ANNOTATIONS INCLUDE 174 N. C.

NORTH CAROLINA REPORTS

VOL. 119

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1896

REPORTED BY
ROBERT T. GRAY

ANNOTATED BY
WALTER CLARK
(2 ANNO. ED.)

REPRINTED FOR THE STATE
RALEIGH
EDWARDS & BROUGHTON PRINTING CO.
STATE PRINTERS
1918

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor, and Conf.	as	1	N. C.
1 Haywood	"	2	"
2 Haywood	"	3	"
1 and 2 Car. Law Repository and N. C. Term	"	4	"
1 Murphey	"	5	"
2 Murphey	"	6	"
3 Murphey	"	7	"
1 Hawks	"	8	"
2 Hawks	"	9	"
3 Hawks	"	10	"
4 Hawks	"	11	"
1 Devereux Law	"	12	"
2 Devereux Law	"	13	"
3 Devereux Law	"	14	"
4 Devereux Law	"	15	"
1 Devereux Equity	"	16	"
2 Devereux Equity	"	17	"
1 Dev. and Bat. Law	"	18	"
2 Dev. and Bat. Law	"	19	"
3 and 4 Dev. and Bat. Law	"	20	"
1 Dev. and Bat. Eq.	"	21	"
2 Dev. and Bat. Eq.	"	22	"
1 Iredell Law	"	23	"
2 Iredell Law	"	24	"
3 Iredell Law	"	25	"
4 Iredell Law	"	26	"
5 Iredell Law	"	27	"
6 Iredell Law	"	28	"
7 Iredell Law	"	29	"
8 Iredell Law	as	30	N. C.
9 Iredell Law	"	31	"
10 Iredell Law	"	32	"
11 Iredell Law	"	33	"
12 Iredell Law	"	34	"
13 Iredell Law	"	35	"
1 Iredell Equity	"	36	"
2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
8 Iredell Equity	"	43	"
Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
1 Jones Equity	"	54	"
2 Jones Equity	"	55	"
3 Jones Equity	"	56	"
4 Jones Equity	"	57	"
5 Jones Equity	"	58	"
6 Jones Equity	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
Phillips Equity	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SEPTEMBER TERM, 1896

CHIEF JUSTICE:

WILLIAM T. FAIRCLOTH.

ASSOCIATE JUSTICES:

ALFONSO C. AVERY,
WALTER CLARK,
DAVID M. FURCHES,
WALTER A. MONTGOMERY.

ATTORNEY-GENERAL:

FRANK I. OSBORNE.

SUPREME COURT REPORTER:

ROBERT T. GRAY.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

MARSHAL AND LIBRARIAN OF THE SUPREME COURT:

ROBERT H. BRADLEY.

JUDGES SUPERIOR COURTS OF NORTH CAROLINA

GEORGE H. BROWN, JR. ..... *First District*
HENRY R. BRYAN ..... *Second District*
E. W. TIMBERLAKE ..... *Third District*
W. S. O'B. ROBINSON ..... *Fourth District*
*A. W. GRAHAM ..... *Fifth District*
†E. T. BOYKIN ..... *Sixth District*
J. D. MCIVER ..... *Seventh District*
A. L. COBLE ..... *Eighth District*
H. R. STARBUCK ..... *Ninth District*
L. L. GREENE ..... *Tenth District*
W. A. HOKE ..... *Eleventh District*
W. L. NORWOOD ..... *Twelfth District*

SOLICITORS

W. J. LEARY ..... *First District*
W. E. DANIEL ..... *Second District*
C. M. BERNARD ..... *Third District*
E. W. POU ..... *Fourth District*
W. P. BYNUM, JR ..... *Fifth District*
M. P. RICHARDSON ..... *Sixth District*
H. F. SEAWELL ..... *Seventh District*
J. Q. HOLTON ..... *Eighth District*
M. L. MOTT ..... *Ninth District*
J. F. SPAINHOUR ..... *Tenth District*
J. L. WEBB ..... *Eleventh District*
GEORGE A. JONES ..... *Twelfth District*

JUDGES OF THE CRIMINAL COURTS

Criminal Circuit Court for Craven, New Hanover, Mecklenburg, Vance, Warren, Robeson, Edgecombe, and Halifax Counties:
OLIVER P. MEARES.

Criminal Circuit Court of Buncombe, Madison, Haywood, and Henderson Counties:
H. G. EWART.

Criminal Court of Hertford County:
B. B. WINBORNE.

*Judge Graham was succeeded on 1 January, 1897, by Spencer B. Adams, who was elected in November, 1896.

†Judge Boykin resigned 1 January, 1897, and Oliver H. Allen was appointed in his stead by Governor Carr.

