not know who it was. Another witness testified that she saw some one going around her fence, in the direction where the deceased was killed, in a fast walk, or trot, in a stooped condition, with a gun in his hand, though she did not know who it was. Dr. Norment testified that he acted as the coroner in holding an inquest over the dead body the day after he was killed; that a short distance from where the deceased was killed he saw grass tramped behind a tree, as if some one had stood upon it or kneeled upon it, though he saw no tracks and could not tell whether it had been done recently or not; that he saw a twig cut on the opposite side of the road, in a line with this tree and where the deceased was killed. It was also in evidence that the deceased had a gun with him, which was found lying by (1156) his side, and it was not shown whether this gun was loaded or not. There was also evidence by some of the witnesses that they heard "guns" about the time it was supposed the deceased was killed.

This is a synopsis of the strongest part of the evidence against the prisoners, and it must be admitted that it tends strongly to prove that the prisoner Wade was the author of the killing, or, as the Attorney-General put it, "it is consistent with the verdict of murder in the first degree." But this is not the question before us. The question presented for our consideration is the correctness of his Honor's charge, which is stated as follows: "That after the jury had been out from Saturday evening until the following Wednesday, they returned into court and requested his Honor to restate to them the law with regard to the different degrees of murder. This the court did, by reading the statute to the jury, and charged them that if the

killing was by lying in wait and shooting deceased from behind a tree, and the jury were satisfied of this, beyond a reasonable doubt, and that the killing was willful, deliberate and premeditated, it would be murder in the first degree." To this part of the charge there can be no objection. It is in harmony with every opinion delivered by this Court upon the act of 1893, dividing murder into two degrees. But the charge did not stop with what we have quoted. The judge added to that the following: "That there was no evidence of murder in the second degree in the case now on trial." In this there was error. It was the same, in substance and effect, as if he had told the jury, if they found the prisoners guilty of anything, they must find them guilty of murder in the first degree. To sustain this charge would be to nullify the statute of 1893. This we cannot do, nor per-
(1157) mit to be done by the judges of the Superior Courts. Before the act of 1893, the law of homicide was the common law, as laid down by Sir Michael Foster, that where the killing was admitted or proved to have been done with a deadly weapon, malice was presumed, and it was murder, nothing more appearing. And it devolved upon the prisoner to show circumstances in extenuation, mitigation or excuse. This rule, under the act of 1893, applies to murder in the second degree, and not to murder in the first degree. If it did, the act of 1893 would be a nullity. The first section of chapter 85, Laws 1893, except from the second section, which provides for murder in the second degree, and which retains the common-law presumption, a number of murders which are therein enumerated, among them, where it is perpetrated "by lying in wait, * * * or by any kind of willful, deliberate and premeditated killing, * * * it shall be deemed to be murder in the first degree and shall be punished with death." And the third section provides: "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."

Then, to constitute the prisoners murderers in the first degree, the killing must have been committed "by lying in wait or with deliberation and premeditation." This is presumed by law, or it must be proved. If it is presumed, as we have said, then the act of 1893 is a nullity, and every killing that would have been murder before the act is murder in the first degree under the act. If it is to be proved, by whom is it to be proved? Does the State have to make out its case, or does it devolve on the prisoner? Is it required that the prisoner should prove a negative, or prove that he is not guilty, before the State proves that he is? This cannot be so, and were it not
(1158) for the great respect we have for those who differ with us, we would say, to our minds, it seems absurd. Then, if these

things are not presumed, but are to be found as facts, who is to find them, the judge or the jury? It would be new law in North Carolina for a judge to find the facts in a trial for murder. But the act of 1893 says in express terms that the jury before whom the case is tried shall determine the degree of murder. And we do not understand this to mean an unbridled arbitrating or mob finding, any more than it was before the statute. Even before the act of 1893 we all know that it was within the *power* of the jury to acquit and turn loose a prisoner, no matter how guilty he might be, and the court was powerless. In fact, it is alleged that they often did this. But it is expected that they will find the facts and apply them to the law given by the court, determine whether the prisoner is guilty or not, and, if guilty, in what degree. We see no reason why they should act differently now to what they did before the statute, and we do not believe they are any more disposed to take the law in their own hands in deciding cases under the act of 1893 than they were before.

It has been said that this Court has gone too far in its grant of power to the jury. But we do not think so. We have not gone as far as *Judge Iredell,* of the Supreme Court of the United States, went in charge of his in Georgia, quoted and approved by *Justice Gray* in his opinion in the case of *Sparf v. U. S.,* 156 U. S., 51, and appendix, p. 714.

This question has been fully discussed heretofore, and the act of 1893 construed by this Court, especially in the case of *S. v. Fuller,* 114 N. C., 885, and *S. v. Gadberry,* 117 N. C., 811, and we can see no reason to change or modify the construction given the statute in those cases.

There are a number of other ecxeptions made and argued by the prisoner's counsel, but we have not considered them, as (1159) they may not arise on another trial and as we thought it best to put our judgment upon the point we have, with a view of emphasizing, if we could, the opinions of this Court heretofore given upon the construction of this statute. There is error, and a new trial is ordered.

New trial.

CLARK, J., dissenting: In *S. v. Covington,* 117 N. C., 834, it was held, affirming the construction of the statute theretofore made by *McRae, J.,* in *S. v. Gilchrist,* 113 N. C., 673; and by *Avery, J.,* in *S. v. Norwood,* 115 N. C., 791, that "the act of 11 February, 1893" (which divided the crime of murder into two degrees) "does not give jurors 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 lesser 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." From this most recent deliverance of the Court (so clearly restating the law and citing with approval the former authorities) it is plain that the degree of murder for which the verdict can be rendered is not a matter of discretion with the
(1160) jury, but must be in accordance with the evidence. It necessarily follows, therefore, that if there is no evidence of murder in the second degree it could not be error to so instruct the jury. Here there is no question of a presumption to be drawn from the use of a deadly weapon, nor does any question arise as to premeditation and deliberation. These points are not presented in this case. The statute makes "the killing by lying in wait" murder in the first degree. If the evidence was sufficient to show that the prisoner killed the deceased at all, it showed that he slew him while lying in wait. If it was not sufficient to show that the prisoner slew the deceased from ambush, it was not sufficient to prove that he killed him at all. There was no evidence whatever of murder in the second degree nor of any killing by the prisoner in any mode, except by lying in wait, which was murder in the first degree. The judge, therefore, could not have erred in telling the jury that "there was no evidence of murder in the second degree," and "that if the killing was by lying in wait and shooting the deceased from behind a tree, and the jury were satisfied of this, beyond a reasonable doubt, and that the killing was willful and premeditated, it would be murder in the first degree." His Honor states that the charge is not sent up in full, but, in accordance with repeated recommendations of this Court, only so much is sent up as is pertinent to the exceptions. *Bank v. Bridgers,* 114 N. C., 107; *Durham v. R. R.,* 108 N. C., 309. In charging upon this state of facts, that the jury should find the prisoner guilty of murder in the first degree, if satisfied beyond a reasonable doubt that he slew the deceased by lying in wait and shooting him from behind a tree, and if not so satisfied to acquit him, *Judge Hoke* followed the law, as laid down in *S. v. Covington,* 117 N. C., 834, and adopted
(1161) in identical charge which was approved in that case and in the several cases cited therein. A careful inspection of the

evidence will show, as the judge correctly stated, no evidence whatever of murder in the second degree, for it either proved that the murder had been committed by the prisoner's shooting the deceased by lying in wait or it did not show that he had killed the deceased at all. The evidence of murder in the first degree was sufficient to convince the jury, and the trial judge refused to set the verdict aside. It need not be marshaled here, as its sufficiency is not before us. The Attorney-General's statement, in his argument, was that the evidence "was consistent with murder in the first degree and inconsistent with murder in the second degree." The issue of fact was properly left to the jury and in every aspect presented by the evidence.

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: *S. v. Finley, post,* 1172; *S. v. Moore,* 120 N. C., 572; *S. v. Booker,* 123 N. C., 726; *S. v. Clark,* 134 N. C., 714; *S. v. Matthews,* 142 N. C., 624; *S. v. Roberson,* 150 N. C., 842; *S. v. Spivey,* 151 N. C., 684.

(1162)

STATE v. A. L. FINLEY, JR.

MURDER IN FIRST AND SECOND DEGREE—SEVERANCE IN TRIALS—JUDICIAL DISCRETION—DEPOSITIONS IN CRIMINAL ACTIONS—CONSPIRACY—DYING DECLARATIONS—EVIDENCE COMPETENT AS TO ONE DEFENDANT ONLY—REFRESHING MEMORY OF WITNESS.

1. Where several defendants are jointly indicted, a severance is within the sound discretion of the *nisi prius* judge, and his refusal of a motion for a severance will not be reviewed, in the absence of abuse of such discretion.

2. Where there are several defendants in the same bill of indictment it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf, under Laws 1891, chapter 552.

3. A deposition taken under chapter 552, Laws 1891, is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it.

4. When a wounded person has been told by a physician that his injury is fatal, and states himself that the wound will produce death, his dying declarations are properly received in evidence.

5. A witness who proposes to testify as to dying declarations can refresh his memory by looking at a deposition of deceased, taken in his presence, although such deposition is not competent as evidence in chief. It is not essential in cases of this kind that the witness should himself have written the matter from which he is to refresh his memory.

6. In the absence of any evidence of a conspiracy, if two persons are indicted for murder, and the jury are in doubt as to which struck the fatal blow, they should acquit both; but if a conspiracy between the prisoners is shown, they should both be convicted, under such circumstances; for, having conspired together to commit the crime, they are both principals, and it is immaterial to inquire which of the two actually struck the blow.

7. If two persons conspire to vex, annoy and commit unlawful acts upon a third and in the prosecution of their unlawful plans one of them kills their victim, they are both responsible for such homicide, although their original object in conspiring together did not compass so great a crime.

8. Now, as before the statute of 1893 (dividing murder into two degrees), the killing being proved or admitted, malice is presumed, and the burden is put upon the prisoner to establish to the satisfaction of the jury such facts and circumstances as will rebut malice and reduce the crime from murder in the first degree to a crime of inferior grade.

9. The instructions proper to be given on the question of murder or manslaughter, as pointed out in *S. v. Locklear, ante,* 1154, and *S. v. Thomas, ante,* 1113, approved.

(1163) INDICTMENT for murder, tried before *Bryan, J.,* at Fall Term, 1895, of MCDOWELL.

The appellant, A. L. Finley, Jr., and one James Jimmerson were jointly indicted for murder, and both convicted of murder in the second degree. A. L. Finley, Jr., appealed.

Attorney-General for the State.
J. F. Morphew for defendants.

MONTGOMERY, J. The defendants A. L. Finley and James Jimmerson were indicted and tried jointly for the murder of L. H. McNish. On the trial his Honor denied a motion, made at the proper time, by the defendant Finley for a severance. The defendant alleged that the defenses of each of the accused were in antagonism as the foundation of the motion. An exception was filed, on the ground that the denial of the motion was a gross breach of discretion on the part of the court. Unless the accused suffered some apparent and palpable injustice in the trial below, this Court will not interfere with the decision of the court on the motion for a severance. Although the defenses were in conflict and involved the admission of testimony which was competent as against one of the defendants and not against the other, yet his Honor, with entire certainty and clearness, carefully instructed the jury in the application of the evidence, explaining to them, by a proper analysis of the same, what part of it was competent against both and what part competent against one and not against the other, and guarding them against being influenced against either of the de-

fendants by such evidence as he had instructed them was only competent against the other one. We therefore refuse to interfere with the ruling of the court below. The matter was in the sound discretion of his Honor, and, from what appears, it is certain (1164) that there was no abuse of that discretion. *S. v. Oxendine,* 107 N. C., 783; *S. v. Gooch,* 94 N. C., 987.

The second exception was to the ruling of his Honor, admitting, against the objection of the defendant Finley, the deposition of the deceased, offered in evidence by the other defendant, Jimmerson, for himself and not against Finley. Due notice had been given to the solicitor of the district of the time and place for taking the deposition, and all of the other requirements of the law in respect thereto had been complied with. No notice, however, was given to the defendant Finley. Chapter 552, Laws 1891, authorizes the defendant in criminal actions pending in the Superior Court, upon giving the notices and observing the other requirements named therein, to take the depositions of such persons so infirm or otherwise physically incapacitated that their attendance at court cannot be had, to be read on the trial. Because, also, of the failure to give the defendant Finley notice of taking of the deposition, the objection was made. It was not necessary that Finley should have had any notice of the taking of the deposition, and his Honor committed no error in admitting it as testimony for Jimmerson. *S. v. Kilgore,* 93 N. C., 533. When his Honor came to instruct the jury as to this evidence he told them that the deposition was not evidence against Finley, and that they should consider only such parts of it as related to Jimmerson, and to consider no part of it which in any manner related to Finley or might in any way tend to prejudice their minds against him; "that the deposition was taken, under the statute, without notice to Finley; and although the evidence contained in it charges them with the commission of the crime, you must not consider the same against him, and treat it as . though his name had not been mentioned therein, and not (1165) allow it in any way to influence your verdict against Finley."

Particular exception was made by Finley to the admission of the testimony of James Smith, a witness for the State. This evidence is a part of the case on appeal, and appears in full in the original transcript. The witness did not say that Finley was absent or not near enough to hear what the deceased said in the drug store when he called on Dr. Morphew for protection. He said that, upon his coming up, he found both of the defendants and the deceased just outside the door of the drug store; that Finley walked around and "kinder brushed his foot like he was going to kick the deceased"; that then the deceased went into the drug store, Jimmerson going in afterwards and

laughing. The witness said nothing further about the position of Finley, except that when he left he was sitting on the steps.

Dr. White had already testified that Finley, at the time the deceased called on Dr. Morphew for protection, "was at the door, making a noise, kinder noise like mocking him"; that Finley was near enough to hear him (deceased) if he had not been making a noise. He had testified, further, that the deceased stayed in the store five or ten minutes, and when he closed it for the night they went out together. finding Finley and Jimmerson there. Finley had on the deceased's cap, and in his raised hands had a board sign, like he was going to strike the deceased; that he told him not to have any row and to get away.

Thomas Finley, a witness for the State, had testified that the defendant Finley was at the door, outside two or three feet, and, he thought, was near enough to hear a conversation inside. The testimony of the witness Smith was competent against both defendants,

(1166) and it was for the jury to determine whether the declaration of the deceased was made in the hearing of defendant Finley —whether he heard and understood the statement, and if he did, what his conduct was. It was for them alone to say what value was to be attached to the surrounding circumstances as tending to prove the defendant's guilt. *S. v. Bowman*, 80 N. C., 432. Besides, enough testimony had already been given in to be submitted to the jury on the question whether there was an agreement and conspiracy between the defendants to do an unlawful act. The whole of the evidence, having been made a part of a case on appeal and not having been printed in the case, discloses, upon an examination of it, numerous other exceptions made by defendant Finley.

The objections, all of them, are without force, and his Honor was right in overruling them and in receiving the testimony objected to. There was one, however, dwelt on with so much earnestness here that we will notice it particularly. The defendant Jimmerson had introduced for himself the deposition of the deceased, and it had been admitted by the court for Jimmerson, but not against the defendant Finley. The State offered to prove by its witness, E. C. Hudgins, who was present at the taking of the deposition, the statements of the deceased, made at that time as dying declarations. The witness stated that he was present the whole time, and that the deceased said the wound would be the cause of his death in a very short time. The undisputed testimony was that the skull had been crushed and broken; that both the doctors who had seen him had testified that the wound produced death; and that Dr. White had told him (deceased), about the time of taking the deposition, that he thought the wound would probably be fatal. There can be no doubt that the deceased knew

that death was impending and that he knew the nature of the wound. He was near death, and did die from the effects of (1167) the wound. The statements, beyond question, were admissible as the dying declarations of the deceased. *S. v. Mills,* 91 N. C., 581. His Honor allowed, against the objection of defendant Finley, the witness to read over the deposition of the deceased, taken in the witness' presence, that he might refresh his memory in reference to the matter. The objection was properly overruled. It was not necessary, under the circumstances, that the witness should have written the paper himself in order that he might read it to refresh his memory. Greenleaf Ev., sec. 436; *S. v. Staton,* 114 N. C., 813.

In considering the exceptions made by defendant Finley to the rulings of his Honor, refusing to give his special prayers for instruction, and the exceptions of the charge as given, we find that much repetition of parts of the testimony will be saved by a succinct and connected recital of such parts of it as bear on the exceptions and charge; and for convenience and orderliness we will make such synopsis from the testimony of the witnesses. The deceased was a stranger in Marion (he was from Rochester, N. Y.), forty-two years old, lame and with only one arm. He arrived in the town from Old Fort at 11 o'clock in the morning, and received the injury from which he died between 10 and 11 o'clock of the night of the same day. He met both of the defendants, who were drinking freely, at a barroom. He took a drink with each of them. Presently the defendant Finley began to mock him, to box and scuffle with him, slap him over the head, and to take his cap from him. This treatment proceeded to such violence as to cause one Turnbill to interfere and to stop it, and to apologize for the rude behavior of Finley, stating "Bunk" (mean- (1168) ing Finley) was a good boy and did not mean any harm. Very soon the bar was closed, the deceased and Finley going out at one door and the barkeeper and Jimmerson at the other. The barkeeper went on and left the deceased and Finley standing talking together, and Jimmerson about ten feet off. There was testimony going to show that just then the defendants, under a pretended power of arrest, took hold of the deceased and by force carried him to the calaboose (town lockup), and after getting him there Finley pulled out his knife instead of a key and threatened to cut his throat. The deceased then broke away and went to the drug store of White & Morphew, near by, the defendants following him and overtaking him at the door. Jimmerson pulled out a box from the store and sat down on it, within two or three feet of the deceased, while Finley walked around and "kinder brushed his foot like he was going to kick the deceased," the latter instantly going into the drug store, and Jimmer-

son following him and laughing at him. The deceased at once called for Dr. Morphew, and, upon his appearing, said, "Doctor, I want protection from these fellows." Jimmerson was then inside and Finley outside, leaning against the door, one side of the door being open, according to Dr. Morphew's testimony. Dr. White said that Finley was near enough to hear, if he had not been making a noise, mocking the deceased. Thomas Finley testified that the defendant Finley was near enough to hear a conversation inside. Deceased was bareheaded and said they had his cap. Dr. Morphew said the deceased had the Irish brogue and a peculiar walk, and that Jimmerson was laughing and Finley was mimicking him in talk and action. Upon closing the drug store for the night, Dr. White and the deceased went out together, when they found at the door both the defendants. The deceased said, "Give me my cap." Finley had on the cap of
(1169) the deceased, and also at this time had a board sign, several feet long, raised like he was going to strike the deceased, but desisted on being told by Dr. White not to have any row and to get away. Finley walked up a few feet from the drug store, with the board sign in his hand. Dr. White went on his way up the street and the deceased in the same direction. White met Thomas Finley (not the defendant), and while they were talking, missiles like bottles were thrown from the direction in which the defendants had been left, and then the deceased came running, trying to get behind them; and then the defendants came up, Finley in front and Jimmerson six or eight feet behind. Thomas Finley remonstrated. A few moments later the deceased received a blow on the forehead, inflicted with some hard substance, which crushed the skull, including the inner table. There was ample testimony going to show that both defendants were present at the time the blow was struck; they both admitted that they heard the blow and saw the man fall. The defendant Finley said that he saw Jimmerson reach down and get into a "jower" with the deceased, heard a lick and saw the man fall. Jimmerson, on the other hand, said Finley hit the deceased with a rock. At the courthouse, next day, about the time of the justice's examination, the deceased recognized Finley as the one who had struck him, and so stated, near enough to be heard by Finley, one witness testifying that he must have heard the charge. No denial of it was made by Finley. In his dying declarations the deceased stated that the blow was given by Finley.

Eight special instructions were asked by the defendant Finley, three of which were given, and the second, third, fourth, sixth and seventh refused. The second is as follows: "If the jury are in doubt as to which one of defendants struck the blow, and have a reasonable doubt as to whether Finley inflicted the injury, or as to whether

Jimmerson inflicted it, then their verdict should be not (1170) guilty as to both." The prayer in the abstract, embraces a sound doctrine of law; but where a conspiracy or an agreement between two or more to do an unlawful act has been proved, and as a result and consequence therefrom a crime is committed, the rule is different, and it is altogether an immaterial matter which one of the actors actually commits the deed; they are all principals and all guilty of the offense. *S. v. Hill*, 72 N. C., 345. There was plenary proof going to show a combination and conspiracy between the defendants to commit an unlawful act, and in the doing of it the deceased received a wound, by one or the other of the defendants, from which he died. His Honor properly refused this instruction.

We can consider together the third, fourth and sixth exceptions, which are as follows:

3. "That if they believe from the evidence that Jimmerson inflicted the injury, the defendant Finley would not be guilty, unless they find there was a conspiracy on the part of both to commit the crime, or unless they find that Finley was present, aiding and abetting Jimmerson in its commission."

4. "That there is not sufficient evidence to go to the jury of any conspiracy on the part of Finley with Jimmerson to commit the offense charged."