LICENSED ATTORNEYS

SEPTEMBER TERM, 1896

JOE ELI ALEXANDER.....Tyrrell
OMAR LEE ANDERSON.....Clay
DAVID COLIN BARNES.....Hertford
WILLIAM THOMPSON BRADSHER.....Person
HENRY CLARK BRIDGES.....Edgecombe
JAMES OSBORNE CARR.....Duplin
HUGH CRAWFORD CHEDESTER.....Buncombe
JOHN CHARLES CLIFFORD.....Davie
WILLIAM ALEXANDER COCHRAN.....Montgomery
THOMAS WILLIAM COSTEN, JR.....Gates
ROBERT EDWARD COSTNER.....Lincoln
ROBERT WARLAND DALBY.....Granville
ADAM CLARKE DAVIS.....Wayne
ISAAC NEWTON EBBS.....Madison
LEVERETT FRANCIS INGLESBY.....Gaston
ABNER COLLY FARTHING.....Watauga
HANNIBAL LAFAYETTE GODWIN.....Harnett
MILO ORLANDO HAMMOND.....Randolph
WILLIAM FREDERICK HARDING.....Pitt
STARKEY HARE.....Hertford
GEORGE ABNER HARRELL.....Vance
LYTLE NOWLIN HICKERSON.....Wilkes
ALFRED WINTON HORNE.....Macon
WILLIAM WALLACE JOHNSON.....Jackson
EDWARD WILBER KEITH.....Buncombe
RALPH ROBERTS LAXTON.....Burke
FRANK ARMFIELD LINNEY.....Alexander
JOHN WILLIAM MANN.....Macon
FRANK CARTER MEBANE.....Orange
WAYNE ADOLPHUS MITCHELL.....Lenoir
WILLIAM THEODORE MORGAN.....Rutherford
JOHN MARION MULL.....Burke
JAMES WALTER MURRAY.....Alamance
CALVIN NICKS MCADOO.....Guilford
VICTOR CLAY MCADOO.....Guilford
WILLIAM LAFAYETTE MCCOY.....Macon
HENRY HOWZE MCLENDON.....Anson
CHARLES MCNAMEE.....Buncombe
GEORGE WILLIAM NEWELL.....Franklin
SAMUEL TATE PEARSON.....Burke
FRANCIS EDWARD PRESNELL.....Haywood
JOSEPH HERBERT PRITCHARD.....Bertie
ANDREW DEMPSEY RABY.....Jackson
WILLIAM PUGH RAGAN.....Guilford
MCDUFFIE RAY.....Transylvania
LEWIS LAKE ROSE.....Atlantic City, N. J.
WILLIAM LEVI SCOTT.....Guilford
EDWARD SANDERS SMITH.....Cumberland
OSCAR EDWARD SNOW.....Surry

LICENSED ATTORNEYS

JOHN WESLEY STAMEY.....Haywood
ROBERT BRUCE WHITE.....Franklin
AMIDAS AUGUSTUS WHITENER.....Catawba
CHARLES WINBURN .....Cumberland
WADE WISHART .....Robeson
THOMAS CLEBURN YOUNG.....Buncombe

CASES REPORTED

CASES CITED

A

B

C

D

H

I

J

M

N

O

P

R

S

T

U

V

W

Y

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1896

C. E. KRAMER ET AL. v. JAMES Y. OLD ET AL.

Contract—Sale of Good Will—Restraint of Trade—Validity of Contract—Breach of Contract—Injunction.

1. One who by his skill and industry builds up a business acquires a property in the good will of his patrons which is the product of his own efforts, and he has the power to sell his right of competition to the full extent of the field from which he derives his profit, and for a reasonable length of time.
2. An agreement by vendors of property and business that they will not continue the business in the town in which the property is located will be upheld as restricting the vendors from engaging in such business in such place for the lives of each and every one of them, and is not invalid as being in restraint of trade for an unreasonable length of time.
3. Where the vendors of a property and business stipulate that they will not engage in the same business in the same place thereafter, neither of them has the liberty to take stock in or help to organize or manage a corporation formed to compete with the purchaser.
4. A single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do or to refrain from doing certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed. Hence:
5. Where vendors sold their property and business, and stipulated with the purchaser that they would not thereafter engage in the same business at the same place, the latter stipulation was not without consideration because the property sold was worth all that was paid for it.

6. Where vendors of property and business who agreed not to conduct the same business in the same place thereafter joined with others in forming a corporation for such purpose, only such vendors, and not the corporation or other stockholders, will be enjoined from engaging in or taking stock in or assisting in the organization of such corporation.

ACTION by C. E. Kramer and others against James Y. Old, W. T. Old, W. N. Old and the Elizabeth City Manufacturing Company, to enjoin defendants from engaging in the milling business in Elizabeth City, pending in PASQUOTANK, and heard before *Timberlake, J.*, at chambers, at Currituck Court-House, on 7 September, 1896, on motion to continue the restraining order theretofore granted.

His Honor continued the restraining order until the hearing,
(7) and the defendants appealed.

W. J. Griffin for defendants (appellants).
E. F. Aydlett for plaintiffs.

AVERY, J. The courts in later years have disregarded the old rules by which it was sometimes attempted arbitrarily to fix by measurement the geographical area over which a contract in partial restraint of trade might be made to extend, and to prescribe a limit of time beyond which it could not be made to operate.

The modern doctrine is founded upon the basic principles that one who, by his skill and industry, builds up a business, acquires a property at least in the good will of his patrons, which is the product of his own efforts (*Cowan v. Fairbrother,* 118 N. C., 406), and has the fundamental right to dispose of the fruits of his own labor, subject only to such restrictions as are imposed for the protection of society either by express enactments of law or by public policy. *Hughes v. Hodges,* 102
(8) N. C., 239; *Bruce v. Strickland,* 81 N. C., 267. But the property which one thus creates by skill, or talent and industry, is not marketable, unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit, and for a reasonable length of time. *Cowan v. Fairbrother, supra;* 2 High Inj., sec. 1174; *Cloth Co. v. Lorsant,* 39 L. J. N. S. Eq., 86; *Rousilon v. Rousilon,* 14 Ch. D., 351; Clark on Contracts, p. 451. To the extent that the assignor of this species of property is left at liberty to come into competition with the assignee the market value of what is sold must fall below that of the untrammeled right of freedom from competition in the whole field from which the former derived the support of his business. The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is greater than it is necessary to make it in order to protect the purchaser from competition in his efforts to hold and get the full benefit of the

business or right of competition bought by him. The three defendants, who sold to the plaintiff, retained the undisputed right to continue in the same business and operate at any point beyond Elizabeth City and the vicinity, and exercised it by operating their mills.

But in our case it was not contended that the area of territory covered by the restrictive agreement was so unreasonably great as to vitiate the contract, but that the time for which the defendants covenanted to refrain from entering into the same business imposed an unnecessary restriction upon the rights of the three defendants, and was therefore contrary to public policy and void. It must be conceded that in so far as it is consistent with the power to sell the property which is the creation of one's own labor, physical or mental, society has the right to claim an open field for every man's labor, skill and competition with others, both for the benefit of his family and the more direct benefits accruing (9) to society from removing restrictions and encouraging competition in every kind of trade. The reason of the law leads to the adoption of any rule that is calculated to reconcile all conflicts between the proper exercise of the *jus disponendi* of the individual and the interests of society at large. The services of no one person are so valuable to the public, in any field to which his business may extend, as to demand that he shall receive a smaller price for his right of competition, because an arbitrary rule forbids him to extend the restriction in point of time to the term of his own life, or that of the purchaser, or for their joint lives. The enlargement of the restrictive area by later adjudications is founded, therefore, upon a principle which it was reasonable to apply in determining what is the lawful limit of time. Where the contract is between individuals or between private corporations, which do not belong to the *quasi*-public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of should apply. *Diamond Match Co. v. Roeber,* 106 N. Y., 473; *Morgan v. Perhamus,* 36 Ohio St., 517; *Morse v. Morse,* 103 Mass., 73.

The stipulation on the part of James Y. Old, W. P. Old and W. N. Old, to quote the exact language of the contract, is, "that they will not continue business of milling in the vicinity of Elizabeth City after 1 September, 1891, and the full completion of this agreement." The contract having been in other respects performed, the agreement is now complete in the sense contemplated by the parties. The three defendants were at most restricted from engaging in the business for the lives of each and every one of them. Such a sale has been upheld upon reason and authority in other courts. The plaintiff bought their (10) right to compete in their own persons in the business to which he succeeded as purchaser. It was not unreasonable that he should insist

upon the stipulation that none of the three should interfere while they lived, by competition at the particular place mentioned, either with him as purchaser, or his assignee in law or in fact. In the case of *Morgan v. Perhamus, supra,* the facts were that a milliner sold her stock and good will, and engaged "not to carry on the business *at any time in future* at the town of F, or within such distance of said town as would interfere with said business, whether carried on by said L. S. and P. or their successors." The agreement was held to be binding by the Supreme Court, and the seller was enjoined from resuming business. There, as in our case, the time was not described, except as an inhibition on a particular person, with the implication that it should extend to her life. The law would have construed the contract as conferring the right to sell or transmit to a personal representative as a part of the assets of his estate the property bought, whenever the time was found to be coextensive with the lives of the three defendants. *Cowan v. Fairbrother, supra;* Clark Contracts, p. 454, 455, and note, p. 456; 2 High Inj., Sec. 1345; *Lewis v. Langdon,* 7 Sim., 422; *Bininger v. Clark,* 60 Barb., 113. In *McClary's Appeal,* 58 Penn. St., 51, the agreement, which was held not to be unreasonable, was that a physician who had sold his business and good will to another physician should "never thereafter establish himself as a physician within twelve miles (of his original place of business) without the consent of the purchaser." The contract there, like that under consideration, could be fairly construed in no other way than as operating for the term of the seller's life. These cases and others are cited with approval by text-writers, and seem as a rule to have established
(11) the reasonable doctrine contended for by the plaintiff in the States as well as in England. 2 High, *supra,* sec. 1180; 1 Beach Inj., sec. 462 to 470; *Whitaker v. Howe,* 3 Bear, 383.

It is elementary learning that the single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do or refrain from doing certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed. It is sufficient to set forth that A has paid or agreed to pay a certain sum, and that B has agreed to do or abstain from doing certain things which may be stated *seriatim* in separate paragraphs.. A case almost exactly in point, because it relates to a somewhat similar agreement, is that of *Morse v. Morse, supra.*

Though the contract is valid and binding as between the parties, it in no way impairs the right of the defendants who were not parties, to engage in any kind of business in Elizabeth City. But, as a Court of Chancery we must declare that, where injunctive relief is asked, it is the duty of the Court to restrain the contracting parties from violating

the spirit as well as the letter of the agreement. Under a fair and just interpretation of its terms, the stipulation meant that the three defendants would not engage in business so as to bring their skill, names and influence to the aid of any competitor carrying on the same trade within the prohibited limits. It was therefore a violation of the contract on the part of the three mentioned, or either of them, to take stock in, help to organize or manage a corporation formed to compete with the plaintiff in his business. *Jones v. Hearns,* 4 Ch. Div., 636. (12)

While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague,* 114 N. C., 647), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they can not lawfully do as individuals.