6. "They must find beyond a reasonable doubt, if they should find a conspiracy existed at all, that such conspiracy must be to commit the offense charged in the indictment, to-wit, the murder of the deceased, and that no evidence of a common design, or purpose to tease, worry and have fun out of the deceased would be such a common design and purpose as would warrant the jury in finding a verdict against Finley, in case they find that he did not strike the blow."

The above exceptions cannot be sustained. It was not necessary to the conviction of Finley that the jury should believe that the conspiracy between the defendants, if proved, extended to (1171) and included the commission of the crime charged in the indictment—murder. It is sufficient, if the defendants were engaged in any unlawful object, leading up to the killing of the deceased, to make them both guilty as principals. The evidence tended strongly to show an agreement between the defendants to engage in the pursuit of an unlawful object—that is, to worry and annoy and to oppress and to assault the deceased, by taking his cap from him, by boxing and slapping him violently, by threatening to put him in the lockup, threatening to kick him, and drive him by their annoyances and persecutions to seek protection from them, and by cursing him and chasing him up and down the street. In *Regina v. Cox*, 4 C. & P., 538, the rule is thus laid down: "If two persons are engaged in pursuit of an

unlawful object, the two having the same object in view, and in pursuit of that common object one of them does an act which is the cause of death, under such circumstances that it amounts to murder in him, it amounts to murder in the other also." The same doctrine is held in *S. v. Simmons,* 51 N. C., 21, and in *S. v. Gooch,* 94 N. C., 987.

We do not understand the theory upon which the defendants' counsel base their exceptions to those parts of his Honor's charge which they allege to be objectionable. There can be no valid objection to the court's definition of malice. It is elementary learning. And on the question of murder in the first and murder in the second degree the language of the court was the identical language which the same judge used in the first trial of the case of *S. v. Fuller,* 114 N. C., 885, except the last sentence, and which was approved by this Court. He said in the trial of that case that, "the killing with a deadly weapon being admitted or proved, and nothing else appear-
(1172) ing, the court charges you that no presumption is raised that it is murder in the first degree; and unless the facts and circumstances show beyond a reasonable doubt that there was a deliberate, premeditated, preconceived design to take life, it is murder in the second degree." This has been affirmed by this Court in *S. v. Gadberry,* 117 N. C., 811, and in *S. v. Locklear, ante,* 1154, and *S. v. Thomas, ante,* 1113. Now, as before the statute of 1893, dividing murder into two degrees, the killing being proved or admitted, malice is presumed, and the defendant, if he seeks to reduce the crime to manslaughter, must prove such facts and circumstances to the satisfaction of the jury as will rebut the presumption of malice. The defendant must show and prove all matters of excuse or mitigation upon which he relies to reduce the crime from murder to manslaughter. There are dozens of cases to this effect in our decisions, made before the statute of 1893, and numbers of them will be found cited in the case of *S. v. Rollins,* 113 N. C., 722. Since the statute the same principle has been declared in *S. v. Fuller* and *S. v. Gadberry, supra.*

The defendant cannot complain because his Honor did not submit the theory of manslaughter to the jury. There was not one particle of evidence offered to show provocation—not a scintilla of proof, even, offered with a view to reduce the crime charged in the indictment to manslaughter.

From the light in which we view the testimony, his Honor's charge was, if liable to exception, too favorable to the defendants and the judgment extremely lenient. The case was tried with thoroughness by his Honor and with absolute impartiality. There is

No error.

Cited: *S. v. Booker,* 123 N. C., 726; *S. v. Hicks,* 125 N. C., 640; *S. v. Goode,* 132 N. C., 988; *S. v. Teachey,* 138 N. C., 597; *S. v. Worley,* 141 N. C., 768; *S. v. Banks,* 143 N. C., 657; *S. v. Kendall, ib.,* 663; *S. v. Cloninger,* 149 N. C., 572; *S. v. Holder,* 153 N. C., 607; *S. v. Greer,* 162 N. C., 652.

STATE v. JAMES JIMMERSON

MURDER AND MANSLAUGHTER—NEWLY DISCOVERED EVIDENCE—RECORD FOR SUPREME COURT IN STATE CASES.

1. The admission of additional testimony after the evidence is closed, but before a verdict is rendered, like a motion for a new trial for newly discovered evidence, is a matter of unreviewable discretion in the judge below.

2. It is not essential that the transcript of the record in a State case shall contain a list of the grand jurors.

(For other points decided, see headnotes to *S. v. Finley, ante,* 1162.)

INDICTMENT for murder, tried before *Bryan, J.*, at Fall Term, 1895, of MCDOWELL.

Attorney-General for the State.
J. B. Batchelor for defendant.

MONTGOMERY, J. The defendants, James Jimmerson and A. L. Finley, were indicted and tried jointly for the murder of L. H. McNish. The case on appeal on the part of Jimmerson was agreed upon and signed by the solicitor of the district and the counsel of the defendant. It contained the statement that the deceased was a "tramp." The testimony showed that he was a brave and kind-hearted and jovial Irishman. In the darkness of night, in a strange place, without an acquaintance, he was wounded unto death by the defendants, without the least provocation or excuse, in or near a vacant lot about the courthouse in Marion. The morning after he was wounded he was carried to the examination before the justice of the peace, and upon seeing the defendants said: "Oh, boys, ain't you sorry? But I'll forgive you." He deserved a bet- (1174) ter fate.

There was strong evidence going to show a combination and conspiracy between the defendants to commit an unlawful act, and in the course of it the deceased received a wound, inflicted by one or the other of the defendants, both being present, from which he died. The testimony tended to show an agreement between the defendants to

engage in the pursuit of an unlawful object, to worry and annoy and to assault the deceased, by taking his cap from him, by chasing him about the streets, by throwing missiles at him, like bottles, by cursing him, and in various other ways annoying him. There was not a scintilla of proof offered with the view to reduce the crime charged in the indictment (murder) to manslaughter. If the killing with a deadly weapon is proved or admitted, nothing else appearing, malice is presumed, and the defendant must show and prove to the satisfaction of the jury all matters and circumstances which he relies upon for excuse or mitigation to rebut the presumption of malice. His Honor instructed the jury to that effect. The court further instructed the jury that if the defendants, or either of them, were present at the time of the killing, with no formed design of killing the deceased, and without any preconcert to kill, they would not be guilty of murder in the first degree. The exception made by the defendant to that instruction cannot be sustained, for, as we have said, there was no proof tending to show a less crime than murder in the second degree. His Honor further charged the jury, among other things, as follows:

"If the jury believe beyond a reasonable doubt that the defendants were in the pursuit of an unlawful object, to-wit, in this case 'deviling' the deceased, the word used by one of the witnesses, by taking his cap from him, placing their hands on his person, threatening to put him in the lockup, raising the foot as if to strike
(1175) him, driving him into or, by their persecutions and annoyances of him, caused him to go into the drug store and ask the doctor for protection (from these fellows), one going into the store and the other standing outside, cursing him and running him up the street, as detailed by the witnesses, the two having the same object in view, and in pursuance of that common object one of them strikes the deceased on the head with a rock, both of them are guilty of murder in the second degree."

There was no error in this, and the exception is not sustained. *Regina v. Cox*, 4 C. & P., 538; *S. v. Gooch*, 94 N. C., 987. The court further instructed the jury, at the request of the other defendant, Finley, "that the mere fact that the defendant Finley was present at the time of the killing is not sufficient, but the jury must find beyond a reasonable doubt that he was aiding and abetting and encouraging the defendant Jimmerson to inflict the injury of which the deceased died, or that there was a prior agreement to do an unlawful act."

Under the facts testified to in this case, his Honor did right in instructing the jury as requested, and the exception by the defendant Jimmerson is not sustained.

The defendant Jimmerson requested the judge to charge as follows: "If the prisoner Jimmerson, when the blow was given, with-

out any community of unlawful purpose with the prisoner Finley, and without any knowledge of the intention of the prisoner Finley to commit any assault upon the deceased; if you should find that Finley, and not Jimmerson, struck the fatal blow, and you should find that there was no community of purpose between Finley and Jimmerson to do the deceased bodily harm or other personal injury, the commission of which might result in death, although he may have (1176) said "God damn it (or you), you can't knock anyone;" and if you find that these words were used in spirits of drunken levity, and not with intent to aid and abet, this would not make him guilty, and you should acquit him."

The charge was given as requested, but his Honor added the words "unless there was a common purpose to 'devil' and annoy the deceased." The addition was proper, and the jury could not have misunderstood the meaning of the words "to devil," for his Honor had defined the word as used, at length, in one of the instructions already given.

After the verdict of guilty the defendant made a motion for a new trial, because of newly discovered testimony. His Honor overruled the motion, and the defendant excepted. The matter was one of discretion of the court, and we will not review it. *McCullock v. Doak*, 68 N. C., 267. It was a matter of discretion, also, with his Honor when he refused to allow the alleged newly discovered testimony to be submitted to the jury before verdict. *Pain v. Pain*, 80 N. C., 322.

There was an exception made here that the transcript fails to show the names of the individuals who composed the grand jury upon whose action the bill was found. That is immaterial. It would have been in better form if the names had been mentioned, but it is not of serious moment. There is

No Error.

Cited: *S. v. Fogleman*, 164 N. C., 640; *S. v. Trull*, 169 N. C., 370; *S. v. Davidson*, 172 N. C., 945.

(1177)

STATE v. ROBERT USSERY

MANSLAUGHTER—TRIAL—INSTRUCTIONS—EVIDENCE — REPUTATION — CHARACTER WITNESS—PRACTICE.

1. As manslaughter may be committed in various ways and without the use of a deadly weapon, a defendant who was indicted and tried for murder with a stick, and was convicted of manslaughter, cannot complain of the failure of the trial judge to instruct the jury whether the stick used was a deadly weapon.

2. It is the duty of the trial judge, to be exercised in his discretion, to either stop counsel in their argument on a trial when they abuse their privileges

by indulging in a line of argument for which there is no support in the evidence, or, in the charge, to caution the jury to disregard the objectionable remarks.

3. Where, on a trial for murder, the judge instructed the jury that if they were satisfied that the prisoner reasonably feared the loss of his life or great bodily harm at the hands of the deceased at the time he struck the blow, and that it was necessary for him to strike for the protection of his life or to save himself from serious bodily harm, they should acquit the prisoner: *Held,* that such instruction was sufficiently explicit and not erroneous, in that it did not instruct the jury to acquit the defendant if he believed it necessary to strike, etc.

4. If on a trial the court omits any evidence favorable to the prisoner in his recapitulation and charge, it is the duty of the prisoner's counsel to call it to the attention of the court in time to enable it to correct the omission, for, after verdict, an exception grounded on such omission will not be sustained.

5. It is not necessary, in the absence of a special request, for the trial judge to recapitulate all the evidence in his charge to the jury, and if the prisoner desires the entire testimony or any portion to be repeated to the jury he must make the request in apt time and before verdict. If no such instruction is asked, the failure to repeat the entire testimony is not error.

6. A witness as to general character, after qualifying himself, can only state the general reputation of the person whose character is the subject of inquiry. If cross-examined as to particular facts, the redirect examination must be limited to the particular matter brought out by the cross-examination. *Hence,*

7. Where a witness, testifying to the general character of the prisoner, had on cross-examination stated that the prisoner had submitted on a charge of fornication and adultery, the redirect examination was properly limited to that matter and not allowed to include inquiry as to the general character for "truth and honesty."

AVERY, J., dissents.

(1178) INDICTMENT for murder, tried at December Term, 1895, of RICHMOND, before *Robinson, J.*, and a jury.

The defendant was charged with the murder of Oliver Capel, was convicted of manslaughter, and, after being sentenced to imprisonment at the State penitentiary for a term of ten years, appealed.

It is not necessary to state the facts connected with the killing in order to an understanding of the decision.

Attorney-General for the State.
Shepherd & Busbee and Cameron Morrison for the defendant.

FAIRCLOTH, C. J. The defendant was indicted for murder and convicted of manslaughter. There were numerous exceptions to the admission and exclusion of evidence and to the charge of the court. Several of these were abandoned in this Court, and we note only those which seemed to be relied on.

One of the exceptions relied on in the argument is that his Honor

failed to tell the jury whether the stick used was a deadly weapon. This we need not discuss, as the verdict is only for manslaughter, and the prisoner has the benefit of treating the stick (1179) as not being a deadly weapon, because manslaughter may be produced in various ways without the use of such a weapon. Another exception by the prisoner is that the court stopped one of his counsel in his argument when commenting on a state of facts, of which his Honor stated there was no evidence. It would be manifestly improper for counsel to indulge in a line of argument when there is no evidence to support it.

There are frequent occasions on trials below calling for the discretion and sound judgment of the trial judge. When he shall be of opinion that counsel are exceeding and abusing their privileges in any matter, it is his duty to either stop the counsel at once or caution and tell the jury in his charge to disregard the objectionable remarks, and neither course will be error. *Greenlee v. Greenlee,* 93 N. C., 278; *S. v. Hill,* 114 N. C., 780, and several cases therein cited. His Honor charged the jury that if they were satisfied "the prisoner reasonably feared the loss of his life or great bodily harm at the hands of the deceased at the time he struck the blow, and that it was necessary for him to strike for the protection of his life or to save himself from serious bodily harm, you should acquit the prisoner." We think this complies with the rule that "he believed it was necessary," etc., insisted on by the defendant, and this disposes of several other exceptions of the same import.

The prisoner's seventh exception is that his Honor, in his charge in relation to murder in the second degree, called attention to the State's evidence and omitted to call attention to the prisoner's evidence on the same subject. This exception seems of no importance, now that the verdict was only for manslaughter; but if the court omits any evidence favorable to the prisoner in his recapitulation and charge, it is the duty of the prisoner's counsel to call it (1180) to the attention of the court, in order that the same may be supplied, and after verdict an exception grounded on such omission will not be sustained. *S. v. Grady,* 83 N. C., 643.

There are other exceptions to the charge, such as that his Honor did not eliminate the material facts of the case or weigh the state of facts on both sides and apply the principles of law to them; that he did not state in a full and explicit manner the facts given in evidence; that he did not tell them what evidence was substantive, what corroborative, what contradictory, and the purposes for which such kind of evidence might be considered by the jury. On reading the charge, which seems to have been carefully delivered, we are unable to see that the case was presented unfavorably to the prisoner. The judge

is not required to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions before them and explain the law applicable thereto. If the prisoner desires the entire testimony or any specific part thereof repeated to the jury, he should make the request in apt time and before verdict. If no such instruction is asked, the failure of the court to repeat will not be a ground for a new trial. *S. v. Pritchett,* 106 N. C., 667; *Boon v. Murphy,* 108 N. C., 187.

The remaining exceptions refer to the evidence on the question of character and reputation. Reputation is the estimation in which a person is held by others, especially the popular opinion. Some critic has said that character lives in a man—reputation outside of him. In the trial of Thomas Hardy for treason, Mr. Erskine described it in these words: "The slow-spreading influence of opinion arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so (1181) extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence." State Trials, p. 1079. This rule of evidence is so manifestly just and reasonable, and appeals so strongly to the common sense of man, that it has ever been the law in this country. The rule is that where an impeaching witness is called, he must first qualify himself by answering whether he knows the general reputation of the witness or party whose character is being inquired about. If he says he does not, then he should be stood aside and no cross-examination allowed. If he answers in the affirmative, he can only state the general reputation of the witness or party. On cross-examination, he, for the purpose of testing his knowledge and weakening the force of his first statement, may be examined as to particular traits; then the redirect examination is limited to the particular matter brought out by the cross-examination. Without this limitation, which we gather from numerous decisions, the trial would lead to endless inquiry and would soon lead the jury into great confusion. Then, for the uniform and faithful administration, it is quite necessary that this rule be settled, as it has been long since.

In this case one of the exceptions will be sufficient to settle all the exceptions on this question. J. M. Smith was called by the prisoner and testified that the general character of the prisoner, Ussery, was good. On cross-examination he stated that the prisoner had submitted on a charge of fornication and adultery. He was then asked by the prisoner's counsel, "What is the general character of Ussery, the prisoner, for truth and honesty?" Objected to by the State and excluded by the court, and the prisoner excepted. It will be seen that the question violates the rule above stated, and that there was

no error in excluding the answer. *S. v. Perkins,* 66 N. (1182) C., 126; *S. v. Laxton,* 76 N. C., 216.

No error.

Cited: *Patterson v. Mills,* 121 N. C., 269; *S. v. Kinsauls,* 126 N. C., 1097; *Davis v. Evans,* 139 N. C., 442; *Whitfield v. Lumber Co.,* 152 N. C., 214.

STATE v. JAMES STANTON AND ROD SHELTON

INDICTMENT FOR MURDER—HOMICIDE—MURDER IN SECOND DEGREE—TRIAL JURY—CHALLENGE TO ARRAY—EVIDENCE—APPEAL—HARMLESS ERROR.

1. In the absence of any allegation that the sheriff acted corruptly or with partiality in summoning the *venire,* or that anything had been done affecting "the integrity and fairness of the entire panel," it is not a ground of challenge to the array that the sheriff failed to summon several of the special *venire* drawn from the jury box or that the jury box was not revised by the county commissioners.

2. When a special *venire* is exhausted without completing the jury, the court may (under section 1739 of The Code) order a further *venire* to be summoned at once from the bystanders.

3. An objection to evidence must specifically point out the portions claimed to be obnoxious, especially when it is made to a large volume of testimony.

4. On the trial of J. and R. for murder, a witness for the State testified as to a conspiracy between defendants; that R. and witness were in jail together, and R. told witness that they had been his ruin; that he said he met three persons, named, and had started home, and they begged him to come back with them to hunt certain boys, to get into an affray with them; that he had then turned and went back with them, and that was his ruin. Defendant J. was not present during such conversation: *Held,* that it was error to admit such testimony as against J.

5. In such case the admission of such evidence was harmless error, inasmuch as the jury convicted defendants of murder in the second degree only, thereby declaring that the conspiracy had not been proved.

INDICTMENT for murder, tried before *Ewart, J.,* at June (1183) Term of the Criminal Court, Western Circuit, for MADISON.

The defendants were convicted of murder in the second degree, and appealed.

Attorney-General and J. M. Gudger, Jr., for the State.
J. M. Moody for defendants.

MONTGOMERY, J. The indictment is for murder. A special *venire* was ordered and return thereof made. The defendants challenged the array, on the grounds, first, that the sheriff had failed to summon several of the special *venire* drawn from the jury box; second, that

the jury boxes had not been revised by the county commissioners. The court properly declined to hear either one of the grounds of objection. There was no allegation that the sheriff acted corruptly or with partiality in summoning the *venire*, or that anything had been done affecting the "integrity and fairness of the entire panel." In *S. v. Whitt*, 113 N. C., 716, a challenge was made to the array, one of the grounds being "because one of those named in the *venire* was not summoned." The objection was overruled, and this Court affirmed the ruling of the court below. The same point had been decided in *S. v. Hensley*, 94 N. C., 1021. In the last-named case it was decided that while the county commissioners, who had failed to revise the jury list according to law, were guilty of neglect ("highly culpable"), and the clerk and sheriff were equally negligent in the perform-
(1184) ance of their respective duties, as to the locking, custody and safe-keeping of the box, yet the regulations concerning these matters were directory and not mandatory, and that the "only essential was to obtain a fair and impartial jury, composed of eligible men." It was not suggested even in the defendant's objection that any names in the jury box were improperly there, or that any had been put there fraudulently, or that any had been taken out. There was not even a suspicion hinted at that the defendants might be prejudiced in the trial by reason of the matters stated in the opinion, and it does not appear anywhere that they were prejudiced. There was no error in the ruling of his Honor.

The first special *venire* having been exhausted before the jury had been completed, the court made an order that another special *venire* of thirty, returnable at once, should be summoned. Upon the return of this *venire* the defendants objected, on the ground that "as the first *venire* had been drawn from the jury box, the court did not have the power to order a second *venire* to be summoned by the sheriff from the bystanders." The objection was overruled, and his Honor was right in so doing. The statute (section 1739 of The Code) provides that the judge, in his discretion, has the power, the first *venire* proving insufficient, to order a further *venire* to be drawn from the box or summoned by the sheriff. *S. v. Brogden*, 111 N. C., 656, construes the power of the judge under that statute.

Exceptions were made by the defendants to the ruling of his Honor admitting the testimony of Jamison Chandley, George Franklin, Hattie Franklin and Baxter Shelton, witnesses for the State. Chandley had testified at considerable length when the defendant's
(1185) counsel objected, without specifying what part of the evidence he objected to. He was informed by the solicitor that the object of the testimony was to show a conspiracy between the defendants to assault and beat deceased or to kill him. The witness then

continued his testimony at great length, when objection was again made, "because there was no conspiracy charged in the indictment, and the conspiracy ought to be shown first before any circumstances were admissible, and the defendants objected to this whole evidence on that line, as given so far." The witness still proceeded at length, when "defendants objected to all this testimony, if made to show a conspiracy." The witness, in the beginning of his testimony leading up to the meeting of the parties an hour or so before the homicide occurred, stated some immaterial things, of no harm to the defendants, without objection. As he proceeded, he narrated facts and circumstances strongly going to show a conspiracy between the defendants to assault and beat the deceased. The witness was also an eye-witness to the killing, and gave the details with clearness and in an intelligent manner. We have read his testimony, and we fail to see that it was objectionable. If, however, it had contained objectionable matter, the defendants ought to have pointed out from the general mass of the whole evidence the parts that were alleged to be obnoxious. In *Barnhardt v. Smith,* 86 N. C., 473, *Chief Justice Smith* said for the Court: "As a rule of practice, a party is not allowed to except generally to testimony, severable into distinct parts, some of which are competent and others not, and afterwards single out and assign as error the admission of the incompetent parts. The exception, as embracing the whole testimony, must be valid or it will not be sustained. It is not erroneous to refuse to rule out a volume of testimony when portions of it ought to be received; and therefore the salutary rule of practice prevails which requires that the obnoxious evidence should be specifically pointed out and brought to the notice of the court in order to a direct ruling on its reception." This (1186) ruling was affirmed in *Smiley v. Pearce,* 98 N. C., 185, and in *Hammond v. Schiff,* 100 N. C., 161. The objections to the testimony of the other State witnesses, named above, were made in the same manner as were those made to Chandley's evidence, generally, without specifying the parts alleged to be objectionable, and for the reasons given for overruling the exceptions to Chandley's evidence the objections to the testimony of the other witnesses were properly overruled. We have examined the whole of it, however, and we are of opinion that it was competent and almost all of it relevant.

Of course, in a large volume of testimony, like that which was brought out in this case, there must creep in some tautology and prolixity about immaterial and irrelevant matters.

The State also introduced one Blankenship as a witness, for the purpose of proving the conspiracy between the defendants, who testified as follows: "He (that is, Rod Shelton, the defendant) did not tell what he did. Rod and I were in jail together, and Rod told me that

they had been his destruction and ruin forever. * * * He said that he met Bev Stanton, Jim Stanton and Boss Stanton in the road, somewhere near the church, and he had been up the creek and had started home, and they begged him to come back up the creek and go with them to hunt these boys, Baxter and Everett Shelton, to get into an affray with them, and he said that he turned and went back with them, and that was his destruction and ruin." James Stanton, the other defendant, was not present when this conversation took place. His Honor received this testimony as against both defendants and against their objection. Of course, the testimony was compe-
(1187) tent against the defendant Shelton for all purposes. It was not competent against Stanton, the other defendant, it being a declaration made after the homicide, and if the jury had convicted him of murder in the first degree he would be entitled to a new trial. The testimony was harmless, however, because they were convicted of murder in the second degree and by this verdict the jury declared that the conspiracy had not been proved, and there was not more than a scintilla of evidence in favor of Stanton going to show excusable homicide, Stanton himself in his testimony making statements which alone would have justified the jury in convicting him of murder in the second degree, and no witness who saw the killing had a favorable word for him.

Six special instructions were prayed by the defendant. There appear in the case no exceptions to the charge of the judge, nor does it appear that ruling was made on the request for special instructions. The fourth prayer, requesting the court to withdraw the testimony of Blankenship from the jury, was not granted, as we notice it in the recapitulation of the evidence by his Honor to the jury; but, as we have before remarked, the error in admitting that testimony was harmless. On all the other questions involved in the prayer for instructions his Honor's charge was full and in accordance with the law. He submitted the question of excusable homicide to the jury, which we doubt if the prisoner Stanton was entitled to. There is

No Error.

Cited: *S. v. Smarr*, 121 N. C., 670, 674; *S. v. Perry*, 122 N. C., 1021; *Moore v. Guano Co.*, 130 N. C., 232; *S. v. Ledford*, 133 N. C., 722; *Rollins v. Wicker*, 154 N. C., 563; *S. v. English*, 164 N. C., 508.

(1188)

STATE v. FORTUNE JOHNSTON

RESIDENT OF THE STATE—LIABLE TO PUBLIC SERVICE—HIGHWAYS—ROAD DUTY.

Where an able-bodied male person between eighteen and forty-five years of age resides in this State and pursues a vocation for its income for an indefinite period, he is liable to road duty, under section 2017 of The Code, although he is a citizen of another State, to which he intends to return when he finishes his present employment.

THE defendant was tried and fined by a justice of the peace in Halifax for disobedience to a summons of a road overseer to work on a public road, and was again convicted on appeal, heard before *Meares, J.*, at December Term, 1895, of the Criminal Court of HALIFAX.

The jury returned a special verdict, the substance of which is set out in the opinion of *Chief Justice Faircloth*, and from the judgment of *Meares, J.*, defendant appealed.

Attorney-General for the State.
Thomas N. Hill for defendant.

FAIRCLOTH, C. J. From the special verdict these facts appear: That the defendant, who has never married, was a citizen of Virginia, where he still votes and pays taxes, until January, 1895, when he came to Halifax County, N. C., and engaged to work as an employee and laborer of the Enfield Lumber Company, at $1 per day, in loading cars and log trains, and so continued to work until 3 July, 1895, when he was duly summoned to work on the road in the township in which he was at work; that defendant is still at work, as aforesaid, and intends to return to Virginia when he gets through with his job with said company, but he does not know when this will be; (1189) that he has never listed for nor paid poll or any other tax or registered or voted in North Carolina, but has performed all those acts in Virginia, and that he is twenty-nine years of age.

The verdict and authorities cited by defendant's counsel show that he is not domiciled in nor a citizen of North Carolina; so these questions need not be considered.

Does The Code, sec. 2017, embrace the defendant as a resident? It provides that "all able-bodied male persons between the ages of eighteen years and forty-five years" shall be required to work on public roads, except those exempted by sections 2017 and 2018 of The Code. The defendant's liability, then, depends upon the true intent and meaning of section 2017. He is an "able-bodied male person" and has resided in Halifax Township, in said county, since January, 1895, working for pay, and says he expects to continue doing so until he

finishes his job, at some future time, he does not know when, and then return to Virginia. This may mean one or many years. We think a reasonable construction of section 2017 includes the defendant as one liable to road duty. We think his case is distinguishable from those of sojourners or visitors for health or pleasure, who are not engaged in business for profit and are without any fixed home. The case of *Cantrell v. Pinkney,* 30 N. C., 436, is not on all fours with the present case, because there the defendant had a dwelling house in this State, where he and his family habitually lived for four months in the year, and claimed exemption from toll at the gate, as all citizens of that county were entitled to by law. Of course, he was liable.

In *S. v. Cauble,* 70 N. C., 62, the defendant was a section hand and in the constant employ of the railroad company, and his ser-
(1190) vices were constantly needed by the railroad company, and it was held that the defendant could not escape a public duty by engaging in another urgent private business, and that he was liable to road duty. In our case the defendant selects and pursues his vocation for its income, as any citizen of the State. We hold that he is liable, not as a citizen, but as a resident, according to the facts found by the special verdict and the intent of the Legislature.

Affirmed.

Cited: Chitty v. Chitty, ante, 649; *S. v. Covington,* 125 N. C., 643.

STATE v. ERNEST TAFT

MUNICIPAL ORDINANCE—PUBLIC HEALTH—NUISANCE—SECONDHAND CLOTHING.

1. Municipal authorities having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance.

2. While a town, under its authority to pass laws abating nuisances and for preserving the public health, may throw restrictions around the sale of secondhand clothing by compelling fumigation and disinfection or requiring assurances that it has not been brought from infected places, etc., yet an ordinance prohibiting absolutely the importation and sale of secondhand clothing is unreasonable, in that it prohibits a business lawful in itself and not necessarily dangerous, and is therefore void.

(1191) INDICTMENT for violation of an ordinance of the town of Louisburg, heard on appeal from a judgment of the mayor, before *Robinson, J.,* and a jury, at January Term, 1896, of FRANKLIN.

There was a verdict against the defendant, and from the judgment thereon the defendant appealed.

Attorney-General and F. S. Spruill for the State.
Charles M. Cooke for defendant.

MONTGOMERY, J. The ordinance, for a violation of which the defendant was convicted, is as follows: "No. 47. That it shall be unlawful for any person, merchant or dealer to import into the town of Louisburg, for the purpose of selling or offering for sale, any secondhand clothing, garment, cloth or bed furniture; and any person, merchant or dealer who shall import any such article into said town, with the purpose aforesaid, or shall sell or offer the same for sale, shall for every such act be subject to a fine of $25."

It is enacted in chapter 142, Private Laws 1887, that the general laws in regard to cities and towns (in The Code) shall apply to the town of Louisburg; and it is provided in that chapter of The Code that the commissioners of towns "may pass laws for abating or preventing nuisances of any kind and for preserving the health of the citizens," and that "they may enforce their by-laws and regulations by imposing penalties on such as violate them." The preamble sets forth that the object of the ordinance was the protection of the health of the community. Beyond question, the General Assembly has power to authorize the commissioners of towns to pass by-laws intended to prevent the introduction of infectious or conta- (1192) gious diseases and to preserve the public health; and the powers conferred, under the statutes above referred to, are admitted to be sufficient for those purposes. Such ordinances are regarded as police regulations, are of the utmost consequence to the general welfare, and, if they be reasonable, impartial and not against the general policy of the State, must be submitted to by individuals, for the good of the public. In truth, the public health and the peace and good order of the community ought to be the chief concern of the authorities of cities and towns; and the courts are quick to encourage watchfulness in this respect on their part, will always presume that they have acted from a sense of propriety and necessity, and will never interfere with or set aside their ordinances, unless it appears clearly that they are unreasonable or beyond the scope of their authority. It is not to be doubted, however, that the courts have the right to inquire into any alleged abuse of their powers, and to restrain them when they transcend the limits of their authority.

The question presented in this case for our consideration is whether the commissioners can, under the powers given them by law, in their discretion, absolutely prohibit a lawful business, not in itself necessarily a nuisance, but which may be conducted without danger to the community, when properly regulated. The sale of secondhand clothing is not a nuisance, *per se*, but is, on the other hand, a lawful business, and under proper regulations may be so conducted as to be

without danger to the health of the community and at the same time to be of great benefit to a large portion of the people. There is nothing dangerous to health in articles of secondhand clothing of themselves; they can only become noxious by reason of prior use, of having been worn or possessed by persons themselves infected or liv-
(1193) ing in infected communities. The town authorities would have the right to compel fumigation and disinfection of secondhand clothing; they might require proper assurance before such articles were imported or offered for sale, that they have not been bought in or bought from markets or places where epidemics of contagious or infectious diseases were or had been recently prevailing, or they might prohibit the further sale of such stocks from which articles had been sold and had communicated disease. In the case of *Greensboro v. Ehrenrich,* 80 Ala., 579, the ordinance was not as prohibitory as the one before us, and the Court there, in passing upon its validity, said: "Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business, not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in secondhand or cast-off garments, blankets, bedding and bedclothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some time and in some places it is infected with *trichina.*" The same principle is also decided in *Weil v. Ricaud,* 24 N. J., Eq., 169.

We are of the opinion that the commissioners transcended their powers in the passing of this ordinance; that it is unreasonable, in that it is prohibitory of a business lawful in itself, and that it is void.

Error.

Cited: Rosenbaum v. New Bern, ante, 100; *S. v. Higgs,* 126 N. C., 1025; *Paul v. Washington,* 134 N. C., 371.

(1194)

STATE v. JOHN GLENN

INDICTMENT FOR WILLFUL TRESPASS ON LAND—THE CODE, SEC. 1120—BURDEN OF PROOF—BONA FIDE CLAIM OF RIGHT—REASONABLE BELIEF—HARMLESS ERROR.

1. In an indictment, under section 1120 of The Code, for entering upon land after being forbidden, it is incumbent on the State to prove such entry, but it is upon the defendant to show by way of defense that he entered under a license from the owner or a *bona fide* claim of right.

2. In the trial of an indictment for willful trespass on land the defendant must show that he not only entered under a belief in his right to enter, but that he had reasonable grounds for such belief. Such defense must be proved not beyond a reasonable doubt, but only to the satisfaction of the jury.

3. Where, in the trial of an indictment for willful trespass on land, there was no evidence that the defendant had reasonable ground for his belief in his right to enter, an instruction to the jury that such defense must be proved beyond a reasonable doubt is harmless error.

4. One who enters land after being forbidden, pending an appeal from an adverse adjudication upon his title to the land, can have no reasonable ground for believing that he has a right to so enter, and his entry subjects him to the penalties of section 1120 of The Code.

INDICTMENT, under section 1120 of The Code, for willful trespass on land after being forbidden, tried, on appeal from a justice of the peace, before *Starbuck, J.*, and a jury, at January Term, 1895, of WAKE.

The defendant was convicted, and appealed.

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

Attorney-General and T. P. Devereux for the State.
T. R. Purnell and J. C. L. Harris for defendant.

CLARK, J. It was incumbent upon the State to prove that (1195) the defendant (indicted under The Code, sec. 1120) had entered upon the land after being forbidden so to do. It devolved upon the defendant to show by way of defense that he entered under a license or a *bona fide* claim of right, since those are matters peculiarly within his knowledge. The license referred to is not a license from the owner, as that is negatived by the allegation that the defendant was forbidden to enter, but it is the license from some justice, mentioned in the proviso to section 1120. This license, like the license to sell liquor, on the trial of an indictment for retailing without license, is a matter of defense, and it is incumbent upon the defendant to show it. The State is not called on to prove the negative. *S. v. Morrison,* 14 N. C., 299; *S. v. Emry,* 98 N. C., 668. It devolved upon the defendant to prove in defense, not merely a *belief* that he had a *bona fide* right to enter, but he "was bound to prove that he had reasonable ground for such belief." *S. v. Bryson,* 81 N. C., 595; *S. v. Crawley,* 103 N. C., 353.

In the present case it was in evidence that the title to the premises had been decided adversely to the defendant in the Superior Court (which judgment on appeal here was affirmed), and that the entry was made by the defendant after such adverse decision below and pending the appeal to this Court. In the face of an adverse decision

in the Superior Court, the defendant had no right to take the law into his own hands and make an entry on the land in controversy. The defendant introduced no evidence even of his belief in his right to enter. However reasonable or unreasonable might be his grounds for a belief that the Superior Court was in error in adjudging the title to the premises against him, he had no reasonable ground for
(1196) a belief that he had a "right to enter" after such judgment, until reversed.

There being no evidence of reasonable ground for such belief, "the court properly instructed the jury, in substance, that if they believed the evidence the defendant was guilty." *S. v. Fisher*, 109 N. C., 817.

No Error.

Cited: *S. v. Holmes*, 120 N. C., 576; *S. v. Neal, ib.*, 621; *S. v. Durham*, 121 N. C., 550; *Meredith v. R. R.*, 137 N. C., 486; *S. v. Blackley*, 138 N. C., 623; *S. v. Wells*, 142 N. C., 595; *S. v. Connor, ib.*, 708; *S. v. Taggart*, 170 N. C., 741.

STATE v. SOFRONIA HUNTER

INDICTMENT FOR RELEASING IMPOUNDED CATTLE—STOCK LAW.

While section 2816 authorizes the impounding of cattle running at large, and makes it a misdemeanor to release stock so impounded, yet when the prosecutor drove defendant's hogs into an enclosure while defendant was in pursuit of them, in view of the prosecutor, and after she had sent a message to him not to imprison them, as she was trying to catch them: *Held*, defendant's offense was not within the meaning and spirit of the law, and the evidence did not justify a conviction.

INDICTMENT for releasing impounded stock, tried before *Coble, J.*, and a jury, at September Term, 1895, of WAKE, on appeal from the judgment rendered against the defendant in the court of a justice of the peace.

There was evidence showing that certain hogs, the property of the defendant, Sofronia Hunter, escaped from the enclosure
(1197) or pen in which they were confined, without the knowledge of the defendant, and when the defendant discovered it, she, with the assistance of two other women who were at her house at the time, endeavored to get them back into the pen, but, failing to do so, they kept watch over them, and when the hogs started off from the house the defendant and the other women went immediately in pursuit of them; and that the hogs went into a marsh, and the defendant, being unable to follow them, went to the house of a neighbor, who had planted corn, and notified him that the hogs had broken out and she was doing all she could to get them back to the pen; that the hogs went through the marsh, leaving the defendant on the opposite side,

and defendant, when she saw that they had passed through the marsh, started around the marsh after them, and, being some distance off, but in plain view of the prosecutor, saw him and another man going towards the hogs, and after reaching them attempted to toll and drive them. At this time a neighbor of the defendant came up, on horseback, and defendant requested him to ride on and tell the prosecutor that she was after the hogs, and ask him not to put them them up; that the messenger reached the lot of prosecutor about the time he was putting the hogs up, there being evidence tending to show that he reached the place before any of the hogs were fastened up, and when only one had been gotten in the lot, and that prosecutor was notified not to put the hogs up, as the defendant was in pursuit of them; that before the hogs could be confined within an inner enclosure, defendant arrived and drove two of the hogs from the lot, but could not get them away; that the others broke out of the enclosure that afternoon, but did not go off, and prosecutor again put them up that evening, and kept them until he was directed by the owner of the land to release them without charge. (1198)

Upon this evidence defendant insisted that the stock was not "running at large," in the sense used by the statute, at the time of the taking-up, and that the taking-up was not a legal impounding, and that therefore the releasing was not unlawful.

Attorney-General for the State.

Argo & Snow for defendant.

FAIRCLOTH, C. J. The defendant is indicted for releasing impounded stock, under The Code, sec. 2819. It is a misdemeanor to allow stock to go at large in stock-law territory. The Code, sec. 2811. Stock found at large may be impounded. The Code, sec. 2816. It is a misdemeanor to release impounded stock. The Code, sec. 2819. Assuming the evidence to be as it appears in the printed record, we are of opinion that the defendant is not guilty. We see no error in the judge's charge in a case for the jury, but we put our decision on the principle that the evidence is not sufficient to authorize a conviction. We think the evidence fails to show a case falling within the meaning and spirit of the law. The defendant was in earnest pursuit of her hogs, and the prosecutor was diligent in endeavoring to capture and impound the same, although the defendant was in "his" plain view, in pursuit, and although he was notified by a messenger from the defendant not to put them up, as she was in pursuit of them. It is not to be understood, however, from this opinion that the stock running at large, without the knowledge or consent of the owner, is not subject to be impounded and dealt with as provided by the statute.

Error.

STATE v. MOSES GREGORY

PEACE WARRANT—APPEAL.

There is no appeal in peace-warrant proceedings from the justice of the peace to the Superior Court.

PROCEEDINGS on a peace warrant, heard before *Starbuck, J.*, at February Term, 1896, of DUPLIN.

Attorney-General for the State.
No counsel contra.

FURCHES, J. This is a proceeding in a peace warrant before a justice of the peace. The justice of the peace, finding sufficient cause, adjudged and required defendant to enter into bond to keep the peace, and from this judgment defendant appealed to the Superior Court. In the Superior Court defendant moved to quash the proceeding for want of sufficient averment in the affidavit upon which the warrant was issued; and the State moved to dismiss defendant's appeal, for the reason that no appeal lies in a proceeding of this kind. The court refused the motion of defendant, allowed the motion of the State, and dismissed the defendant's appeal. In this there was no error.

It has been more than once held in this Court that no appeal lies from a justice of the peace to the Superior Court from his judgment upon a peace warrant. *S. v. Walker*, 94 N. C., 875; *S. v. Lyon*, 93 N. C., 575.

Affirmed.

(1200)

STATE v. NATHANIEL BUNTING

FORM OF INDICTMENT FOR PERJURY.

An indictment for perjury must charge that it was done feloniously.

INDICTMENT for perjury, tried before *Graham, J.*, at October Term, 1895, of SAMPSON.

Attorney-General and Shepherd & Busbee for the State.
F. R. Cooper and John D. Kerr for the defendant.

FAIRCLOTH, C. J. The defendant was indicted and convicted of the crime of perjury. A motion in arrest of judgment, because the indictment failed to charge that it was committed "*feloniously*," was overruled, and the defendant appealed. This question has been so often decided that it requires no further discussion. *S. v. Purdie*, 67

N. C., 25; *S. v. Skidmore,* 109 N. C., 795; *S. v. Bryan,* 112 N. C., 848; *S. v. Caldwell, ib.,* 854; *S. v. Wilson,* 116 N. C., 979; *S. v. Snow,* 117 N. C., 774.

Reversed.

Cited: *S. v. Mallett,* 125 N. C., 724; *S. v. Marsh,* 132 N. C., 1002; *S. v. Harris,* 145 N. C., 458.

(1201)

STATE v. M. H. HOLMES

ASSAULT AND BATTERY—EXCESSIVE PUNISHMENT—RESISTING SPECIAL POLICE OFFICER.

1. An act authorizing the mayor of a town "to appoint special policemen for the protection of property and the preservation of the peace" does not give the mayor power to appoint policemen generally and for an indefinite time, but only to place on duty, at extraordinary times and on unusual occurrences and occasions, special policemen to aid the regular policemen to meet the extraordinary needs of such occasions.

2. Where one was indicted for simple assault and battery upon one who at some time previous had been appointed a special policeman, and was acting as such at the time of the assault, but there was no evidence to show that there were any unusual circumstances requiring his appointment the infliction of a punishment of six months' imprisonment in the county jail was excessive and unwarranted, the assault being a simple one and not the aggravated offense of resistance to a public officer.

INDICTMENT for assault upon a special policeman of the town of Clinton while in the lawful discharge of his duty. The defendant was convicted and sentenced to imprisonment in the county jail for six months, and appealed.