The judgment must be modified so as to restrain only the three defendants who were parties to the original contract from engaging in or from taking stock in or assisting in the organization of a corporation formed with the purpose of carrying on the business of milling in or in the vicinity of Elizabeth City. The order must be vacated as to the other defendants.

MODIFIED AND AFFIRMED.

Cited: Hauser v. Harding, 126 N. C., 299; *Shute v. Heath,* 131 N. C., 282; *Teague v. Shaub,* 133 N. C., 465; *Disosway v. Edwards,* 134 N. C., 257; *Anders v. Gardner,* 151 N. C., 605; *Wooten v. Harris,* 153 N. C., 44; *Faust v. Rohr,* 166 N. C., 191; *Finch v. Michael,* 167 N. C., 323; *Sea Food Co. v. Way,* 169 N. C., 683, 685.

(13)

F. M. COOK v. GUIRKIN & CO.

Pleading—Confession and Avoidance—Burden of Proof—Different Causes of Action.

1. Where the answer admits material allegations of the complaint (*i. e.*, such as are issuable or essential to the proof of the cause of action), but accompanies the admission with a statement of affirmative matter in explanation by way of defense, the admission, so far as it extends, has the force and effect of a finding of a jury, and the burden of proving the new matter in avoidance is upon the defendant.

2. An ordinary test to determine upon whom the burden rests to produce certain testimony is that it is always incumbent upon a party who sets up in his pleadings facts which are within his own peculiar knowledge, or who has the custody of documents upon which he relies to establish a certain averment, to prove such facts or averments where it is material for him to do so.

3. Where, in an action to enjoin the sale of mortgaged land and for a cancellation of the note secured by the mortgage, the plaintiff alleged that the note had been paid and discharged in full by the sale of securities deposited with defendant for much more than the mortgage debt, and prayed judgment for the cancellation of the note, and, as a second cause of action, prayed judgment for the residue of the proceeds of the sale of the securities, and defendant admitted the sale of the securities for more than the mortgage debt, but averred that the excess was applied, by plaintiff's consent, to the payment of other debts due by plaintiff: *Held*, that upon the admission of the answer, the plaintiff having established a *prima facie* case, was entitled to the equitable relief prayed for, and it was incumbent upon the defendant to prove the averments of his answer.

4. In such case, a motion by the plaintiff for judgment on the admissions in answer, before empaneling the jury, or his refusal to offer evidence in support of his second cause of action after the empaneling, does not affect his right to judgment on the first cause of action, though it waives his claim for relief on the second.

(14) ACTION, tried before *Timberlake, J.*, and a jury, at Fall Term, 1896, of PASQUOTANK. The nature of the action and pleadings appears in the opinion of Associate Justice AVERY.

After the jury had been empaneled, the pleadings were read. The Court then directed the plaintiff to proceed with his case. The plaintiff then announced that he rested his case on admissions in pleadings. The court then said: "Judgment for the defendant," and wrote same on his docket, and directed the clerk to so enter it. The plaintiff then asked to be allowed to take a nonsuit, which motion the Court stated came too late, as judgment had already been entered for defendant, and refused it; said motion was made, however, before the actual signing of the judg-

ment, but after its rendition. Plaintiff excepted. No issues were asked for, or tendered, or submitted. Plaintiff moved for a new trial. Motion for a new trial was overruled. Plaintiff excepted and appealed.

E. F. Aydlett and B. B. Winborne for plaintiff (appellant).
No counsel contra.

AVERY, J. The plaintiff alleges that the defendant holds his note for the sum of $464.60, due August, 1886, and secured by a deed of trust conveying a certain lot, and that on 19 May, 1894, the other defendants caused the defendant trustee to advertise the same for sale. The plaintiff further alleged that the note had been paid and discharged in full by the sale of bonds and coupons deposited with the defendants, from which the defendant realized $1,500. The plaintiff demanded judgment that the note be canceled and for the residue of the $1,500 and asked and obtained an injunction till the hearing.

The defendants admit that they received the securities worth (15) more than $1,500 from the plaintiff, but aver that the proceeds of the sale of the bonds received were by the plaintiff's consent applied to the payment of other debts due them from the plaintiff, after a settlement and before the note and mortgage (which gave rise to this controversy) were executed.

Upon the trial, the plaintiff rested his case before the jury upon the admissions in the answer, and insisted that the laboring oar was with the defendants to show the lawful application of the fund, which they admitted was received, otherwise the court should adjudge the application of it to the payment of the note secured by the mortgage.

Had the plaintiff simply set up, as a ground for the interference of the Court of Equity, that the debt secured by the mortgage had been paid, and had that allegation been met with a general denial, the burden would manifestly have rested on the plaintiff to prove the payment, but when the defendants admitted the receipt of $1,500 from the plaintiff and sought to avoid its application, as a payment on the note, by a general averment that it was lawfully applied to the payment of other claims held by them against the plaintiff, the question arose whether the burden was not shifted to the defendants. Was it not incumbent on them to show that a fund, admitted to have been received, was not properly applicable to the discharge of a debt acknowledged to have been then due, but that it was used in liquidation of other indebtedness, to which they might lawfully apply it in preference to the note?