Attorney-General, Henry E. Faison and Shepherd & Busbee for the State.

No counsel contra.

MONTGOMERY, J. The indictment charges the defendant with a simple assault and battery upon one Killett, and that the latter was a special policeman of the town of Clinton and in the discharge of his duty at the time of the assault. He was convicted by (1202) the jury and sentenced by the court to imprisonment for six months in the county jail. We presume that this sentence was under the act of 1889 (chapter 51), which is an act to punish resistance to a public officer and to make such resistance a misdemeanor, without limiting the punishment. The State relied on section 3, chapter 90, Laws 1883, with the testimony of Killett and the mayor, to show that Killett

was a constable of the town at the time of the alleged assault. The section of the act of 1883 referred to reads as follows: "The mayor of said town shall have the right to appoint special policemen for the protection of property and the preservation of the peace." This language cannot be construed to mean that the mayor had the power to appoint policemen generally, the appointment to be indefinite as to the duration of time, in addition to the proper number of policemen employed and appointed by the regular town authorities. It must mean that the mayor's power extends only to the placing on duty, at extraordinary times and on unusual occurrences and occasions, a special police force, in addition to the regular force, in order that the needs of such unusual times and occasions may be fully met.

The testimony in this case shows neither such occasions nor such need, nor such appointment by the mayor. The verdict cannot stand, and the case will be sent back for a reformation of the judgment in respect to the punishment imposed by the judge, it being beyond his power to inflict for a simple assault and battery, for the reason that upon a trial for a simple assault the principles of the law which apply in cases of resistance to public officers are not the same as those which apply to a simple assault and battery, for which the defendant in this case is indicted. The defendant is entitled to a

New Trial.

(1203)

STATE v. U. M. COLLINS

WITNESSES—HUSBAND AND WIFE—TESTIMONY—INSTRUCTIONS.

On the trial of a criminal action against a husband, in which he and his wife were witnesses on his behalf, it was error to instruct the jury that, because of such relationship and the witnesses' interest in the result of the action, the jury should carefully scrutinize the testimony and receive it with grains of allowance, without adding that, if the jury believed the testimony of the witnesses, they were entitled to full credit, notwithstanding their relationship and interest.

INDICTMENT for larceny, tried before *Graham, J.*, and a jury, at Fall Term, 1895, of ONSLOW.

The defendant was convicted, and appealed.

The facts necessary to an understanding of the decision of the Court are set out in the opinion of *Associate Justice Montgomery.*

Attorney-General for the State.
W. D. McIver for defendant.

MONTGOMERY, J. In the trial below the defendant and his wife were introduced as witnesses for himself. In reference to the weight

of their testimony, the court told the jury that it was their duty "to scrutinize carefully the evidence of the defendant and his wife, and on account of their interest in the event of the action should receive their testimony with grains of allowance." The defendant entered an exception to this instruction, and we are of the opinion that the exception was well taken. The language used was, in effect, a charge to the jury that, even though they might believe the witnesses to be honest and the testimony to be true, yet that, somehow or other, the testimony was still suspicious and not entitled to their full confidence. His Honor should have said to the jury, in addi- (1204) tion, that if, after a careful scrutiny of their testimony, because of their interest, they yet believed the same to be true, the witnesses would be entitled to as full credit as other witnesses. In *S. v. Byers,* 100 N. C., 512, where the prisoner and his near relations went on the stand as witnesses, the court directed the jury "to scrutinize their testimony carefully, because of their interest in the result; but, notwithstanding such interest, the jury might believe all they said, or part of it, or none of it, according to the conviction produced upon their minds of its truthfulness." This Court approved the charge. The same matter is discussed and decided in the same manner in *S. v. Holloway,* 117 N. C., 730. Several other exceptions were taken to the charge; but as defendant is entitled to a new trial for the error already pointed out, and as the same questions may not arise on the next trial, we will not pass upon them.

New Trial.

Cited: 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., 324.

STATE v. STEPHEN MAY

APPEAL—DEFECTIVE TRANSCRIPT OF THE RECORD—DISMISSAL—PRACTICE.

Where an insufficient record on appeal is sent to this Court, the appeal will be dismissed, unless it appears that the appellant is guilty of no laches, or unless a serious question is presented.

INDICTMENT for barn burning, tried before *Graham J.,* (1205) and a jury, at January (Special) Term, 1895, of LENOIR.

The defendant was convicted, and appealed from a refusal of his motion in arrest of judgment for defects in the bill of indictment.

Attorney-General for the State.
No counsel contra.

CLARK, J. The transcript fails to show that the court was held by a judge at the time and place required by law; that a grand jury was drawn, sworn and charged, and presented the indictment, and there are other defects. It is the duty of the appellant to have the record sent up; and when it is in such condition as above stated, usually the Court will dismiss the appeal, unless it is shown that the appellant was guilty of no laches; otherwise, the appellant could always procure six months' delay by simply failing to have a sufficient record sent up. *S. v. McDowell,* 93 N. C., 541; *S. v. Johnston, ib.,* 559. The Court has sometimes not dismissed in such cases, but only where a serious question is presented, as in *S. v. Farrar,* 103 N. C., 411, and cases cited. But in the present case the only exception is for refusal to arrest the judgment on the allegation of a defect in the indictment, and on inspection there is no defect. The Code, sec. 985, subsec. 6, has been amended by the act of 1885 (chapter 66), repealing that part requiring an allegation of intent. *S. v. Rogers,* 94 N. C., 860.

Dismissed.

Cited: *S. v. Daniel,* 121 N. C., 575; *S. v. McDraughon,* 168 N. C., 133.

STATE v. J. WYNNE ET AL.

INDICTMENT UNDER SECTION 991 OF THE CODE—PUBLIC OFFICER—UNLAWFULLY RECEIVING COMPENSATION—SPECIAL CONSTABLE—JUSTICE OF THE PEACE.

1. An allegation in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to receive" such compensation, is sufficient, and is not defective because of the use of "and" instead of "or," as used in the statute. (Section 991 of The Code.)

2. One who undertakes to exercise and does exercise the duties of an officer, and receives the emoluments thereof, though his appointment is irregular or defective and his title defeasible, is bound to perform all its duties, and is liable for malfeasance.

3. A justice of the peace may, under section 645 of The Code, "in extraordinary cases," appoint anyone, not a party, to execute his mandate, and his decision is conclusive as to when such "extraordinary cases" arise for the exercise of such power.

INDICTMENT, under section 991 of The Code, tried before *Hoke, J.,* and a jury, at October Term, 1895, of ROBESON.

The defendants were convicted of receiving $2 for releasing two offenders who had been arrested on the warrant of a justice of the peace by the defendants as special constables. Defendants appealed

from the judgment of the court sentencing them to an imprisonment in the State penitentiary for five years.

Attorney-General for the State.
French & Norment and Shepherd & Busbee for defendants.

FAIRCLOTH, C. J. The defendant Wynne was indicted, under The Code, sec. 991, for unlawfully receiving and consenting to receive money for an illegal purpose, to-wit, to discharge (1207) a prisoner then in his custody for a crime committed, said Wynne being then a special constable, duly appointed under the law of the State; and the defendant Oxendine is indicted for being present, aiding and abetting the unlawful act of the defendant Wynne. The defendants were convicted, and appealed. The defendants contend that the indictment was insufficient, because it uses the words "did receive and consent to receive," whereas the act (section 991) uses the words "receive *or* consent to receive." "Receiving" necessarily implies consenting to receive, and the Court has held that the indictment, in form like the present, was sufficient, and the reasons given in full. *S. v. Van Doran*, 109 N. C., 864. The defendant also insists that a constable specially deputized was not an officer, within the terms and meaning of the statute. It is not necessary for us to enter into the question of the regularity of defendant's appointment and whether he was in office or not, for the reason that he undertook and exercised the duty of an officer, and is therefore entitled to its emoluments and liable to the penalties attaching to a failure to discharge the duties of such office. This has long since been settled in a case in which *Ruffin, C. J.*, used the following explicit language: "A person who undertakes an office and is in office, though he might not have been duly appointed, and therefore may have a defeasible title or not have been compelled to serve therein, is yet, from the possession of its authorities and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect." *S. v. McEntyre*, 25 N. C., 171.

It is not denied that the defendant received the warrant and arrested the defendants and had them in his custody, and (1208) discharged them for a consideration.

A justice of the peace, under The Code, sec. 645, may, "in extraordinary cases," appoint anyone, not being a party, to execute his mandate, and his decision is conclusive as to when such cases arise. *S. v. Dula*, 100 N. C., 428. The charge of the court fully covered the contentions made on the trial, and there was no exception to it.

No Error.

Cited: *S. v. Cole*, 156 N. C., 623.

STATE v. WILLIAM L. OSTWALT

BASTARDY PROCEEDINGS—APPEAL BY STATE IN CRIMINAL ACTIONS—AUTREFOIS ACQUIT—CONSTITUTION.

1. A proceeding under the existing statutes upon the subject of bastardy is a criminal action of which a justice of the peace has jurisdiction.

2. Being a criminal action, the defendant cannot, under the Constitution, be twice put in jeopardy, and an acquittal by a justice of the peace is final and conclusive, and unreviewable upon the appeal of the State or prosecutrix.

3. The clause in section 32, The Code, allowing an appeal by the "affiant or the woman," is unconstitutional.

4. Cases in which the State can appeal in criminal action pointed out by AVERY, J.

CLARK, J., dissents.

PROCEEDING in bastardy, commenced before a justice of the peace, charging the defendant with being the father of her unborn bastard child. The defendant was acquitted, and the prosecutrix appealed to the Superior Court. This case, on appeal, came on for trial (1209) at August Term, 1895, of IREDELL, before *Norwood, J.*, and a jury. In said court the defendant entered the plea of former acquittal and not guilty.

The following issues were submitted to the jury by the court:

1. "Is the prosecutrix bound by a former acquittal upon a trial before a justice of the peace?" Answer: "No."

2. "Is the defendant the father of the bastard child of the prosecutrix?" Answer: "Yes."

Defendant was convicted, and appealed.

Defendant excepted to the overruling of his plea of former acquittal.

Attorney-General for the State.

L. C. Caldwell for defendant.

AVERY, J. In chapter 92, sec. 2, 1879 (The Code, sec. 35), it was provided that "when the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding ten dollars, which shall go to the school fund of the county." In the same section it was provided further that "the court shall make an allowance to the woman, not exceeding the sum of fifty dollars, to be paid in such installments as the judge or justice shall see fit," etc. This provision was first enacted in the chapter of the Laws of 1879, which was passed for the

purpose, as appears upon its face, of enlarging the criminal jurisdiction of justices of the peace (under the Constitution, Art. IV, sec. 27) by limiting the punishment so that it could not exceed a fine of fifty dollars or imprisonment for thirty days. After the passage of the act, however, the attention of this Court had never been called to the fact that a fine was imposed by this statute until the argument of the case of *S. v. Burton,* 113 N. C., 655. The Court agreed to rest the decision in that case upon other grounds, but the (1210) Justice who delivered the opinion of the Court discussed the question and expressed for himself the opinion that the act of 1879 had made bastardy a criminal offense, cognizable originally before a justice of the peace. At the next succeeding term the Court held, in *Myers v. Stafford,* 114 N. C., 234 (*Justice McRae* delivering the opinion and *Justice Clark* dissenting), that section 35 of The Code made bastardy a petty misdemeanor, and consequently that the county commissioners were not liable for damages for putting a defendant convicted of that offense to work on the public roads until the fine and costs should be paid. At the next term the ruling of the Court that the proceeding was a criminal action was affirmed (in *S. v. Parsons,* 115 N. C., 730), and it was held by an undivided Court that where there was a *verdict of guilty* the defendant must be discharged from custody and relieved of all liability as to the fine of $10 and the costs upon remaining in jail for the requisite time and taking the prescribed oath. But it was held in those cases that the allowance of $50, while the making of it was contingent upon a finding that the defendant was the father—as was the imposition of the fine—was still, like the old allowance, imposed under that part of the act passed by the Legislature in the exercise of its power to enact police regulations, but that as the act made the allowance payable to the mother she became, in contemplation of law, a creditor of the defendant, and could, under section 2948 of The Code, suggest fraud and contest the defendant's right to discharge, as an insolvent from its payment.

In *S. v. Wynne,* 116 N. C., 981, the Court, as now constituted, held, without a dissent, that bastardy was a criminal offense, complete on the begetting of the child, and was within the exclu- (1211) sive jurisdiction of a justice of the peace for twelve months thereafter.

We are now urged to overrule all of those adjudications, made upon full consideration of the question by two Courts, the majority of the members of which were differently constituted, and declare that the imposition of a pecuniary fine as a punishment for a violation of law does not, *ipso facto,* create a criminal offense. This persistent effort on the part of counsel to overturn the former rulings of the

Court makes it necessary to again adduce the authorities upon which they were founded.

The Constitution of 1868, as amended in 1875 (Article I, section 13, and Article IV, section 27), had authorized the Legislature to provide for the trial of petty misdemeanors without the intervention of a jury, and the boundary line of a justice's jurisdiction should depend upon the punishment prescribed by statute. It must be inferred that, when the Legislature associated bastardy with a number of misdemeanors, the punishment whereof in the same act was reduced so as to make them cognizable before a justice, it was not accidental, but with a purpose to constitute it a criminal offense, that for the first time it was made punishable by a fine of $10. But not only do the circumstances indicate an actual intention on the part of the Legislature to create a criminal intention, but the apt words used, *ex vi termini,* can be construed to mean nothing else. Was the construction of the act of 1879 in the three recent decisions of this Court erroneous, as it is now contended it was?

It is familiar learning that words in a statute must be construed according to their technical meaning, unless a contrary intent is apparent upon the face of the act. Under this rule, what must be the interpretation of the provision that on the admission that the de-
(1212) fendant is the father, or the finding of the issue of paternity, "he shall be fined by the judge or justice of the peace not exceeding ten dollars, which shall go to the school fund of the county"? "A crime is an act made punishable by law." Broom's P. of Law, sec. 162; 1 Wharton's Cr. Law, sec. 14, and note. "A crime," says Bishop, "is any wrong which the government deems injurious to the public at large and punishes through a judicial proceeding in its own name." 1 Bishop Cr. Law, sec. 32.

Under the Constitution of North Carolina, the death penalty can be inflicted in four cases only, all other capital punishment being forbidden. The Legislature is empowered to prescribe as a punishment for all other criminal offenses either a fine or imprisonment (with or without hard labor), or both.

When an act affecting the public is forbidden by statute, says Bishop, "the doing of it is indictable at common law." *S. v. Parker,* 91 N. C., 650; 2 Arch. C. L., 2; 2 Hawkins P. C., Ch. 25, sec. 54; 1 Bishop Cr. L., sec. 237. If a crime is a wrong or an act punishable by law, in a proceeding conducted in the name of the State, it would seem that there can be no controversy about the fact that this proceeding, conducted in the name of the State, in order to carry out a police regulation, became a crime when made punishable by law by fine, appropriated to the school fund, as are all other fines imposed on conviction for crime. It seems never before to have been doubted

that the Legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment, or forbids it generally and by implication empowers the courts to impose either fine or imprisonment, as is the case where the law simply declares that a certain act shall be deemed a misdemeanor, without providing how it is to be punished. *S. v. Hatch*, 116 (1213) N. C., 1003; *S. v. Hawkins*, 77 N. C., 494; 1 Bishop Cr. Law, sec. 940.

"A fine (says Lord Coke, 1 Coke on Lit., 126b) signifieth a pecuniary punishment for an offense or contempt committed, imposed by the judgment of a court." 7 Am. and Eng. Enc., 991. If a fine is either a punishment for a criminal offense or a contempt, there being no pretense that begetting a bastard is a contempt, it must be a criminal offense.

The Scotch definition of a criminal offense, which was founded upon principles identical with the common law, declared an act made punishable by law, either by corporal punishment or pecuniary mulct, to be a crime. McKenzie Cr. Law, 3.

The act of 1791 (Potter's Revisal, p. 14, sec. 10) and all subsequent enactments contain substantially the same provision as is still contained in section 32 of The Code, that the father, upon the finding of the issue of paternity against him, "should stand charged with the maintenance of the child, as the court may order, and shall give bond," etc. Haywood's Manual, p. 446; Laws 1814, ch. 870, 871; 2 Potter's Revisal, p. 304; 1 Revised Stat., ch. 12, sec. 4; Revised Code, ch. 12, sec. 4; Battle's Rev., ch. 9, sec. 4.

The act of 1879, which is embodied in section 35 of The Code, is in direct conflict with the language quoted from section 32, in providing that "the court shall make an allowance to the woman, not exceeding the sum of fifty dollars, to be paid in such installments as the judge or justice shall see fit, and shall give bond," etc., instead of standing chargeable to the county, as to amount as well as date of payment, as the court might determine. Clearly the effect of the passage of the act of 1879 was, until The Code took effect, in 1883, to repeal this portion of the old Revised Code, as compiled in (1214) Battle's Revisal. Either the court had the power to make an unlimited allowance or one limited to $50. It is manifest that the commissioners inadvertently brought forward and the Legislature inadvertently enacted in The Code provisions apparently conflicting. In the same way the later provision of The Code (section 35), in making bastardy a criminal offense, deprives the State of the right of appeal from a verdict of "not guilty." "The pre-existing law and practice, recognized and enforced in numerous adjudications," said the Court in *S. v. Powell*, 86 N. C., 640, "had settled the principle that when a

party, charged with any offense before a tribunal of competent jurisdiction, has been tried and acquitted, the result is final and conclusive, and no appeal is allowed the State to correct any errors committed by the court, and this has been uniformly maintained *since the adoption of the new Constitution*, as before. *S. v. Jones*, 5 N. C., 257; *S. v. Taylor*, 8 N. C., 462; *S. v. Martin*, 10 N. C., 381; *S. v. Credle*, 63 N. C., 506; *S. v. Philips*, 66 N. C., 646; *S. v. West*, 71 N. C., 263; *S. v. Armstrong*, 72 N. C., 193. The right of the State to appeal from erroneous rulings in the court below exists only where judgment is given for the defendant upon a demurrer to the bill, or upon a special verdict, or on a motion to quash, or in arrest of judgment. *S. v. Lane*, 78 N. C., 547; *S. v. Swepson*, 82 N. C., 541; *S. v. Moore*, 84 N. C., 724." The reason given by *Chief Justice Pearson* and *Judge Daniel*, in *S. v. Connor*, 19 N. C., 370; and *S. v. Pate*, 44 N. C., 244, for declaring that the Legislature had no power to make a criminal offense and provide for its trial, without indictment or presentment, ceased when power was given to the Legislature (Constitution, Art. IV, sec. 14)

"to provide other means of trial for petty misdemeanors." A (1215) justice's court now has jurisdiction to try misdemeanors, and the Attorney-General frankly conceded that no appeal on the part of the State lies from a finding of a court of competent jurisdiction that a defendant is not guilty. When the Constitution was so altered as to permit the substitution of the justice of the peace, as a trier of the fact, for the jury, as intimated by *Chief Justice Smith*, in *S. v. Powell, supra*, the principle was in no way changed. In speaking of the constitutional provisional that no person shall be twice put in jeopardy of life or limb, Bishop (1 C. L., sec. 997) says: "We have seen elsewhere that while so much of a statute as is against the accused is interpreted strictly, the parts in his favor are extended liberally, and the same distinction applies to a written constitution. Therefore the constitutional provision now under consideration should be liberally construed as covering cases within its reason, while not within its words, on which principle, plainly, the courts should, as we have seen they generally do, hold it applicable to misdemeanors, the same as to treason and felony." Again, Bishop says (1 C. L., sec. 1026): "A statute which, by a device of an appeal by the State, undertakes to authorize the retrial of one acquitted on a valid indictment is void."

Granting, then, that the act of 1879 created a criminal offense, the re-enactment of the old provision, in section 32 of The Code, that "from the judgment and finding the affiant (the woman) or the defendant may appeal to the next term of the Superior Court," etc., would be void, if the principle is properly stated by Bishop. It is the duty of courts, however, as far as it can be done without violating a

constitutional principle, to reconcile apparent conflicts in two statutes and construe them so as to give effect to both. *Winslow v. Morton, ante,* 486. It has been held, in *S. v. Wynne, supra,* that the criminal offense is within the exclusive jurisdiction of a jus- (1216) tice for twelve months from the time the child is begotten; and if that was true the justice here had jurisdiction, and any statute providing for an appeal would be, *pro tanto,* void. While the defendant, in conviction, may be committed to a house of correction or to prison, yet when committed to prison or prayed into custody, without further action by the State or the complainant, he will be discharged on taking the required insolvent oath. *S. v. Burton* and *S. v. Wynne, supra; Myers v. Stafford,* 113 N. C., 234. In these cases the right of the mother has been held to be an incidental one, growing out of conviction, which was compared to the right to have a nuisance abated in certain instances, and it is difficult to see how we could have gone further, in the face of the prohibition against placing a person twice in jeopardy—subject a defendant to a second trial. The utmost length that this Court has gone, since attention was called to the act of 1879, was when it was conceded that, after conviction (not after acquittal), the mother acquired the rights of a judgment creditor, and, where she showed due diligence in giving notice, could insist upon contesting the right to discharge as an insolvent on the part of the defendant, and might appeal in apt time to vindicate her right. This privilege can be given her, under the statute, without infringing the constitutional rights of the defendant. But the unfortunate bringing forward of the old statute could not annul rights acquired under the later statute, embodied in a subsequent section of The Code. After the passage of the act of 1879, and before the attention of this Court was called to the fact that a fine had been imposed by that act, several cases came before this Court, which were cited in *S. v. Burton* and have been considered in every subsequent opinion in which this subject has been discussed. It would seem needless to (1217) thresh over such old straw for the fourth time. The fact that the imposition of a fine creates a criminal offense is none the less true because the Court overlooked for a time the fact that it had been done.

For the reasons given, the judgment of the court below is reversed, and the defendant is entitled to be discharged.

Reversed.

CLARK, J., dissenting: Up to and including *S. v. Edwards,* 110 N. C., 511 (in which the authorities are collected), the decisions of this Court were uniform that proceedings in bastardy were civil, not criminal. In *S. v. Burton,* 113 N. C., 655, it was intimated, but not decided, that they might be construed to be criminal actions. This has been followed by *Myers v. Stafford,* 114 N. C., 234, (dissenting

opinion, P. 689), which held, by a divided Court, that it was a criminal action, and two decisions to that effect have since been made, but the constantly increasing perplexity and difficulties arising from this construction, and which threaten to virtually nullify the act, warn us to return to the ancient landmarks and show the peril of departing from them.

For the first time the effect of the new departure has brought us face to face with this question. The Legislature has provided (The Code, sec. 32) that from the judgment and finding on the trial before the justice "the affiant (the woman or the defendant) may appeal to the next term of the Superior Court of the county where the trial is to be had, *de novo.*" Now we are asked to nullify this express provision of the lawmaking power, upon the ground that, this being a criminal action, no appeal lies from the judgment of the magistrate if in favor of the defendant. The power of the Legislature to enact laws cannot be abridged or denied, except when their action is (1218) clearly contrary to some provision of the Constitution. But it is contended that The Code, sec. 35, authorizing a fine of $10, turns the action into a criminal proceeding, and, *ergo,* the express provision (section 32), giving affiant, or the woman, the right to appeal, is abrogated and of no effect. This cannot be so.

1. If sections 32 and 35 are incompatible, the provision of section 35, authorizing the $10 penalty, should be held nullified, rather than the express provisions of section 32. To disregard the latter is to change the whole nature of the proceeding. In construing statutes, particular stress is laid upon the mischief to be remedied. The mischief to be remedied here is not to make the begetting of a bastard child a criminal offense and to collect the petty penalty of $10 therefor. Clearly not, for there is already the criminal offense of fornication and adultery, admitting of far heavier penalty, and even when no child is begotten. Besides, if bastardy is a criminal offense, the woman would be liable as an aider and abettor, a coprincipal, which is clearly not contemplated by the statute. The object of the statute, through and through, is to provide for the maintenance of the child and prevent its being a charge upon the county, which is a civil, not a criminal, proceeding. This is the evident purport of the whole chapter on bastardy, and has been so recognized by a long and, until very recently, an unbroken line of decisions. Section 32 directs that the judgment, if against the defendant, shall be "for the maintenance of the child"—a civil judgment. If the incidental power, given by section 35, to impose a penalty of $10 conflicts with the entire balance of the chapter and the evident purpose of this long-established legislation, then that provision should be held a nullity, and not the other provisions and evident intent of the entire chapter.

2. But the addition of the penalty of $10 cannot consistently be held to change this proceeding (which is essentially (1219) civil in its nature, and has always been so held till very recently) into a criminal action. In exactly similar manner it is provided that the board of county commissioners are liable in certain cases for all losses sustained in the collection of taxes, and also guilty of a misdemeanor and liable to a fine of not less than $500. The Code, section 2075. Again, The Code, sec. 2703, provides that the sheriff, for failure to make proper returns of the election for State officers, is liable to forfeit $2,000 to anyone who will sue for the same, and shall be guilty of a misdemeanor, punishable by imprisonment in the penitentiary. In the same manner a penalty of $2,500 is allowed against the sheriff for failure to settle his taxes, and is added to the amount of the judgment (*McKee v. Davenport*, 98 N. C., 500), but it was not held that this made such proceeding a criminal action. There are numerous like cases. Can it be contended that, because in these cases a fine or imprisonment is imposed, the civil action is turned into a criminal proceeding, so that the defendant has the benefit of superior number of challenges, the benefit of reasonable doubt, and, if he gets a verdict by errors of the judge in the court below, there is no review by an appeal? In bastardy proceedings the woman is given the right to institute proceedings to obtain judgment for the maintenance of the child by the defendant, and that he pay in a sum fixed by the court for that purpose; and if the penalty of $10 is a criminal proceeding, it is simply, as in the above instances, a separate matter, which cannot change the woman's civil remedy into a criminal proceeding, which would protect the man from review by appeal if the civil issue is found in his favor. If the provisions of sections 32 and 35 are incompatible, the latter, being merely inciden- (1220) tal, and not the former, should give way. They should, however, rather be construed together, and if so, section 32 gives the woman a civil proceeding, and section 35 is a criminal proceeding (as in so many sections of The Code, of which two sections are above cited) for the petty penalty limited to $10.

3. If, however, the recent doctrine were reiterated, that the incidental $10 penalty changes the whole nature of the proceeding, still it does not follow that the express provisions of the statute, giving the woman the right of appeal, is unconstitutional. The provision that no one shall be twice in jeopardy means simply that no one shall be tried *in another action* for a criminal offense after a verdict, either of conviction or acquittal, in a trial for the same offense. It does not forbid a review of the same case by appeal, which is merely a continuation or prolongation of the same. It is true that appeals, except on special verdicts and in certain other limited cases, are not given to the State.

But that restriction is simply by virtue of the statute and not by any constitutional provision. *S. v. Taylor,* 8 N. C., 162, is put expressly on that ground, and is cited as authority for a similar ruling in *S. v. Credle,* 63 N. C., 506. Accordingly, appeals from a general verdict of "not guilty" were recognized in this State [*S. v. Haddock,* 3 N. C., 162 (348); *S. v. McLelland,* 1 N. C., 353 (569)] till restricted by statute (Laws 1815, ch. 895).

A case exactly in point is *S. v. Giles,* 103 N. C., 396, where *Smith, C. J.*, adverts to the $10 fine, but expressly holds that, nevertheless, bastardy is not a criminal proceeding. But even if this be a criminal proceeding, the Legislature has chosen to give the "woman and the affiant" the right to appeal and in so doing the legislative department acted within the limits of its constitutional authority. That an appeal can be authorized by statute on behalf of the State from a judgment discharging the prisoner on a special verdict, or on a motion to quash, or in arrest of judgment, or from a verdict procured by fraud, is conclusive that the cases in which the State can appeal from a judgment and verdict in favor of the defendant are to be determined by the statute law. If this be a criminal action, The Code, sec. 32, by giving the affiant or the woman the right of appeal, has simply added this proceeding to the instances in which the State can appeal from a judgment discharging the defendant. The matter lies entirely with the people, acting through their representatives in the Legislature. It is not likely that they will increase the number of instances already existing by law in which the State can appeal from a judgment in a criminal action discharging the defendant. But power exists. The Constitution forbids that a defendant be tried for the same offense in another action. The statute allows a defendant to apply for another trial in the same action, and that the State may do the same in certain specified instances. It is in the legislative power to increase or diminish, at will, the instances in which the State may have the matter re-examined upon appeal.

(1221)

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: McDonald v. Morrow, 119 N. C., 675; *S. v. Mitchell, ib.,* 788; *S. v. Nelson, ib.,* 799; *S. v. Ballard,* 122 N. C., 1026; *S. v. Bruce, ib.,* 1041; *S. v. Pierce,* 123 N. C., 747; *S. v. White,* 125 N. C., 677; *S. v. Savery,* 126 N. C., 1088; *Turner v. McKee,* 137 N. C., 254.

Overruled: S. v. Liles, 134 N. C., 737; *S. v. McDonald,* 152 N. C., 804, which are now the settled law.

STATE v. E. A. THOMAS

TOWN ORDINANCES—DELEGATION OF LEGISLATIVE POWERS—THE CODE, SEC. 3799.

1. The Code, sec. 3799, does not empower a town to pass an ordinance forbidding one who sells liquor to occupy his own premises between certain hours.

2. The extent to which legislative authority may be delegated by the General Assembly to municipal authorities discussed.

INDICTMENT for violation of town ordinance, tried before (1222) *Brown, J.*, at March Term, 1896, of MCDOWELL.

A warrant was issued (upon complaint of one Patton) by the mayor of the town of Marion, charging the defendant with being and remaining in his barroom, in the town of Marion, N. C., between the hours of 10 o'clock P. M. and 4 o'clock A. M., it being a public place, where spirituous and intoxicating liquors are sold (the said barroom belonging to and being kept by the said C. A. Thomas), and permitted others so to do, in violation of an ordinance (section 35 of the ordinances) in force in the said town of Marion, etc.

Upon the trial the defendant was adjudged to be guilty and to pay a fine, and he appealed to the Superior Court, where the jury rendered a special verdict, as follows:

"That the town of Marion duly enacted by its commissioners and published the following ordinance:

" 'Sec. 35. That all barrooms and places where spirituous or intoxicating liquors are sold shall be closed for the day at 10 o'clock P. M. It shall be unlawful for any barkeeper, clerk or agent, or any person whatever, to keep open or be or remain in such barroom or other place where spirituous or intoxicating liquors are sold, between the hours of 10 o'clock P. M. and 4 o'clock A. M., and any person violating any of the provisions of this ordinance shall, on conviction therefor, be fined $25.'

"That on the night of 30 January, 1896, the defendant, being a saloon or barroom owner, engaged in retailing intoxicating liquor in said town, remained, together with one Elliott, in his saloon as late as 10 o'clock, and forty-five minutes P. M. thereafter, in his saloon on said night; that a bright light was burning, the same as during the preceding part of the night; that the door was shut, but not locked; that said Elliott was the bartender and C. A. Thomas (1223) the owner and proprietor of said barroom; that at 10:45 o'clock P. M. said Thomas came out of the door and went home.

"That if, upon the foregoing facts, the court be of opinion that defendant is guilty, the jury find him guilty; and if 'not guilty' shall be the opinion of the court, the jury find him not guilty."

The court, upon the special verdict, adjudged the defendant guilty of violating said ordinance, and the jury rendered a verdict of "guilty" accordingly. The court fined the defendant $5 and costs, the same imposed by the mayor.

The defendant moved for a new trial, assigning as error the failure of the court to declare said ordinance void on its face, which defendant had prayed court to do.

Overruled. Exception by defendant. Appeal.

Attorney-General for the State.
J. F. Morphew for defendant.

AVERY, J. The defendant is indicted for violation of a town ordinance making "it unlawful for any barkeeper, clerk or agent, or any person whatsoever, to keep open or be or remain in a barroom, or other place where spirituous or intoxicating liquors are sold, between the hours of 10 o'clock P. M. and 4 o'clock A. M." The charge is not keeping open the barroom, but remaining in it after the hour prescribed for closing. So that, the testimony that the door was not locked, though closed, is not so material as possibly it might have been if the defendant had been charged with failing to close his place of business. The ruling of the court below, that the defendant was guilty upon a finding that he and his clerk sat in the barroom till 10:45 o'clock in the evening, raises the question whether the authority had been granted to the municipality to pass any such ordi-
(1224) nance, and suggests the investigation of the still more important inquiry whether the Legislature, if it attempted to do so directly, was empowered to so restrict a person in the use and enjoyment of his own property.

It is familiar learning that an agent, acting under a power of attorney, cannot transcend the limit of his authority, ascertained by a strict construction of the instrument under which he acts. This elementary principle grows in importance when we come to apply it to public instead of private agencies. The maxim, "*Delegatus non potest delegari,*" applies to the Legislature as a co-ordinate branch of the government, exercising authority derived from the Constitution, as well as to agencies constituted by the ordinary power of attorney, executed by an individual. Where the Constitution of a State confers no express authority to delegate legislative powers to municipalities, some discussion has arisen as to the rightful exercise of such powers by municipalities. But the most satisfactory solution of the question is to be found in the fact that almost all of such instruments contain some recognition of the existence of municipalities, as in section 3 of our Constitution of 1776 (Rev. Code, p. 18, where borough representation is provided for), and such recognition has been held to

imply a right in the Legislature to grant the power of local legislation, as it had been conferred in England, but subject to the restriction that there can be no implied authority to do anything contrary to the provisions of the State or Federal Constitution. It is admitted that the municipality is not empowered by the charter (Laws 1889, ch. 183, sec. 24) to prohibit the defendant from remaining in his house, but it is insisted that the authority is implied in the provision of the general law (The Code, sec. 3799) empowering all towns "to make such by-laws, rules and regulations for the better government of the town as they may deem necessary." It must be conceded that (1225) a person has the right at common law to occupy and remain in his own house day and night, whether it be fitted up for the purpose of a dwelling only or for the conduct of mercantile or other business. The Legislature may pass laws in furtherance of the principle that one must so use his own as not to injure others. But the question whether the lawmaking power could rightfully have granted the authority to pass the ordinance does not arise if it does not clearly appear that it has attempted to do so. If we concede, for the sake of argument, that it was competent for the Legislature to confer the power, it has clearly failed to do so. The authority to prohibit a person from sitting in his own house after 10 o'clock in the evening is neither given expressly nor by any fair implication; nor is it essential to the declared objects of creating the municipality, or to the proper exercise of the authority granted, to enact such an ordinance; and, therefore, as the unauthorized act of a governmental agency, the ordinance must be treated as null and void. 1 Dillon Mun. Corp., sec. 89 (55); Cooley Const., Lim., pp. 242, 744, note 2; *S. v. Webber,* 107 N. C., 962. "An ordinance," says Dillon (1 Mun. Corp., sec. 325), "cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit." *Taylor v. Griswold,* 2 Green (N. J.), 222; *Hoyden v. Noyes,* 5 Conn., 391.

If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creat- (1226) ing them, with the incidental grant embodied in section 3799 of The Code, to give the unequal authority with the Legislature itself to restrict and regulate the rights of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the Legislature to be given to the statute, and its attempted exercise was therefore unlawful.

The Legislature can rightfully restrict the manner of selling spirituous liquors by prescribing hours for selling, or can altogether prohibit the sale in any particular locality or at any place in the State. It may enact either a pubic, local or a general law, within the purview of its powers, if no discrimination is shown. *S. v. Moore,* 104 N. C., 714; *S. v. Joyner,* 81 N. C., 534; *S. v. Stovall,* 103 N. C., 416; *S. v. Chambers,* 93 N. C., 600. But while it is unnecessary to concede or deny its power to pass a law forbidding a person to sit in his own house for whatever purpose it may at the time be used, it is certain that no attempt has been made, expressly or by any implication, to authorize the town of Marion to make such a regulation. For the error in holding him guilty on the special verdict the judgment is

Reversed.

Cited: Edgerton v. Water Co., 126 N. C., 98; *S. v. Ray,* 131 N. C., 817 and 824; *Paul v. Washington,* 134 N. C., 375, 389; *S. v. Dannenberg,* 150 N. C., 801; *S. v. Darnell,* 166 N. C., 301; *S. v. Burbage,* 172 N. C., 878; *Lawrence v. Nissen,* 173 N. C., 361.

(1227)

STATE v. WILLIAM IVIE

BASTARDY—REMOVAL OF CAUSES IN MAGISTRATE'S COURT—AUTREFOIS ACQUIT—PROCEDENDO, WHEN PROPER—APPEAL BY STATE.

1. Under The Code, sec. 907, it is the duty of a justice of the peace, upon affidavit and motion for a removal being filed, to remove the case to another justice residing in the same township. If there be no other justice in the same township he can remove the case to the justice of some neighboring township. If the case is removed to a justice of a neighboring township when there is another justice in the same township in which the action commenced, the justice to whom the case is thus removed has no jurisdiction, and his judgment is void.

2. Where, upon appeal to a higher court, it appears that the proceedings and judgment under which a prisoner charged with a criminal offense was arrested or sentenced in a justice's court are void for irregularity, the prisoner should not be allowed to escape, but a *procedendo* should issue to the justice, to the end that the charge be again and lawfully inquired into.

3. It is only where a judgment is rendered by a court having jurisdiction that it is available as a plea in bar.

BASTARDY, tried before *Norwood, J.,* at January Term, 1896, of ROCKINGHAM.

The prisoner was arrested on a warrant charging bastardy, issued by a justice of the peace in Wentworth Township. Prisoner applied for removal of the case, upon affidavit in due form. Although there were at the time other justices of the peace in Wentworth Township, the justice transferred the case to a justice resident in Leaksville

Township, adjoining Wentworth. When the case was called for trial before the justice to whom it had been thus removed, (1228) the State moved to dismiss for the want of jurisdiction in such justice. This motion was overruled, and defendant was tried and acquitted. The State and the prosecutrix appealed to the Superior Court. When the case was called for trial in the Superior Court the State moved to remand it to the justice who originally issued the warrant, for trial or removal to some other justice in Wentworth Township. This motion was opposed by defendant. The court gave judgment remanding the cause to said justice, upon the ground that the justice in Leaksville Township had no jurisdiction to try the action. The defendant excepted, and appealed to the Supreme Court, assigning as errors the action of the court "(1) in remanding the cause, as above set out; (2) in holding that the justice in Leaksvile Township had no jurisdiction to try the cause."

Attorney-General for the State.
H. R. Scott and Dillard & King for defendant.

AVERY, J. Before the passage of the act of 1880 (The Code, sec. 907) the justice before whom a warrant charging a defendant with bastardy was returned had jurisdiction to try, and could not have been compelled to remove the case for trial to another justice. That statute provided that "in all proceedings and trials before justices of the peace," upon affidavit of either party to the effect that he cannot obtain justice in the court in which it is pending, the action must be removed to the court of "some other justice residing in the same township," or to the court of a justice of some neighboring township "if *there be no other* justice in said township." Under the statute, the justice, on the filing of the affidavit, was not author- (1229) ized by the statute to remove the case for trial to a neighboring township when there was another justice in his own. It was not intended by the Legislature, in giving one party the opportunity to object to trial before a court where there might be some prejudice against him, to afford such party or the objectionable officer the opportunity to annoy his adversary by forcing him unnecessarily to go to a point remote from his home, with all the additional cost and trouble incident thereto. The order of removal was unauthorized and void, and the justice who tried the action had no jurisdiction. Though bastardy is now a petty misdemeanor, it is only where a court has jurisdiction that a verdict of acquittal is available as a plea in bar. *S. v. Powell*, 86 N. C., 640; *S. v. Wynne*, 116 N. C., 981. Where, under the act of 1868, the complaint was not filed by the injured party, or there was a failure to comply with any of the prerequisites to clothing a justice of the peace with jurisdiction, it was repeatedly

held, not only that the whole proceeding before the magistrate's court was void, but that on appeal the Superior Court acquired no jurisdiction. If a sufficient time had elapsed for the higher court to acquire concurrent jurisdiction, a new bill could not be sent, but the prosecutor was taxed with the costs of the original void proceeding.

In order to the validity of a proceeding, whether civil or criminal, as constituted in the court of the justice or when considered in a higher court on appeal after originating before such a tribunal, it was held that the record must affirmatively show everything necessary to confer the jurisdiction upon the justice's court. *S. v. Johnson,* 64 N. C., 581; *Allen v. Jackson,* 86 N. C., 321. In *S. v. Cherry,* 72
(1230) N. C., 123, it was held that the courts had no right to infer, from an attempt in express language to confer upon justices of the peace jurisdiction of an offense, a legislative intent, not expressed, but by implication, to reduce the punishment for that particular kind of larceny, so as to bring it below the limit prescribed in the Constitution, Art. IV, sec. 27. It being admitted that there were other justices of the peace in Wentworth Township, the justice in Leaksville Township had no authority to try the case, and his judgment was void.

It was held in *S. v. Sykes,* 104 N. C., 700, that where a justice of the peace, having original jurisdiction of a criminal offense charged in a warrant, transfers it by mistake to a higher court which can take cognizance only on appeal, it is the duty of the higher court to issue an order in the nature of a *procedendo* to the court where it originated. This was declared to be an exercise of the inherent power of the court to prevent the failure of justice by the escape of a guilty party. Here the justice who issued the warrant had original jurisdiction, but the statute made it his duty, on the filing of the affidavit, to remove the case for trial to a justice in the same townhsip. The defendant has never been lawfully convicted, but he ought not to have been allowed the opportunity to escape, and therefore the court properly directed that an order issue to the justice who signed the warrant to proceed—not to try the indictment, but to provide by order for its removal to some justice living in the same township, unless the application for removal should be withdrawn. This we understand to be the meaning of the words "for trial or removal to some justice resident in Wentworth Township," and upon that construction of the order of the court the judgment is

Affirmed.

(1231)

STATE v. WILLIAM PICKETT

INDICTMENT, TRIVIAL DEFECTS IN—BILL OF PARTICULARS—RESISTING AN OFFICER, INDICTMENT FOR.