The general rule is that the laboring oar remains with the plaintiff to establish every affirmative proposition that it is essential to prove, in order to entitle him to the judgment demanded. But when the defendant admits the truth of any or all of the facts, which constitute his

(16) cause of action or entitle him to recover, such admissions as far as they extend have the same force and effect as a finding of the jury. *Helms v. Green,* 105 N. C., 251; *Bonham v. Craig,* 80 N. C., 224. If the defendant admits all the material allegations and seeks to avoid the apparent liability growing out of such admissions, by setting up new matter in avoidance, he must prove the facts necessary to establish his defense and thereby overcome the plaintiff's apparent right to recover.

It is true in this case that the plaintiff first admitted a debt and set up payment, but when the defendants admitted a sufficient set-off, and sought to avoid its application in discharge of the debt by averring the legal right to apply it in some other way, it became incumbent on them to show what they averred, or submit to the judgment for a perpetual injunction. It seems to be the well-settled rule that where the answer admits material allegations of the complaint but accompanies the concession with a statement of affirmative matter in explanation by way of defense, "the plaintiff may avail himself of the admissions without the qualifications." Pomeroy R. & Rem., sec. 578; *Dickson v. Cole,* 34 Wis., 626; *Farral v. Hennessy,* 21 Wis., 632. The material facts, in the application of the rule, are such as are issuable or essential to the proof of the cause of action, Pomeroy, *supra, sec.* 617.

"Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is reached (says 2 Wharton Ev., sec. 354), then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof." This rule was laid down as applicable to the common-law system of pleading, where the contest was ultimately narrowed down to a single issue. But under the code system the ultimate issuable fact upon which the controversy in our case hinges (17) is whether the defendants held other claims, to which they had the right to apply the fund, which they admit passed into their hands. This they have asserted and have the means of proving if it be true.

One of the tests often resorted to in order to determine upon whom the burden rests to produce particular evidence is that it is always incumbent upon a party who sets up in his pleadings facts which are within his own peculiar knowledge, or who has the custody of the documents upon which he relies to establish a certain averment, to prove such facts or averments where it is material to his cause to do so. *S. v. Morrison,* 14 N. C., 299; *S. v. Emery,* 98 N. C., 668; *Helms v. Green, supra,* at p. 263; *Bank v. Bridgers,* 114 N. C., 383; 1 Rice Civil Evidence, sec. 77; *Brown v. Mitchell,* 102 N. C., 347; Rice Cr. Evidence, sec. 260. In no court can the burden of proving a negative be imposed on a plaintiff, where the facts are within the peculiar knowledge of the de-

fendant, and this principle may also be invoked in support of the proposition that it was incumbent on the defendant to show the truth of averments that, from the face of the pleadings, seemed to involve the production of papers in possession of defendants. Rice, *supra*, sec. 262.

It may be contended for the defendants that the plaintiff, for a second cause of action, claimed that a balance of "five hundred dollars or some other large sum" was due him from the defendants, and that it thereupon became incumbent on him to offer testimony to show the sum that he was entitled to recover. But if, on the other hand, the pleadings established the right of the plaintiff upon his first cause of action to demand judgment that the mortgage debt was paid and for the cancellation of the note or for perpetual injunction, and the failure to (18) offer additional evidence would not work a forfeiture of his right to the judgment which he was entitled to demand without empaneling a jury, the motion for such a judgment before empaneling a jury, or the refusal to offer proof in support of his second cause of action after they were empaneled, must be held a waiver of the claim for relief growing out of the second cause of action, but neither would work a forfeiture or be deemed an abandonment of the right to a judgment on admissions in pleadings which constituted a sufficient basis for a decree for any relief whatever. The burden rests upon the plaintiff to prove a *prima facie* case, and he may safely rest when he has offered testimony tending to show his right to the relief demanded upon any one of several causes of action declared upon, *a fortiori* when upon the face of the pleadings admissions appear which entitle him to relief without offering any additional testimony. 1 Rice Civil Ev., p. 136, sec. 894. The plaintiff was entitled to win upon the test question who had the right to judgment without offering testimony other than that already before the Court.

The assertion of the right to judgment upon one cause without attempting to establish the facts upon which other causes of action depend is a waiver of the demand for judgment upon them, but in no way precludes a party from the benefit of admissions in pleadings which are tantamount to a verdict that will support a judgment.

For the reasons given there was error, and the plaintiff is entitled to a NEW TRIAL.

Cited: *S. v. Morrison,* 126 N. C., 1124; *Thomas v. Gwyn,* 131 N. C., 461; *Junge v. MacKnight,* 135 N. C., 114; *Eason v. Dortch,* 136 N. C., 294; *S. v. Blackley,* 138 N. C., 623; *Bowser v. Wescott,* 145 N. C., 63; *Embler v. Lumber Co.,* 167 N. C., 460; *Walker v. Parker,* 169 N. C., 155.

(19)

AMOS GWINN ET AL. v. L. S. PARKER ET AL.

Practice—Judgments in Fieri During Term of Court—Discretionary Power of Judge to Extend Time for Filing Pleadings.