1. A bill of indictment for resisting an officer, which describes the officer as "a duly constituted officer of the police of the town of Rockingham," and also that he was "discharging a duty of his office," is good.
2. Where the bill charged that the officer resisted was a *police* officer in the due execution of his office, and the proof was that the officer was the *chief marshal* of the town, and the town ordinance authorized the *constable* to make arrests, the variance was immaterial.
3. However it may have been in the past, no indictment will now be quashed or judgment arrested for trivial defects. If the offense charged is not set out as clearly as defendant wishes it to be, he has the right to a bill of particulars, if demanded in apt time.

INDICTMENT for resisting an officer, tried before *Robinson, J.*, at December Term, 1895, of RICHMOND.

Before pleading, the defendant moved to quash the bill of indictment, for the reason that it failed to allege the office W. L. Covington (the officer alleged to have been resisted) held.

The indictment was as follows:

"The jurors for the State, upon their oath, present: That William Pickett, late of the county of Richmond, on 2 March, 1895, with force and arms, at and in the county aforesaid, willfully and unlawfully did resist, delay and obstruct W. L. Covington, a duly constituted public officer of the police for the town of Rockingham, in discharging and attempting to discharge a duty of his (1232) office, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

And for the further reason that the office alleged was not a public office.

Motion overruled, and defendant excepted.

The other facts appear in the opinion.

Attorney-General and Cameron Morrison for the State.
McRae & Day for defendant.

MONTGOMERY, J. The motion to quash the bill of indictment was based on its alleged failure to describe the office which Covington held at the time the offense was charged to have been committed. The language of the indictment is that Covington was "a duly constituted officer of the police for the town of Rockingham," and that the defendant unlawfully did resist, delay and obstruct him in discharging and attempting to discharge the duties of his office. The motion was properly overruled. The office is sufficiently designated when the officer is

described as "a duly constituted public officer of the police for the town of Rockingham." The general duties of a policeman are well known, and in an indictment which charges resistance to such an officer it is not necessary to set out the writ or the process under which the officer was acting when resistance to his authority was made. It is sufficient to charge that the officer was in the "due execution of his office." On the trial the records of the town were introduced to prove that Covington was a police officer. They showed that he had been elected chief marshal of the town. The act of 1887 (charter of the town of Rockingham) was also read in evidence. The (1233) charter authorized the town commissioners to elect a town constable. Covington was introduced as a witness for the State, and testified that after his election he had been acting as chief marshal or chief constable of the town for many months, and that in March, 1895, while in the execution of the duties of his office, he arrested the defendant, who was in the act of assaulting and beating a man, when the defendant resisted, delayed and obstructed him in making the arrest. An ordinance of the town was also read, showing the authority of the constable to make such arrests. After the testimony was in, the defendant insisted that there was a variance between the proof and the allegations in the bill, and requested the court to instruct the jury to render a verdict of "not guilty" on that account, which the court refused to do. We are of opinion that the variance was immaterial, and that the court committed no error in refusing to charge as requested. It was argued here that the offense laid in the indictment was not set out with sufficient particularity, and that on that account no judgment could be pronounced upon a conviction under it; and many respectable authorities from other States, where there are no statutory provisions, like those in our State, curing defects in indictments, were produced to sustain the position. However this may have been before the decisions of this Court in *S. v. Brady*, 107 N. C., 822, and *S. v. Dunn*, 109 N. C., 839, these cases settle the matter against the defendant. If the offense charged in the bill, in cases like this, was not set out as clearly as the defendant desired it to be, he had it in his power, before going into the trial, to move for a bill of particulars. The details were mere matters of evidence. *S. v. Dunn, supra.*

No Error.

Cited: Edgerton v. Water Co., 126 N. C., 98; *S. v. Van Pelt*, 136 N. C., 669; *S. v. Long*, 143 N. C., 676; *S. v. Leeper*, 146 N. C., 661; *S. v. R. R.*, 149 N. C., 510.

(1234)

STATE v. J. L. CLAY

MUNICIPAL CORPORATIONS—ORDINANCE—VALIDITY.

Under the authority conferred upon towns by section 3799 of The Code to make such by-laws, rules and regulations for the better government of the town "as they may deem necessary, provided the same be not inconsistent with this chapter or the laws of the land," the commissioners of a town have not power to enact an ordinance declaring it to be "unlawful for any person to abuse or insult any officer of the town or member of the police while in the discharge of his duty," and imposing a fine of $25 upon one convicted thereunder.

CRIMINAL ACTION, for the violation of a town ordinance, tried before *Brown, J.*, and a jury, at Spring Term, 1896, of MCDOWELL, on appeal from a judgment of the mayor's court of Marion, N. C.

A warrant was issued by the mayor of the town of Marion upon the following complaint, sworn to by J. M. Patton, the marshal of the town:

"That J. L. Clay did, on 12 October, 1895, abuse J. M. Patton by calling him a coward and challenging him to enter into a fight (the said J. M. Patton being marshal of the town of Marion, N. C., and in the execution of his office at that time), in violation of an ordinance (section 24 of the ordinances in force in the said town of Marion, N. C.), contrary to the statute in such case made and provided, and against the peace and dignity of the State."

Defendant was adjudged to be guilty and a fine of $25 imposed, and he appealed to the Superior Court.

The town ordinance, for a violation of which the defendant was charged, is as follows:

"Ordinance No. 24: It shall be unlawful for any person to abuse or insult any officer of the town or member of (1235) the police while in discharge of his duty, and on conviction shall pay a fine of $25."

J. M. Patton was introduced for the State and testified: That on . . . . day of October, 1895, he was in the store of Nichols & Bro.; that when he came into said store the defendant, being in said store at the time, and looking toward the witness, who was at that time town marshal of said town of Marion, remarked that he "only wanted one or two words out of that man"; that at the time there were several persons in the store, but no one came in at the time except the witness; that while witness was in said store the defendant was snarling at the witness, grating his teeth at him (witness); that witness left the store, and in a few minutes walked into the store of one Swindell, where he found defendant talking to Swindell; that immediately upon the witness entering the store the defendant remarked that "he smelt

a sneak'' (looking in the direction of and at witness, marshal), and that ''he could always tell when a sneak entered the house''; the defendant walked up in front of witness and remarked to witness, ''Don't you like it?'' whereupon the witness remarked that he (the defendant) could act the fool without putting himself to so much trouble, when the defendant remarked that he (defendant) did not visit disorderly houses; that witness replied that if defendant meant that witness did so, he (defendant) told a damn lie, when the defendant challenged witness to go out and pull off witness' billy, badge and pistol, and to fight witness, and stepped two or three paces towards witness, when witness backed a step or two; that witness then left the store, and in a short time went into the drug store,
(1236) where he again saw defendant; that when witness came into the store defendant asked Dr. Morphew if he ''had any pills that would work a dog out of the house,'' and remarked that there was a dog in the house, and made some remark about his younger brother having been arrested, and also said Patton (the marshal and witness in this case) was mad because the defendant had beaten him with a young lady. Said marshal further testified that he was on duty at the time that all these acts occurred, and that they all occurred one evening before 10 o'clock, and in a short space of time.

Verdict of guilty. Defendant moved to arrest the judgment because the ordinance is void, and appealed from the refusal of the motion.

Attorney-General and Shepherd & Busbee for the State.
J. F. Morphew for defendant.

FAIRCLOTH, C. J. The authority to adopt ordinance No. 24 depends upon The Code, sec. 3799, which reads: ''They (the commissioners) shall have power to make such by-laws, rules and regulations for the better government of the town as they may deem necessary, provided the same be not inconsistent with this chapter or the laws of the land.'' Upon reflection, and upon a fair construction, we do not think it was in the mind of the Legislature to confer jurisdiction on the commissioners to such an extraordinary extent, and upon such facts as are disclosed in this record, and we think the defendant's motion should have been allowed. *S. v. Horne,* 115 N. C., 739.

Judgment Arrested.

Cited: Edgerton v. Water Co., 126 N. C., 98.

(1237)

STATE v. COLUMBUS JONES ET AL.

ASSAULT WITH DEADLY WEAPON—INSTRUCTIONS.

Where, in the trial of an indictment for assault and battery, the court charged (1) that if at M.'s house J. and L. (two of the defendants) got off their horses and advanced upon prosecutor, cursing him and with intention of fighting him, and prosecutor ran, in order to save himself from being beaten, they would be guilty; likewise (2) if they all pursued J. to his house with weapons, cursing him, and refusing to leave when ordered off by him; and (3) if the jury believe from the evidence, beyond a reasonable doubt, that defendants L. and M. (two of the defendants) were then present at prosecutor's house, telling J. what to say to him, to call him a mill-burner, etc., defendants will be guilty: *Held,* that such instructions were proper and authorized, the first two by *S. v. Rawles,* 65 N. C., 334, and the last by *S. v. King,* 86 N. C., 603, and *S. v. Perry,* 50 N. C., 9.

INDICTMENT for assault with deadly weapons, tried before *Bryan, J.*, at Fall Term, 1895, of CALDWELL.

It appeared from the evidence that, about dusk on a certain evening, the defendants Jones, Lingle and Mask went to the house of one Minnie Moose; that defendant Jenkins was sitting in the door when they arrived. Jones said, "Good evening, Jim," meaning Jenkins; "are you at home?" Jenkins replied, "I'm at home wherever I have my hat on." Jones said, "You were not at home the other night when you cut me, and, God damn you, step out and we will settle it." Jones rode a mare that had a colt with her. Lingle was riding a stud horse and Mask a mule. When Jones made the last of the above remarks he and Lingle dismounted, for the purpose, Jones said, of fighting Jenkins, and started towards Jenkins (Jones turning his mare loose and Lingle giving his stud horse to Mask to hold.) Jen- (1238) kins ran out of the back door and through a swamp to his house, which was about a quarter of a mile off. Jones, Lingle and Mask followed, cursing him, but claimed to be hunting the mare of Jones (there was evidence that she had gone in that direction.) Jenkins got home. It was in evidence that Jones said he would kill him or die; would put him where some of his brothers were (that is, dead). Jenkins got home, got his gun and stepped out; crowd hallooed, and Jenkins answered, "Whoopee!"

Witness John Poplin testified: "Jones said he was hunting his mare and Jenkins, too. Jenkins told him to leave his premises, Jones cursed him. Heard seven shots fired." This witness further testified that Jenkins shot twice and before anybody else. They appeared to be coming together. When Jenkins asked for his gun the crowd seemed to be coming towards the house.

Jenkins testified that Jones and Lingle were both armed when they advanced on him at Minnie Moose's house. He further testified

that Jones and the other two, Lingle and Mask, were on his premises; that he ordered them off; that Jones called him "a damn cowardly son of a bitch" and "mill-burning son of a bitch." Jenkins testified, further, that he shot at them because they were going to kill him. There was evidence that Lingle stood by Jones and told him to call Jenkins a "mill burner." Lingle and Jones were both wounded.

The court charged the jury, among other things: "That if at Minnie Moose's house Jones and Lingle got off their horses
(1239) and advanced upon Jenkins with the intention of fighting him and cursing him, and Jenkins, in order to save himself from being beaten, ran off, they would be guilty. If these three men all pursued Jenkins to his home with weapons, cursing him and refusing to leave when ordered off by him, they would be guilty. If the jury believe from the evidence, beyond a reasonable doubt, that Lingle and Mask were then present at Jenkins' house, telling Jones what to say to him, to call him a 'mill burner,' etc., they would be guilty." To this charge Lingle and Jones excepted.

The defendants moved for a new trial. Motion overruled. Judgment, and appeal by defendants Jones and Lingle.

Attorney-General for the State.
No counsel contra.

FURCHES, J. Indictment for assault and battery with a deadly weapon on one Jenkins. The court charged the jury, among other things, "that if at Minnie Moose's house Jones and Lingle got off their horses and advanced upon Jenkins, cursing him, and with the intention of fighting him, and Jenkins, in order to save himself from being beaten, ran off, they would be guilty.

"If these three men all pursued Jenkins to his home with weapons, cursing him, and refusing to leave when ordered off by him, they would be guilty.

"If the jury believe from the evidence, beyond a reasonable doubt, that Lingle and Mask were then present at Jenkins' house, telling Jones what to say to him, to call him a 'mill burner,' etc., they would be guilty." Defendants excepted.

The two first paragraphs of the charge seem to be authorized by *S. v. Rawles*, 65 N. C., 334, and the last paragraph by *S. v. King*, 86 N. C., 603, and *S. v. Perry*, 50 N. C., 9.

No Error.

(1240)

STATE v. J. M. MCCRACKEN ET AL.

INDICTMENT UNDER SECTION 1062 OF THE CODE—REMOVING FENCES.

1. To constitute the offense prohibited by section 1062 of The Code, the offender must be a trespasser, and to be a trespasser he must act willfully and unlawfully.

2. Where, in the trial of an indictment, under section 1062, for removing a dividing fence, the defendant offered to prove that he and the prosecutor had agreed upon the removal and had had a surveyor to locate the line, and that he moved the fence to such location in good faith, believing that he was carrying out the agreement: *Held,* that the testimony should not have been excluded, for, if his statement were true, defendant could not be lawfully convicted.

INDICTMENT under section 1062 of The Code, tried before *Ewart, J.*, and a jury, at January Term, 1896, of HAYWOOD Criminal Court.

The defendant was convicted, and appealed.

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

Attorney-General and R. D. Gilmer for the State.
W. T. Crawford for defendants.

FURCHES, J. This is an indictment, under section 1062 of The Code, for removing a fence. The evidence tends to show that the prosecutor, Walker, and the defendant McCracken were adjacent landowners; that there was about to be a road located through their lands which would run near their dividing line; that they agreed to have this line surveyed and to put the road on the line, and to move their dividing fence to the road; that they procured the county surveyor, one Ledbetter, to survey and locate this line, having (1241) agreed upon the corner where the survey should commence.

The survey was made and the road located, the prosecutor and the defendant both being present, with their deeds, and assisting in making the survey and locating the road. There is no complaint that the survey is not correct, but it took from one to two rods of prosecutor's field, which seems to have been in clover at the time.

Defendant admits that he moved the fence and put it up again on the line as surveyed and where the road was located; and it was admitted that the fence was made as good where it was moved to as it was before it was moved.

Defendant denies that he is guilty of any criminal offense in moving said fence, for the reason that it was agreed between him and the prosecutor that the fence should be moved and put on the line, which was a license to him to do what he did; and for the purpose of establishing this defense, and as tending to prove the agreement and license, he offered himself as a witness, and testified that "he and the prosecu-

tor had agreed at the beginning corner to put the fence on the line, and he thought he was acting in accordance with the agreement in putting the fence back and moving the road on the line; that the prosecutor had never notified him that he was unwilling to change the road according to the agreement, and there had never been any dispute about the line between them." This evidence was objected to by counsel representing the State, and ruled out by the court, and defendant excepted.

The defendant then introduced T. C. Ledbetter, the surveyor, who testified that they (prosecutor and defendant) "mutually agreed at the beginning corner to put the fence on the line." This evidence was objected to by counsel representing the State, and ruled
(1242) out by the Court, and defendant excepted.

In both these rulings there was error. To constitute this a criminal offense there must have been a trespass committed by defendants. *S. v. Reynolds,* 95 N. C., 618. To constitute defendant a trespasser he must have acted willfully and unlawfully in removing this fence. *S. v. Howell,* 107 N. C., 835. He could not have acted willfully and unlawfully if he had the permission of prosecutor to move the fence, and did it in a peaceable manner, and made it as good as it was before he moved it.

The question was, did he have this? Did the prosecutor agree that the fence should be moved to the road, and did defendant in good faith believe that, under this agreement, he was authorized to move the fence? And certainly this evidence tended to show that he did. How the jury might have found if this evidence had been allowed, we do not know, but, as it tended to prove the agreement, he was entitled to have it submitted to the jury. There is

Error.

Cited: *S. v. Jones,* 129 N. C., 509.

STATE v. ERASTUS DOWNS

"BROADSIDE EXCEPTIONS" TO JUDGE'S CHARGE—EXCEPTIONS TO EVIDENCE.

1. Rulings of lower court upon the admission or rejection of evidence will not be reviewed unless excepted to on the trial.

2. "Broadside exceptions" to the judge's charge will not be considered.

(1243) INDICTMENT for assault and battery, tried before *Ewart, J.*, at January Term, 1896, of the Criminal Circuit Court of HAYWOOD.

Attorney-General for the State.
Ferguson & Ferguson for defendant.

CLARK, J. The evidence that the shooting had occurred about the time the defendant's distillery had been cut up was admitted by the court, as it stated, simply to fix the date of the assault. Thus restricted, certainly it was unobjectionable. The evidence of Robert Boyd was very indefinite. Though the defendant asked that it be excluded, there was no exception for failure to do so. The Code, sec. 412 (2). *Taylor v. Plummer,* 105 N. C., 56. The exception to the charge is not to any specific instruction, but is a "broadside exception" to the entire charge, and therefore cannot be considered, for the reasons given in *McKinnon v. Morrison,* 104 N. C., 354, and the numerous cases affirming it [Clark's Code (2d Ed.), pp. 382, 383, and in supplement to same, p. 64]. Besides, the charge presented no grounds for exception by this defendant.

No Error.

Cited: Burnett v. R. R., 120 N. C., 519; *Hampton v. R. R., ib.,* 538; *S. v. Moore, ib.,* 571; *Wood v. Bartholomew,* 122 N. C., 185; *Wilson v. Lumber Co.,* 131 N. C., 164; *S. v. Merrick,* 172 N. C., 872.

(1244)

STATE v. JEFF MACE, NEWTON MACE AND JOHN FLASHER

EVIDENCE—CONSPIRACY—DECLARATIONS OF CONSPIRATORS—DYING DECLARATIONS —NEW TRIAL NOT GRANTED FOR TRIVIAL MATTERS—CONTRADICTING ONE'S OWN WITNESS—OTHER CRIMES, WHEN COMPETENT TO SHOW.

1. The exclamation of one who is killed, made simultaneously with the infliction of a mortal wound and immediately preceding his death, in the presence of his slayers, is competent evidence, both as a dying declaration and as a statement made in the presence of accused.

2. When a conspiracy is shown to have existed, the declarations of one conspirator are evidence against the others.

3. While it is a general rule that when a prisoner is on trial for one crime, evidence of his commission of other crimes will not be admitted; still, other criminal acts may be proved if they are connected with the one charged.

4. The rejection of evidence of slight importance, and which is only cumulative, is not good ground for a *venire de novo.*

5. Where evidence is admitted improperly, but the defendant afterwards admits on the trial the very fact which such evidence tended to prove, the error becomes harmless, and a *venire de novo* will not be ordered.

6. While a party cannot discredit his own witness, still he can show the facts to be different from those testified to by such witness.

INDICTMENT for murder, tried at February Term, 1896, of the Criminal Circuit Court of MADISON, before *Ewart, J.*

The defendants were convicted of murder in the second degree, and appealed.

The facts appear in the opinion of the Court.

(1245) *Attorney General and J. M. Gudger, Jr., for the State.*
Julius C. Martin for defendants.

MONTGOMERY, J. The exceptions which appear on the record are confined exclusively to portions of the evidence. The charge of his Honor was not excepted to in any particular, and it seems that the first of defendants' prayers for instructions was given, with a qualification (without objection), and the others submitted to the jury as asked. The defendants, Jeff Mace, Newton Mace and John Flasher, brothers, all armed with deadly weapons, on a roadside, at night, returning from a dance, provoked a difficulty with Zeb Whitt, the deceased, and Jeff Mace, the other defendants aiding and abetting, shot with a pistol and instantly killed the deceased. Two witnesses who were present and saw the whole affair testified that when the deceased was falling he cried out, "Oh, Lord; they have murdered me for nothing in the world!" and another "Oh, Lord; they have killed me!" The defendants objected to this testimony. The grounds of objection were not stated, and it is difficult to conjecture what they were. The defendants and the deceased were "in a huddle," as the witness said, and the man fell almost at their feet. If the objection was that the dying man did not call the names of his slayers, the answer is that his accusation was made to their faces; that the defendants only were just at the spot of the killing, and the exclamation could have been made only of them. But the evidence was competent as a dying declaration. In *S. v. Baldwin,* 79 Iowa, 721, the Court said: "It has been held that where a person dying from a gunshot declares that A shot me, A killed me, A is my murderer, would be admissible as a statement of a fact, because of the circum-
(1246) stances. To say under such circumstances, 'A is my murderer,' would not be an expression of opinion with respect to the degree of the homicide, but a statement of a fact that A had inflicted the mortal wound." The defendant also objected to the testimony of one of the witnesses who saw the homicide, and who said, in substance, that after the killing he went on and overtook them, the defendants; that Jeff Mace and John Flasher leveled their firearms upon him, and that, upon his telling them he wished to go and inform the family of the deceased of the homicide, Jeff cursed him and told him to stop and that he should not pass. This was about a quarter of an hour after the homicide had occurred. The objection was that the matter testified to was a distinct substantive offense, an assault with a deadly weapon upon the witness, and that it could not be admitted

in evidence in support of the indictment for the homicide. That is the general rule, but there are exceptions to it. Other criminal acts may be proved if they are connected with the one charged. Evidence of a *subsequent* criminal act, connected in purpose and character with the offense charged, is admissible. Brown Cr. Law, p. 20; *Kramm v. Com.*, 87 Pa. St., 301. There is a direct connection between the killing of the deceased and the assault upon the witness. The assault was for the purpose of preventing the witness from communicating to the family of the dead man the death of one of its members; and, also, there can be no rational conclusion drawn from the act, except that the defendants intended to terrorize the witness, and also to escape the probable consequences of their act. And it was also competent to show that the homicide was willful, intended and malicious, and not accidental. In *Georson v. Com.*, 99 Pa. St., 398, the Court said of such testimony: "It cannot be received to impeach his general character, nor merely to prove a disposition to commit (1247) crime; yet, under such circumstances, evidence of another offense by the defendant may be given. Thus, it may be to show the act charged was intentional and willful, not accidental; to prove motive to rebut any impression of mistake, and to connect the other offense with the one charged.