1. Any order or decree made during a term of court is *in fieri*, and subject to be vacated or modified during such term.
2. The exercise of the discretionary power of a court to extend time for filing pleadings is not reviewable.

ACTION, heard at Spring Term, 1896, of GATES Superior Court, before *Robinson, J.* The plaintiff appealed from the order referred to in the opinion of *Faircloth, C. J.*

E. F. Aydlett for plaintiffs (appellants).
R. O. Burton for defendants.

FAIRCLOTH, C. J. The plaintiff, having previously filed a complaint, on Thursday, Spring Term, 1896, obtained judgment for want of an answer. On the next day the judge, on defendants' affidavit and application, set aside the judgment and allowed defendants 30 days to answer. Plaintiff appealed.

It has been the settled rule for some time that any order or decree made was, during the term, *in fieri,* and that the Court during the term could vacate or modify the same.

The Court has the discretion also, not reviewable, to extend the time for filing pleadings. Code, sec. 274; *Gilchrist v. Kitchin,* 86 N. C., 20; *Brown v. Hale,* 39 N. C., 188.

AFFIRMED.

Cited: Davison v. Land Co., 120 N. C., 260; *Woodcock v. Merrimon,* 122 N. C., 735; *S. v. Chesnutt,* 126 N. C., 1122; *Cook v. Tel. Co.,* 150 N. C., 429; *Gold v. Maxwell,* 172 N. C., 150.

---

(20)

LOVEY NICHOLSON v. COMMISSIONERS OF DARE COUNTY.

Claim on Decedent's Estate—Suit by Legatee—Evidence—Presumptions.

1. Where, in the trial of an action by one claiming to be the assignee of an interest in a judgment obtained by one county against another, the only evidence as to the assignment was the record of the case in which the judgment was rendered, showing that the commissioners of the creditor

county had assigned the judgment against the debtor county to various persons, of whom plaintiff's ancestor was one, but plaintiff's name nowhere appeared as one of the assignees, it was error to refuse an instruction that there was no evidence of an assignment to plaintiff.

2. In an action by a legatee to recover a claim due to the testator's estate, where it does not appear that an executor was appointed, and that he settled the estate and assigned the claim to plaintiff, it will not be presumed that these things were done.

PETITION to rehear the case between same parties, decided at February Term, 1896, 118 N. C., 30.

W. B. Shaw for plaintiff (petitioner). (22)
E. F. Aydlett contra.

FURCHES, J. This case was heard at the last term of the Court on the appeal of the defendant (118 N. C., 30), and is now before the Court upon a petition to rehear.

The first ground of error set forth in the petition is that this Court reversed the Court below for the reason that the "will of C. W. Nicholson was not made a part of the record, and that it was not shown to the Court that there was a personal representative of said C. W. Nicholson." This assignment of error is not true in fact, as will plainly appear upon reading the case as reported *supra*. It is true that in the argument of the case it is stated that the will of C. W. Nicholson is not made a part of the record, and that it does not appear to the Court whether there was an executor or not. But neither of these was the point decided by the Court, but they were only facts stated leading to the question decided.

The plaintiff in her complaint claimed that she was the assignee of $712.72 in a judgment which Currituck County had recovered and held against Dare County. This was denied by the defendant and made the issue to be tried, and is the only issue decided by this Court at the last term. (23)

The plaintiff by her complaint made the proceedings, the reports and judgments in the case of *Currituck County v. Dare County*, a part of her complaint. And on the trial the plaintiff offered and read this record in evidence, which was the only evidence offered in the case, except the will of C. W. Nicholson. So if there is any evidence to sustain the plaintiff's allegation that plaintiff is the *assignee* of $712.74 in the judgment of Currituck against Dare, it is in this record introduced by plaintiff. Upon examination of this record we find it stated that "on 2 March, 1882, the Commissioners of Currituck County assigned, of this judgment against the defendants, the following amounts to the persons named below," and among the names below is that of

C. W. Nicholson, and opposite his name is set $712.74. We find the name of C. W. Nicholson as many as seven times mentioned in this record, and the name of Lovey Nicholson is not to be found in it. There is this entry, "8. To paid Mrs. Nicholson, $276.50." But this was no part of the judgment of Currituck against Dare, even if the "Mrs. Nicholson" mentioned is Mrs. Lovey Nicholson, the plaintiff in this case; and there is nothing, unless it be this entry, to show that she is.

Upon this evidence on the trial below the defendant asked the Court to charge the jury "that there is no evidence of an assignment of any judgment, or the interest of any judgment, to plaintiff by Currituck County." This prayer was refused by the Court, and we said there was error in this refusal. And after another argument and a full consideration of the whole case we are of the same opinion now that we were then.

(24) In the argument, the counsel for plaintiff seemed to lay great stress upon the fact that it appeared from the record that C. W. Nicholson died in June, 1880, and this assignment was not made until May, 1882. But we are unable to see the force of this argument; for if it should be held (and we do not so hold, as that question is not before us) that it is void as to C. W. Nicholson, it could not follow that this made it a good assignment to some one else to whom it was not assigned.