The same witness was asked by the defendants, to show his bias in favor of the State and against the defendants, "Haven't you been drunk with the deceased many times?" The solicitor objected to the question, and the court properly sustained the objection, but said to the counsel that he might ask him about his habits. Besides, the witness had stated that he and the deceased were on friendly terms and were cousins. The evidence sought was only cumulative; if evidence at all, of slight importance—too slight to constitute ground for a new trial. *S. v. Stubbs*, 108 N. C., 774. Another witness for the State, Levi Ingle, at whose house the crowd gathered for the dance, was allowed to testify that after the visitors had all left, some of them returned in about a half hour, and that he heard them, in the edge of his yard, cursing and swearing, one of them (witness did not know which) saying, "Damn him; see if I don't do what I said I would," and that the next day Jeff Mace told him that he and the other two defendants were the ones who returned to the house. The admitting of this evidence against the defendants, other than Jeff Mace, was error, but it was harmless, as on the trial the defendants admitted that they did return with Jeff to Ingle's house to get a jug of whiskey which they had left under a cabbage plant in the garden. The testimony of the witness Ingle as to the threat made by one of the party was competent against all of them; for, before this witness was examined, evidence going most strongly to show a conspiracy (1248)

on the part of all three of the defendants to kill the deceased had been given in by other witnesses.

There was a knife found near the hand of the dead man, and there had been testimony going to show that Newton Mace placed it there after the man was killed. There was also testimony going to show that Newton, in endeavoring to cut the deceased, had by mistake cut Jeff. One of the State's witnesses had testified that there was blood on the knife blade, and the State offered another witness to show that the first witness was in error. The defendants objected. The testimony was admissible. The State was not bound by what the first witness said. The rule is that while a party cannot introduce testimony to discredit or impeach the moral character of his own witness, yet, if the facts which the witness testified to are against the party introducing him, he is not precluded from showing by other witnesses a different state of facts. *Gadsby v. Dyer,* 91 N. C., 311; *McDonald v. Carson,* 94 N. C., 497. McCone, a witness for the defendants, testified on his cross-examination that he heard Jeff Mace, in a crowd of four or five coming towards the dance gathering, say: "Damn Banjo Branch and everybody that lives on it; they are nothing but a lying set of sons of d— bitches, and I intend to kill some man this night." The defendants objected, because the language was not a threat against any individual. Testimony going to prove a conspiracy on the part of the defendants to kill the deceased, and which resulted in his death, had already been given in; and also it had been proved that the defendants came on together to the dance. This threat was too general to have convicted the defendant of a conspiracy to kill, nothing more appearing; but in the light of subsequent events,

(1249) the conspiracy to kill having been sufficiently proved to be submitted to the jury and its execution shown, the testimony was competent to show that the conspiracy had been entered into before the defendants reached the house of Ingle.

The other exceptions were to the testimony going to show threats against the deceased, made, before the homicide, by the defendants at different times and not in the presence of each other. This testimony was not offered until the fullest proof had been received, going to show that the defendants on the night of the killing had concerted and conspired to take the life of the deceased. The testimony went to prove that they sought opportunity to kill him from the time they saw him; that they called him aside from the crowd, after having talked to themselves awhile, saying, "We have a little settlement to make with you"; that one or two of the witnesses followed, whereupon the defendants told them to stay away; that presently they went off toward Ingle's after the liquor, and, returning, found the deceased sitting on a bank on the side of the road; that Newton said, "Come up here, Zeb," whereupon Zeb and some of the witnesses started, when

Newton said, "No, we don't want anybody but Zeb." Jeff had the pistol in his hand, the other two defendants saying to the witness, "Don't bother Jeff; let Jeff alone." Jeff had his way, and shot and killed the deceased. These defendants are brothers, and Flasher's threats were because of a difficulty between Jeff and the deceased. Under all the circumstances, we are of opinion that the testimony was competent to show that the conspiracy was made and entered into by the defendants before the night on which it was carried out.

No Error.

Cited: *S. v. Adams,* 138 N. C., 694; *Smith v. R. R.,* 147 N. C., 608; *S. v. Bradley,* 161 N. C., 292.

(1250)

STATE v. GEORGE SPURLING.

EVIDENCE—CHARACTER OF PROSECUTOR OR DEFENDANT WHO TESTIFY AS WITNESSES —THE CODE, SEC. 1353.

When a prosecutor or defendant in a criminal action *goes upon the stand as a witness* he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand.

INDICTMENT for slander of an innocent woman, tried before *Robinson, J.,* at Fall Term, 1895, of SWAIN.

There was evidence of slanderous words spoken by defendant concerning prosecutrix, amounting to a charge of incontinence. Defendant offered evidence tending to prove that prosecutrix was not an innocent woman when he used the language charged.

Prosecutrix was examined by the State, and after such examination a witness was put on by the State who testified that the prosecutrix's character was good up to the time this trouble began. On cross-examination this witness was asked by defendant's counsel, "What is her character now?" The State objected, and the objection was sustained. The court ruled that defendant could only impeach the character of the prosecutrix for truth since the slanderous words were spoken.

Defendant excepted, and, upon a verdict being rendered against him and sentence passed, he appealed.

Attorney-General for the State.
J. F. Ray and G. S. Ferguson for defendant.

AVERY, J. The rule that a defendant, on the trial of a (1251) criminal indictment against him, may offer evidence of his good character, was established, after no little discussion, and this right, at his option, to put his general reputation in issue was event-

ually conceded, because it was argued that such testimony tended to raise a presumption of innocence. But it was held in *S. v. Johnson,* 60 N. C., 151, that such evidence ought to be confined to the time when the charge was first made, because a different rule would expose a defendant to the great danger of having his character ruined or badly damaged by "a popular prosecutor, stimulated to activity by the hope of thus making his prosecution successful." Had the prosecutrix refrained from going upon the stand and put the proof of her good character in the scales, to be weighed against the testimony of the defendant that he had had intercourse with her, the case would have been analogous to *S. v. Johnson, supra,* and the question raised would have applied only to her reputation up to the time of the alleged intercourse with the defendant. If in that event the jury had found that she was free from reproach then, they could have given the fact such weight as they deemed proper as against testimony tending to criminate her. While she stood, as prosecutrix, in the attitude of a party whose character at a certain time was at issue, she was entitled, in the application of the principle laid down in *S. v. Johnson,* to restrict testimony of this kind within the same limits prescribed for the benefit of a defendant. But the defendant proposed to impeach her, not as a prosecutrix who had put her character at the time of the alleged carnal intercourse in issue by offering to prove it good, but as a witness. Conceding that the same protection must be given to a prosecutrix as to the defendant, where neither of them goes
(1252) upon the stand, but each is content to offer testimony of good character, the defendant contends that when both become witnesses they both alike place themselves on a footing with all other witnesses.

Before the passage of the act of 1881 (The Code, sec. 1353) the defendant could not testify, and when he elected to put his character in issue, as we have seen, he had the benefit of the restriction, as to the limit of impeaching evidence, stated in *Johnson's case, supra.* But when that statute first came before the Court for construction, in *S. v. Efler,* 85 N. C., 585, *Justice Ruffin,* delivering the opinion of the Court, said: "We understand that he (the defendant) shall occupy the same position with any other witness, be under the same obligation to tell the truth, entitled to the same privileges, receive the same protection and be equally liable to be impeached or discredited. Unless willing to become a witness, he is invested with the presumption of innocence, such as the law makes in favor of every person accused of crime, and evidence cannot be offered to impeach his character unless he voluntarily puts it in issue. But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and

tested as that of any other witness." See, also, *S. v. Lawhorn,* 88 N. C., 634; *S. v. Elliott,* 107 N. C., pp. 449, 450, where the foregoing language is quoted. In *S. v. Davis,* 92 N. C., 764, the Court said a defendant indicted for slandering an innocent woman "stood in the double capacity of defendant and witness," and quoted the rule already stated from *Efler's case.* The defendant, Davis, had gone upon the witness stand, as had the prosecutrix, but she had offered testimony to show her general character very good, as the Court said, "for chastity and truth," while the defendant offered no such evi-
dence in his own behalf. It was there declared legitimate to (1253)
comment upon the fact that the defendant had failed to show his own character good, and to contrast his position with that of the prosecutrix; yet it was reiterated that he was entitled to all of the privileges accorded to any other witness (including the prosecutrix), and was "equally liable to be impeached or discredited." Could the defendant have been impeached by testimony similar to that declared by the court below incompetent as against the prosecutrix? In *S. v. Efler, supra,* p. 588, referring to the contention of counsel that impeaching testimony should have been "confined to an inquiry as to the prisoner's general character for truth, and not permitted to extend to his general moral character," the court said: "In the case of *S. v. Boswell,* 13 N. C., 209, it is said that, ever since the year 1804, it has been an established rule of practice in this State to discredit a witness by making proof of his *general bad moral character,* and that the question need not be restricted to his *reputation merely for veracity.* That such continues to be the law of evidence, as administered in the courts of this State, is shown by the following cases: *S. v. O'Neale,* 26 N. C., 88; *S. v. Dove,* 32 N. C., 469; *S. v. Parks,* 25 N. C., 296. And as the prisoner assumed the character of a witness, he must needs come under the same rule." If, then, the defendant was entitled to the same privileges, and only equally liable to impeachment as a witness with the prosecutrix, it would follow that if he, as a witness, could not restrict the examination to character for truth, instead of general moral character, she could not do so in this case. In giving the right to do so, we would accord to her protection and privileges superior to instead of equal with those granted to the defendant. The State offered a witness who testified that the general character of the prosecutrix was good up to the time of this prosecution.

On cross-examination the defendant proposed to ask the wit- (1254)
ness the question, "What is her general character now?" On objection, the court held that defendant could not impeach her general character, since the slanderous words were spoken. In this ruling there was error. If we concede that there is no rule of evidence which extends to a prosecutrix in a case of this kind, when she assumes

the role of a witness, any greater privileges than to other witnesses who have thus put their reputations in issue, then she subjected herself to liability to have her character tested by the general principles applicable to all alike. Clearly it was competent to make the examination relate to the time of the trial. The question raised by the evidence was not alone whether her general character was good at the time when she was alleged to have had illicit intercourse with the defendant, but whether it was such as to commend her to the jury as a witness at the time of trial. There was a direct conflict on that day. Either was at liberty to show general evidence of moral depravity on the part of the other, but one had no superior right to that of the other. It is needless to discuss the exception to the charge. For the error in the admission of evidence the defendant is entitled to a

New Trial.

Cited: *S. v. Holly,* 155 N. C., 494; *S. v. Knotts,* 168 N. C., 190.

STATE v. JOHN F. BRITT ET AL.

JUSTICES OF THE PEACE—SUPERVISORS OF ROADS, DUTIES OF, IN RESPECT TO ROADS—NEGLECT OF DUTY—OVERSEER OF ROADS.

1. The Code, secs. 2014, 2024, imposes upon the justices of the peace, as supervisors of roads in their respective townships, the duty of dividing the roads into sections, appointing overseers, allotting hands to the overseer, etc., but does not require them to put and keep the public roads in order, it being the duty of the overseer to superintend the hands and to put and keep the roads in order: *Hence,*

2. An indictment does not lie against justices of the peace for failing to put and keep public roads in order, and, if preferred against them, should be quashed.

INDICTMENT against John F. Britt and others, justices of the peace of Robeson County, for permitting certain roads in said county to become and remain out of repair, tried before *Greene, J.,* at Fall Term, 1895, of ROBESON.

The indictment was as follows: "The jurors," etc., "present that (defendants), with force and arms, at and in said county, being justices of the peace in and for Sterling Township, and invested by law with the supervision and control of the public roads in said township, and chargeable with the maintenance, care and repair of said roads, unlawfully, willfully and negligently did allow and permit said roads at Hog Swamp, in said township, to become out of repair, dangerous and impassable; and after the said roads had become so out of repair, dangerous and impassable, as aforesaid, the said Britt, Surles, Nye and Floyd, said justices of the peace, chargeable as aforesaid,

did unlawfully, willingly and knowingly allow and permit (1256) said roads so to remain out of repair, dangerous and impassable as aforesaid, to the great damage of the people, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State."

From the judgment of the court quashing the indictment, the solicitor for the State appealed.

Attorney-General for the State.
No counsel contra.

MONTGOMERY, J. The Code, ch. 50, sec. 1, imposes upon justices of the peace the supervision and control of the public roads in their several townships. Other sections of the same chapter specifically point out the duties required of and the powers conferred upon these justices—supervisors of the roads—and give a definite meaning to the words "supervision," "control"; and section 2024 provides that, "If any board of supervisors shall fail to make said report (annual report of the condition of the roads in their townships to the Superior Court) or to discharge any other duty imposed by this chapter, they shall be guilty of a misdemeanor." The defendants, being justices of the peace, were indicted for unlawfully, willfully and negligently allowing and permitting the portion of the roads in their townships to become out of repair and permitting them to remain so. An examination of the sections of The Code to which we have referred will make it appear clearly that it is no part of the duty of the supervisors of roads to put or to keep in repair the roads of their township. Their duty is to divide the roads into sections, appoint overseers for the sections, allot hands to the overseers, designate the points to which each resident shall be liable to work, and give notice to the overseers in writing of their appointment. It is the duty of (1257) the overseer to superintend the hands and to put and keep the roads in order. *S. v. Comrs.*, 15 N. C., 345; *S. v. Justices*, 11 N. C., 194. The motion to quash the indictment in the court below was sustained, and there is no error in the ruling of his Honor.

Affirmed.

STATE v. J. J. FRAZIER

INDICTMENT FOR LARCENY—EVIDENCE—INCOMPETENT TESTIMONY.

1. It is a rule of evidence, subject to but few exceptions, that evidence of a distinct substantive offense cannot be admitted in support of another offense.

2. In the trial of an indictment for larceny of money given to the prosecutrix by defendant it was error to admit evidence that defendant had seduced her

under a promise of marriage, such evidence not showing that defendant had been compelled to give her the money on account of the seduction, or that he gave it to her grudgingly or unwillingly; nor in such case was evidence admissible as to defendant's inability (he being a married man) to make good his promise of marriage.

INDICTMENT for larceny of $111 from the prosecutrix, tried before *Meares, J.*, at June term, 1895, of the Circuit Criminal Court for MECKLENBURG.

On the trial it appeared that defendant had given to the prosecutrix $125 about three weeks before the alleged larceny. The (1258) prosecutrix was allowed (under objection of defendant) to testify that she had been seduced by the defendant under promise that if she became pregnant he would marry her, and that he subsequently refused to marry her because he was a married man.

There was a verdict of guilty, and defendant appealed from the judgment thereon.

Attorney-General for the State.
Jones & Tillett and Clarkson & Duls for defendant.

MONTGOMERY, J. This Court, in *S. v. Jeffries*, 117 N. C., 727, said: "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." The exceptions to the rule are to be found in those cases in which testimony concerning independent offenses has been admitted because of the necessity of proving the *quo animo*, or the guilty knowledge of the defendant, and also for purposes of identification of the defendant. We do not see how this case can be taken out of the general rule above stated, on the ground of its falling under any of the exceptions. If the testimony had shown that the defendant had been by compulsion made to pay the $125 which he gave or paid to the prosecutrix, and that he had been compelled to pay it because he had seduced her under a promise of marriage, the testimony might have been admissible, both to prove the defendant's knowledge of her possession of the money and the guilty intent in taking it from her—to get back that which he had been compelled to pay for the injury he had done her. It is not necessary to constitute the crime of larceny that the intent should be *lucri causa*. That is generally the motive which influences (1259) the thief, but the larceny is complete if the owner is deprived fraudulently of his property, the taker having a felonious intent to convert it to his own use, whatever application he may afterwards make of it. But the testimony in the case shows no such condition of things. It does not show either that the $125 was paid to the prosecutrix by reason of the defendant's seduction of her or that

he paid it to her grudgingly or unwillingly or by compulsion. Under no condition of this case ought the testimony as to the inability of the defendant to make good his promise of marriage to the prosecutrix on account of his being a married man be admitted. That could only prejudice the defendant and throw no light on the transaction.

New Trial.

Cited: *S. v. McCall,* 131 N. C., 800; *S. v. Hight,* 150 N. C., 819; *S. v. Fowler,* 172 N. C., 910.

STATE v. ROBERT McMINN

INDICTMENT FOR SELLING LIQUOR ON SUNDAY—DENTAL SURGEONS—PHYSICIANS—PRESCRIPTION FOR LIQUOR FOR TOOTHACHE.

A dentist or dental surgeon is not a "physician," within the meaning of section 1117 of The Code, and hence his prescription for liquor for the toothache does not justify one in selling liquor on Sunday on such prescription.

INDICTMENT for unlawfully selling liquor on Sunday, tried before *Ewart, J.,* and a jury at October Term, 1895, of the Criminal Circuit Court for HENDERSON.

The indictment charged that the defendant, on 14 Octo- (1260) ber, 1895, the same being Sunday, did unlawfully and willfully sell intoxicating liquors to one Stagg, without the prescription of a physician, and not for medical purposes, contrary, etc.

By consent, the court found the facts, and adjudged that the defendant is guilty, and gave judgment that he pay a fine of $20, and defendant appealed.

The facts found are as follows: Crow Stagg, being sworn, said that he lived in Hendersonville. On Sunday, in . . . . . ., 1895, he had an aching tooth, and went to Dr. Smathers, a dental surgeon, and asked him for a prescription for whiskey. The doctor offered to give him a prescription for a half-pint, but witness insisted on getting a prescription for a pint, and the doctor gave it to him. Witness took it to defendant, who gave him a pint of whiskey, and witness paid for it. It was on Sunday. Witness had often bought liquor of defendant. Dr. Smathers testified that he is a dental surgeon, licensed by the State Dental Association, and resides in Hendersonville; that on the Sunday referred to Stagg came to him and said he had a severe toothache, and asked for a prescription for whiskey. Witness examined the tooth of Stagg, and told him he would give him a prescription for a half-pint, but on the insistence of Stagg he finally gave him a prescription for a pint. Witness is not a practicing physician, but a dental surgeon, and often uses liquor in his practice.

Defendant testified in his own behalf that he is a barkeeper in Hendersonville, and that on the Sunday referred to Stagg came to him with a prescription from Dr. Smathers, and supposing that it was all right, he delivered to Stagg one pint of whiskey, for which Stagg paid him, and told him at the time that he was suffer-
(1261) ing from toothache. Witness knew Stagg well, and had often sold him whiskey, but never on Sunday before.

The court charged the jury that if they believed the evidence of the witnesses for the State the defendant would be guilty; that the prescription of Dr. Smathers, a dental surgeon, was not a prescription from a practicing physician and was no protection to the barkeeper who sold liquor on Sunday; that prescriptions could only be given by practicing physicians, and could not be filled by barkeepers unless upon such prescriptions, and then only for medical purposes. Defendant excepted and appealed from the judgment rendered.

Attorney-General for the State.
No counsel contra.

CLARK, J. The court instructed the jury that a prescription from a dental surgeon was not "a prescription from a physician" which would protect one who sold intoxicating liquor on Sunday. The Code, sec. 1117. "A physician is one authorized to prescribe remedies for and treat diseases; a doctor of medicine." Webster's Dict. To the same purport are the Century and the Standard dictionaries. A dentist or dental surgeon is one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert or repair them. The statutes of this State recognize that dentists are not included in the term "physician," the latter being regulated by The Code, secs. 3121-3134, with the amendatory Laws 1885, chs. 117, 261, and Laws 1889, ch. 181, while dentists are governed by The Code, secs. 3148-3156, and the amendatory Laws 1887, ch. 178, and 1891, ch. 251. If dentists came within the term "physician," as used in The Code,
(1262) sec. 1117, "toothache" would become more alarmingly prevalent than "snake bite," and that it would, with usage, become more dangerous is evident from the fact that the very first dental surgeon's prescription for toothache coming before us is for "one pint of whiskey." The size of the tooth is not given, nor whether it was a molar, incisor, eye tooth or wisdom tooth, and yet there are thirty-two teeth in a full set, each of which might ache on Sunday. The duties of a dentist are limited to the "manual or mechanical operations" on the teeth. Whenever the use of liquor is necessary, it being a remedy to act on the body, and only indirectly in any case for the teeth, within the purview of the statute it must be prescribed by a "physician" to authorize a sale on Sunday.

No Error.

STATE v. J. A. TAYLOR

JUSTICE OF THE PEACE—POWER TO AMEND WARRANT—DISCRETION—AMENDMENT —JUDGMENT FOR COSTS—APPEAL.