It was suggested on the argument at this term that the plaintiff could probably sustain her action under the doctrine of presumption that the clerk of Currituck had qualified, or appointed and qualified, the plaintiff or some one else the personal representative of C. W. Nicholson; and that as more than two years had elapsed since the death of C. W. Nicholson the plaintiff or whoever qualified as the personal representative, had paid the debts and settled the estate, and assigned this claim to plaintiff as a part of her legacy under the will. But this can not be so, as there is nothing for the presumption to rest upon. There is no law requiring a clerk to appoint an administrator or to qualify an executor, unless he is applied to and asked to make such appointment. Generally, presumptions arise from admitted or established facts, and is a very useful principle of legal jurisprudence. But it can not be presumed that a party is the owner of property without some admitted or established fact to start with. Where an indebtedness exists by a promissory note or other negotiable paper capable of manual delivery, and the plaintiff is in possession of the note or other paper, the law, in the absence of other evidence, presumes the holder to be the owner. But here is the fact that the plaintiff is in possession of the note which creates or raises the presumption. But if the plaintiff had no pos-

(25) session of the note, there would be no presumption. So, if one is

in the actual possession of an office, the fact that he is in, exercising the duties of the office, raises the presumption that he is rightfully in. So it is that where an officer of court does a thing in the line of official duty the law presumes it rightfully done until the contrary appears. But it can not be presumed that a court has tried a case or made an appointment, although it had the right to do so if applied to, and if he does this it must be made to appear upon proof of the fact. So, there can be no presumption that the clerk had appointed and qualified a personal representative of C. W. Nicholson. And as there is no evidence or presumption that any one has ever been appointed, there can be no presumption that they acted properly or improperly.

Besides, this suggestion is not only without foundation to rest upon but it is in direct conflict with the allegation of plaintiff's complaint, which alleges that she is the *assignee of the County of Currituck.* And it was argued before us by plaintiff's counsel that C. W. Nicholson never had any interest in this judgment upon which this action was brought.

The petition must be dismissed, and the case goes back for a new trial, when the plaintiff will take such course as she may be advised by counsel. Petition dismissed.

NEW TRIAL.

Cited: *S. c.*, 121 N. C., 28; *Hamer v. McCall, ib.*, 197; *Nicholson v. Comrs.*, 123 N. C., 15.

---

(26)

ANDREW COWAN ET AL. v. GEORGE A. PHILLIPS ET AL.

Action to Set Aside Fraudulent Deed—Fraudulent Conveyance—Fraud in Law—Presumption of Fraud—Evidence to Rebut Presumption—General Assignment, What is Not.

1. Where a mortgage is fraudulent upon its face the fraud cannot be rebutted by evidence, and it is the duty of the court to declare it fraudulent and void, but where the fraud is not disclosed on the face of the instrument, but sufficient badges appear to create a presumption of fraud, the presumption may be rebutted by evidence, the burden being upon the defendant.

2. In the trial of an action to set aside a deed for fraud, a presumption of fraud raised by the deed in evidence cannot be rebutted by the defendant's testimony that the deed was made in good faith.

3. Where a chattel mortgage given by husband and wife on a stock of goods to secure notes previously given by the husband for the purchase of a half-interest therein, the wife being the owner of the other half, provided that the husband should remain in possession of the stock and conduct the business as agent for the mortgagee at a salary greatly in excess of

what he had formerly received from the business, and no money was required to be paid over to the mortgagee until the maturity of the notes: *Held*, that, while not fraudulent on its face, as a matter of law there is a presumption of fraud which cannot be rebutted by evidence of the parties that the deed was made in good faith and not to defraud creditors.

4. Where an insolvent debtor executed a chattel mortgage to secure a pre-existing debt, but at the same time owned other property nearly or quite equal in value to that mortgaged, the transaction did not operate as a general assignment and was not rendered void by the failure of the mortgagor to file a schedule of preferred creditors, etc., as required by ch. 453, Acts of 1893. (*Bank v. Gilmer*, 116 N. C., 684, distinguished.)

(27) ACTION, tried before *Graham, J.*, and a jury, at May Term, 1896, of BEAUFORT. There was a verdict for the plaintiffs, and from the judgment thereon the defendants appealed. The facts appear in the opinion of *Associate Justice Furches.*

W. B. Rodman for plaintiffs (appellants).
Chas. F. Warren for defendant.

FURCHES, J. This is an action brought by plaintiffs, who are creditors of the defendant, T. E. Warren, against said Warren and George A. Phillips, mortgagee, to set aside the mortgage on the ground of fraud. The defendant Phillips and M. A. Warren, wife of T. E. Warren, were partners in the harness business from 1890 to 14 January, 1893, when the defendant Phillips sold his interest in the business to the defendant T. E. Warren at the price of $1,250, when the defendant T. E. Warren executed six notes as the consideration of the purchase, five for $200 each and one for $250, payable to the defendant Phillips, one of said notes falling due on 14 January of each succeeding year, making the last, which was for $250, fall due on 14 January, 1899. On 21 November, 1894, the defendant T. E. Warren executed a mortgage to the defendant Phillips on the stock of goods in his harness business to secure the payment of the six notes mentioned above. Among the conditions contained in this mortgage were these: That said Warren was to pay said notes as they became due, and in default of said payments the mortgagee, Phillips, was authorized to foreclose. Another condition was that the defendant Warren was to remain in possession of the goods so mortgaged until these notes were paid, was to carry on the business, to buy and sell for cash only, and was to receive from
(28) the business, for his services, and to cover running expenses, such as rents, taxes, etc., $25 per week.