1. The discretionary power to amend a complaint, conferred upon a justice of the peace by section 908 of The Code, is not reviewable on appeal.
2. A warrant cannot be amended by striking out the offense charged and inserting a new and different offense.
3. A prosecutor in a criminal action has no right to appeal, except, it may be, as to matter of costs.
4. This Court cannot review the findings of fact by the Superior Court on matters of costs, on appeal by a prosecutor from a judgment of a justice of the peace taxing him with the costs of a warrant.
5. This Court cannot review the findings of fact upon which the judgment of the Superior Court is based; and where, on appeal, such facts are not set out in the transcript it will be assumed that the judgment was in accordance with the facts found, and the judgment will be affirmed.

CRIMINAL ACTION, prosecuted by J. H. Stepp against J. A. (1263) Taylor, the defendant.

A warrant was issued, upon the complaint of J. H. Stepp, charging that the defendant "did unlawfully, maliciously, willfully commit damage, injury and spoil upon one fence, the property of J. H. Stepp, in violation of section 1081 of The Code," etc., "by pulling down the same," etc. Upon the trial before the justice of the peace the prosecutor moved to amend the warrant so as to charge that the defendant "did unlawfully and willfully pull down the fence surrounding a cultivated field, the property and in possession of J. H. Stepp." The Code, sec. 1062. The motion was denied by the justice, upon the ground that he had no power to make the amendment; and the prosecutor appealed to the Superior Court. It was also adjudged by the justice of the peace that the prosecution was frivolous and that prosecutor pay the costs. Upon the hearing before *Coble, J.*, at Fall Term, 1895, of HENDERSON, the prosecutor moved to remand the case to the justice of the peace, to the end that the warrant might be amended and the case tried. The motion was denied, and the prosecutor appealed to the Supreme Court.

Attorney-General for J. H. Stepp (appellant.).
Ewart & Thomas for defendant.

FURCHES, J. The appeal is without merit and cannot be (1264) sustained. If the justice of the peace had authority to amend the warrant, under section 908 of The Code, he did not do it; and we know of no power we have, or the Superior Court had, to compel him to exercise a discretionary power.

But this being a proposition or motion to strike out the offense charged in the warrant, and to insert another offense, it seems that such amendment was not authorized. *S. v. Vaughan,* 21 N. C., 535; *S. v. Cook, ib.,* 236.

But the prosecutor had no right to appeal, except, it may be, as to costs. *S. v. Powell,* 86 N. C., 640.

And while the Superior Court may review the finding of fact and judgment of justices of the peace on matters of costs, in cases like this, the findings of the judge are conclusive upon this Court. And if the judgment of the Superior Court is in accordance with the facts found, that is also conclusive upon this Court. *S. v. Hamilton,* 106 N. C., 660.

And as the judge below does not set out the facts upon which he founded his judgment, we must take them as being sufficient to justify his judgment.

Affirmed.

Cited: S. v. Morgan, 120 N. C., 564; *Pharr v. R. R.,* 132 N. C., 422; *Lumber Co. v. Buhmann,* 160 N. C., 387; *S. v. Bailey,* 162 N. C., 585.

(1265)

STATE v. PETER HAYNIE

INDICTMENT FOR ASSAULT WITH DEADLY WEAPON—EVIDENCE—SELF-DEFENSE—EXCESSIVE PUNISHMENT—WORKING CONVICTS ON COUNTY ROADS.

1. On the trial of an indictment for assault with a deadly weapon the testimony of a physician as to the nature and extent of the wounds inflicted is admissible to corroborate the testimony of the prosecutor that defendant had assaulted and wounded him with a deadly weapon.

2. In an assault with a deadly weapon an instruction that if the prosecutor and defendant had entered into the fight willingly, and defendant, being seized by the throat, was under reasonable apprehension of suffering great bodily injury, and had cut his adversary to free himself, he would not be guilty, but that the jury were the judges of the reasonableness of the apprehension, was properly given.

3. Under Laws 1887, ch. 355, giving permission to work convicts on the public roads, a sentence of imprisonment for two years in jail, with leave to be worked on the public roads, is not an excessive punishment, on conviction for an aggravated assault with a deadly weapon.

THIS was an indictment for assault and battery with a deadly weapon upon one James West, tried before *Ewart, J.,* and a jury, at February Term, 1896, of MADISON Criminal Court.

The following is the evidence:

J. N. West, the prosecuting witness, testified that he was at Rector's Hotel, in Marshall, at supper; that Peter Haynie, the defendant, was looking through the window of the room, with an open knife in his

hand, and that Haynie called to him, "Hello, little nigger; what are you doing here?" and he replied, "I eat here; what are you doing here? You had better be at home with your wife and babies, cutting wood," etc. After some jesting remarks passed be- (1266) tween the two in the dining room, Haynie went out, and in a little while came back to the door and said to witness, "Come out, Jim; I have got something to tell you." "I stepped out of the room, on the porch, and Haynie said to me, 'You throwed off on me in there before those girls.' I said, 'No, I was just in fun.' He said, 'I was, too, and damned if I liked it.' Then he suddenly struck me on the side of the head, and with his knife or knucks, I do not know which, struck me several blows. One of my ears was nearly cut off, and I was cut, also, a deep gash in my face, and was cut about the clothing. I had to call in a surgeon, and was laid up on account of it for two weeks. The cuts were very severe and painful ones."

On cross-examination witness said: "When I went out of the room, when Haynie told me that he be damned if he liked it, I did say to him, 'You are standing in your own shoes.' I mean by that he could do as he pleased. I never told him that I could whip him in a moment. When he struck me on the head and commenced cutting me with the knife, I caught him by the throat, when Bailey, who was standing near, separated us. I had no feeling against Haynie and was on friendly terms with him, and meant no slur on him when I told him that he had better be at home with his wife and babies."

Peter Haynie, defendant-witness, testified as follows: "Was invited by Mrs. Rector to call at the hotel, and did so. Stopped at the window of the dining room, and was standing there joking with those in the room. About that time West came up, and I said, "Hello, little nigger; where are you starting?" He said, 'You don't know, do you? You had better be at home, cutting wood and carrying water for your wife.' I said, 'I have as good a right to be here as you.' He said, 'If you fool with me, I will put you out of here.' I said, 'I don't think that you will.' I started to go out of the (1267) room, and as I went out of the door I said, 'Jim, come out; I want to see you.' He said, 'I don't want to see you.' I passed out of the door, and he came out right after me. I said, 'Jim, what is that you said?' He said, 'What will you have?' I replied, 'Jim, I don't think you ought to have thrown off on me and my family.' One word brought on another, and finally he said, 'If you don't like it, you are in your own shoes. You know that I can whip you, don't you?' Bailey, who was standing there, said, 'Don't have any fuss here, boys,' and about that time I thought West was going to hit me, and I struck him with my fist in the back of the head. Bailey ran between us and caught me around the waist, and about that time West got me by the

neck, and, pushing me back, was choking me. Then I drew my knife and cut him three or four licks."

Cross-examined: "I had the knife in my pocket when I left the room, and did not draw it till he was pushing me back and choking me. I have been in court twice before—once for shooting a negro and once for disturbing a religious congregation."

The State offered to introduce Dr. Roberts to show the character of the wounds received by West, and also for the purpose of corroborating West. Objection; objection overruled.

Dr. Roberts, witness, testified that he was a physician and surgeon of six years' practice, and that he had attended West and dressed the wounds; that one wound was on the left side of the ear, running down across the ear, cutting a deep gap in it; another wound was in the neck; another was across the cheek; another cut running back, and another in the jaw. One of the cuts was on the right side of the head, across to the nose. There were several cuts in the coat and
(1268) in the vest and shirt, and his thumb had also been bitten.

The defendant's counsel asked the court to charge the jury that if at the time defendant did the cutting he was being severely choked by the prosecutor, West, so much so that his life was endangered, that in law would be "being pressed to the wall," and that the defendant would not be guilty.

This the court declined to do, in the words of the defendant's counsel, but charged the jury that if they should find as a fact from the evidence that when Haynie and West left the dining room both entered into the fight willingly, and in the progress of that fight West seized Haynie by the throat and so sorely pressed him that he was under the apprehension of receiving great bodily injury, and he cut to free himself from the grasp of West, he would not be guilty; but that the jury must be the judges of the reasonableness of the apprehension of the defendant. The court further charged the jury that if they found as a fact from evidence that the defendant used the knife when he was not pressed, but because of his passion and anger, the defendant would be guilty. The court further charged the jury, among other things, that, the defendant being a witness in his own behalf, they should consider his testimony with great caution, taking into consideration that the defendant might have a motive to give a false version of the matter, as conviction might mean for the defendant a long term of imprisonment or the payment of a fine and bill of costs; but at the same time that if they were satisfied that the defendant in this matter had told the truth, they would give his testimony the same weight and credence as any other witness who had testified before them and who was unimpeached and uncontradicted.

There was a verdict of guilty, and the court, being of the opinion that the assault was an aggravated one, and the wounds in-

flicted on the prosecuting witness painful and serious, one of (1269) which was a heavy and disfiguring scar upon the face, sentenced him to two years in the common jail of Madison County, to be worked at hard labor in the chain gang on the public roads of the said county, in accordance with the statute; which punishment the defendant considered excessive, and therefore excepted to the same. There was a motion for a new trial. Motion overruled. Judgment, and appeal by the defendant.

Attorney-General and J. M. Moody for the State.
No counsel contra.

CLARK, J. The physician was competent to testify as to the nature of the wounds and to corroborate the prosecutor in that respect. The court was asked to charge that if the defendant was being severely choked by the prosecutor, so that his life was in danger, then this was "being pressed to the wall," and the defendant would be not guilty. The court charged in lieu thereof that if the jury found that the defendant and the prosecutor both entered into the fight willingly, and during its progress the prosecutor seized the defendant by the throat, so that he was under reasonable apprehension of receiving great bodily injury, and he cut the prosecutor to free himself, he would not be guilty, but that the jury must be the judges of the reasonableness of the apprehension of the defendant. The defendant has no ground to object to this substituted charge. Besides, in fact, there is no exception entered to this or any other part of the charge, and it is not really before us. *Taylor v. Plummer,* 105 N. C., 56.

The sentence of imprisonment for two years in jail, with leave to be worked on the public roads, is not an excessive punishment for the aggravated assault of which the defendant was found (1270) guilty. *S. v. Pettie,* 80 N. C., 367. The permission to work the defendant on the public roads is authorized by Laws 1887, ch. 355. *S. v. Hicks,* 101 N. C., 747; *S. v. Weathers,* 98 N. C., 685.

No Error.

Cited: S. v. Smith, 126 N. C., 1059; *S. v. Hamby, ib.,* 1067, 1069; *S. v. Young,* 138 N. C., 573.

APPENDIX

AMENDMENT TO THE RULES

(FEBRUARY TERM, 1896.)

In view of the fact that appeals are sometimes held back from docketing till the very close of the call of a district, thus requiring counsel for appellees to remain the whole time set apart to the district, lest an appeal be docketed after their departure, Rules 5, 6 and 17 (115 N. C., 835, 836, 839) are amended, to require appeals to be docketed during the first two days of the call of the district to which they belong, so that those rules will read as follows, and in this amended form will be printed in the volume of Reports for this term:

RULE 5. WHEN HEARD.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term before or during the first two days of the call of the docket of the district to which it belongs, and stand for argument in its order. The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed not later than the first two days of the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, in a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless for cause or by consent it is continued.

RULE 6. APPEAL IN CRIMINAL ACTIONS.

Appeals in criminal cases, docketed before the perusal of the criminal docket for any district, shall be heard before the appeals in civil cases from said district. Criminal appeals, docketed after the perusal of the criminal docket of the district to which they belong, shall be called immediately at the close of argument of appeals from the Twelfth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

RULE 17. DISMISSED BY APPELLEE.

If the appellant in a civil action shall fail to bring up and file a transcript of the record during the first two days of the call of causes from the district from which it comes at the term of this Court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant and the date of the settling of the case on appeal, if any has been filed, and filing said certificate or a certified transcript of the record of this Court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term and after notice to the appellee, to apply for the redocketing of the cause.

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 re-

ferred to in the case on appeal as are neecssary 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.

Sections 2 and 3 of Rule 33 are amended by striking out the words "and a half," so that they will read as follows:

(2) The counsel for the appellant may be heard for one hour, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour.

PROCEEDINGS IN HONOR

OF THE

MEMORY OF JOHN H. DILLARD

In the Supreme Court, 7 May, 1896, the Attorney-General announced the death of JOHN H. DILLARD, formerly an Associate Justice, which occurred at his home in Greensboro, and the Court adjourned as a mark of respect to his memory. Thereupon a preliminary meeting of the bench and bar was held, Chief Justice Faircloth presiding and Thomas S. Kenan acting as secretary. A committee was appointed to draft resolutions, and the following gentlemen were named: James E. Shepherd, L. M. Scott, R. R. King, J. T. Morehead, James C. MacRae, S. F. Mordecai and Thomas S. Kenan. An adjournment was then taken until Thursday, 14 May, 1896, when the committee, through its chairman, Mr. Shepherd, submitted the following report:

"JOHN HENRY DILLARD was born in Rockingham County, on 29 November, 1819. After preparation at Patrick Henry Academy, in Virginia, he entered the University of this State, remained two years (taking first distinction in his studies), and left on account of ill health. He began to read law in the office of the late James T. Morehead, at Greensboro, and graduated in 1840 from the law department of William and Mary College, in Virginia. He practiced at Richmond and at Patrick Courthouse until 1846, when he removed to Wentworth. He was Commonwealth Attorney in Virginia, and was County Attorney and Clerk and Master in Equity in Rockingham County for a number of years. On 13 January, 1846, he married Ann I. Martin, daughter of Joseph Martin, of Virginia. In 1862 he raised a company of volunteers and entered the service of the Confederate States as captain. After his removal to Greensboro in 1868 the law firm of Dillard, Ruffin & Gilmer was formed, and continued until 1876 as Dillard & Gilmer, Ruffin having retired on account of ill health. When he removed to his farm in Rockingham County he formed a partnership with his son-in-law, John T. Pannill, which continued until he was elected, in 1878, as an Associate Justice of the Supreme Court. The record he made in the discharge of the duties of that high office was highly creditable, and one which should be the pride of any judge to enjoy. He resigned in the spring of 1881, and was succeeded by Thomas Ruffin, Jr. He then moved back to Greensboro, and continued the practice in association with other members of the bar. For a number of years he was connected with Judge Dick in the conduct of a law school at Greensboro, which gained great reputation. He was for years an elder in the Presbyterian Church and a teacher in the Sunday school, and in the performance of these duties he displayed the same ardor and perseverance and ability which characterized him as a practitioner at the bar and as a judicial officer. He was modest, and self-assertion was not one of his traits—honors were literally thrust upon him. He possessed a unique attractiveness—plain in his habits, but his social graces were always observable. He was greatly beloved by all who knew him, and notably by the members of the bar. His courtesy to them and especially his assistance to the young lawyer in advice, etc., were ever conspicuous. His greatest reputation, perhaps, was that of an equity lawyer, and his high personal character, great integrity and sterling honesty were known of all men.

"He died at his home in Greensboro, 6 May, 1896.

"*Resolved*, That in the death of JUDGE DILLARD we recognize the great loss sustained by the State and the profession, and we tender to his family our warmest sympathy.

"*Resolved*, That a copy of these proceedings be transmitted to the family, and be presented by the Attorney-General to the Supreme Court, with the request that

the same may be spread upon the minutes and published in the ensuing volume of the Reports."

Remarks were made by ex-Judge Shepherd, Mr. Richard H. Battle, Mr. John W. Graham, Judge Avery, ex-Judge Winston, Mr. B. C. Beckwith and Judge Furches. The chairman, Chief Justice Faircloth, upon announcing the adoption of the report, also made appropriate remarks.

REMARKS OF MR. R. H. BATTLE

"I was out of the city when the meeting of the bar was called to take action upon the death of the late JUDGE DILLARD, but such was my regard for our departed brother that I could not but attend this adjourned meeting and ask to say a word expressive of that regard and of my great admiration for the man.

"My personal acquaintance with JUDGE DILLARD dates back some twenty-odd years, when we were associated together in a prolonged litigation on the equity side of the docket of the United States Circuit Court, at Greensboro, though I had known him before, through mutual friends, who always spoke of him in terms of high praise. From that time to his death my regard for him was not unmixed with affection. He was a man of striking characteristics, blunt, but very cordial and hearty in manner, honest, sincere and totally without guile. Though he must have known that his ability as a lawyer was universally recognized, and that he was a master of the principles involved, he was so modest that, in the litigation referred to, he attempted to force his junior associate into the leading place, the place of honor, while he willingly took upon himself the greater part of the labor. And so he was, always, with his associates. He ever gave them the full benefit of his knowledge and skill, and was apparently more than willing that they should enjoy the honor incident to the successful conduct of their causes.

"He never seemed to care to address judge or jury when his associates could be prevailed on to relieve him of that duty, but when he did speak he was remarkably effective. He was, in speech, strong, pointed, emphatic, logical and eminently fair. His manner was unique, and his gestures, though odd and not according to the rules of the elocutionist, impressed his hearers as more forceful than the graceful gesticulation of the polished orator.

"His words, and his manner in speaking them, received added force from the fact that every one could see he was a man of *conviction* and that he spoke only what he honestly thought. His language was clear, concise and strong, but without ornament. His illustrations were homely and attractive, and just sufficient to relieve from the severity of his logic. He was an orator in spite of himself, because no one cared less than he for the graces of oratory.

"In the conduct of his causes he was fair, just and liberal. He never seemed to think the bar was an *arena* for actors to display their power and agility, but that lawyers were members of the court, whose duty it was to further the ends of justice and dispatch the business of those concerned. His precept and example have been to bench and bar, and to all the officers of justice within the sphere of their influence, of real and permanent benefit. He was never a politician or a seeker of public office, and his ability as a lawyer and his very high character as a man were the cause of his nomination, with the late W. N. H. Smith, as Chief Justice, and Thomas S. Ashe, as Associate Justice, by the Democratic Party, when they were seeking the best men in the State for the Supreme Bench, in 1878, and his triumphant election by the people. He served but two years on the bench, from January, 1879, to February Term, 1881, and his opinions are to be found in only four volumes of our Reports, from Vol. 80 to 83, inclusive; but such is their lucidity and ability that those of the profession who have occasion to refer to them must be convinced that as a jurist he did honor to the State. When it is remembered that during nearly the whole period of his service on the bench he suffered with an irritating eczema, which, with perhaps other bodily infirmity, caused him to resign, we are the more filled with regret that his career as a judge of our highest Court was so cut short.

"Those members of the bar who were privileged to know him while a member of this Court must remember his attentive patience as a listener, his bluff but un-

failing courtesy to all, his kindly consideration for the younger and more diffident members of the bar, his ability and learning as a jurist and his fairness and justness as a judge.

"The preamble to the resolutions offered by the committee sets forth, in terms modest and truthful, appropriate to one modest and truthful like him, his character and services. As one who knew him well, I heartily approve every word it contains, and I second the resolutions.

"He was one of the last of the great lawyers who *illustrated* the *bar* and *bench* of this State, and caused them to rank with the first in the country from thirty to fifty years ago. Then pettifogging and shystering received no countenance in the profession, and to be a *lawyer* in North Carolina was to be a *gentleman*. While I, with others here, and nearly all the bar of his district, mourn his departure as that of a personal and dear friend, I fondly hope that the influence of his life and example will long continue a blessing to the State, which as a patriot he warmly loved. In view of the reverence the bad as well as the good have for such exemplars of manly virtue, may we not contradict and paraphrase the poet and say, 'The good that men *are* lives after them'?"

On 16 May, 1896, the proceedings were submitted to the Court in appropriate remarks by the Attorney-General, and the Chief Justice replied:

"The Court, recognizing the high character of JUDGE DILLARD, and his distinguished services on this bench, receives the resolutions and remarks of the committee, and orders the same to be spread on the minutes of this Court."

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COMMISSIONERS, COUNTY, POWER OF.

1. County commissioners have no power to sell property held for corporate purposes, where its alienation would tend to embarrass or prevent the performance of its duties to the public; and hence they have not the right to mortgage county land to secure bonds issued to build a court-house thereon. *Vaughn v. Comrs.*, 636.

2. Power to sell is not a power to mortgage; and hence express authority conferred by statute upon county commissioners, without consent of the justices of the peace of the county to sell real estate of the county at a fair price, does not imply power to encumber the same by mortgage. *Ib.*

COMMISSIONER'S DEED.

A deed made by a commissioner of the court, which recites a sale under the judgment by the commissioner, but does not have the word "commissioner" after the signature of the grantor, is valid. (*Vide McLean v. Patterson*, 84 N. C., 427.) *Exum v. Baker*, 545.

Recitals in, 919.

COMMISSIONS OF ASSIGNEE IN DEED OF ASSIGNMENT.

The assignee of a surviving partner who was appointed to settle the estate had ten days' public sale and four months' private sale of the stock of goods, from which he realized $13,200, and collected, without suit, notes and accounts amounting to $6,400; he unnecessarily and negligently delayed the payment of debts and the settlement of the estate:

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