The plaintiff then produced evidence showing that defendant Warren was the owner of a house and lot in the town of Washington which was under mortgage, which had since been foreclosed by sale, and only brought the amount of the mortgage debt.

That he claimed to own another small tract of land worth some $400 or $500, and that he owned between $400 and $500 worth of personal property not included in the mortgage; that the defendant Warren was then being pressed with debts, and there were $900 or more in judgments against him, besides that of plaintiffs, which was $869.35, making about $1,800 in judgments against him, upon some of which judgments executions had been issued and returned *nulla bona*. In fact he was badly insolvent.

None of these facts were denied or controverted by defendants, and the only evidence defendants offered in rebuttal or explanation was the testimony of both the defendants that the debts secured were *bona fide* debts, and that the mortgage was made in good faith to secure these notes and not with intent to hinder, delay or defraud creditors. This evidence was objected to by plaintiffs, but admitted by the Court, and plaintiffs excepted.

The Court was asked to hold and to charge that the mortgage upon its face was fraudulent and void. The Court declined to give this instruction, and we find no error in this ruling. And while we hold that it was not fraudulent upon its face, it is certainly on the verge of being so, as said by *Bynum, J.*, in the case of *Cheatham v. Hawkins*, 76 N. C., 335. Where a mortgage is fraudulent upon its face it is then called a fraud in law and can not be rebutted by evidence. But where it does not disclose such a fraud upon its face as to call upon the Court to declare it fraudulent and void, but has such ear-marks (29) and badges of fraud as to create a presumption of fraud, this presumption may be rebutted, but the burden is on the defendant. There is sufficient appearing upon the face of this mortgage to create the presumption. And if it had contained upon its face what appears in evidence and uncontradicted—that Warren at the time was badly insolvent, and that while he had worked for the defendant Phillips and M. A. Warren, while they were partners, at $50 per month, and that by this mortgage his wages had been increased nearly one hundred per cent—it would have become the duty of the court to declare it fraudulent and void, as a matter of law. *Cheatham v. Hawkins, supra.*

And this presumption is not allowed to be rebutted by the testimony of the defendants that it was made in good faith to secure the six notes and not to defraud creditors. *Booth v. Carstarphen,* 107 N. C., 395, and cases cited. Indeed, this case is so nearly the same as *Cheatham v. Hawkins,* 76 N. C., 335, and 80 N. C., 161, that we are not able to distinguish the principle involved in the one from the other.

Therefore, while his Honor was correct in refusing to hold that the mortgage was fraudulent and void from what appeared upon its face as

a matter of law, he should have instructed the jury, after the evidence was in, that if they believed the evidence the mortgage was fraudulent as to the plaintiff, and that they should so find.

There was another question discussed, which it hardly seems necessary for us to pass upon in view of what we have already decided, and would not, but for the fact that it would come up again if the case should be tried again.

The plaintiff contended that this mortgage fell within the provisions of the Act of 1893, and was void for the reason that the mortgagor
(30) filed no schedule, as he was required to do; and *Bank v. Gilmer,* 116 N. C., 684, and same case, 117 N. C., 416, were cited to sustain this contention. But this case is distinguishable from *Bank v. Gilmer,* and in our opinion does not fall within the provisions of the Act of 1893.

There is error, and there must be a new trial as to the issue of fraud, and the new trial will be confined to this issue, or issues involving this question, as the appeal seems not to have involved the other questions decided.

ERROR AND NEW TRIAL.

Cited: Ferree v. Cook, post, 171; *Cowan v. Phillips,* 122 N. C., 73; *Commission Co. v. Porter, ib.,* 698; *Edwards v. Supply Co.,* 150 N. C., 173; *Grocery Co. v. Taylor,* 162 N. C., 311; *Wall v. Rothrock,* 171 N. C., 391.

W. H. TAYLOR v. H. A. RUSSELL ET AL.

Statute of Frauds—Pleading—Partnership—Injunction and Receiver.

1. Under a parol agreement to convey real estate, the person who is to receive the conveyance cannot plead the statute of frauds if the other is able and willing to perform his contract.

2. Where one partner agrees to convey an interest in real estate, and is able and willing to perform his part of the contract, equity will consider what should be done as done and the partners joint owners of the property.

3. Where, after the dissolution of a partnership, one of the partners, who is insolvent, retains possession of the assets and buys a subsisting mortgage upon the real estate of the partnership under which he is proceeding to sell, it is proper to restrain the sale, appoint a receiver, and order an account.

ACTION, pending in BEAUFORT Superior Court, for an injunction and the appointment of a receiver, etc., and heard before *Boykin, J.,*

at chambers, in Washington, N. C., at May Term, 1895, of BEAU- (31) FORT. His Honor continued the restraining order theretofore granted by *Brown, J.*, and ordered an account, and appointed a receiver, and defendant appealed. The facts appear in the opinion of Associate Justice FURCHES.

J. H. Small and B. B. Nicholson for plaintiff.
W. B. Rodman for defendant (appellant).

FURCHES, J. This action is before us by appeal of the defendants from an order of the Court below granting an injunction and appointing a receiver. And as the appeal is from an interlocutory order based upon affidavits, it becomes our duty to consider only such matter as will enable us to determine whether the order appealed from should be continued till the final hearing, and to leave as many of the disputed and litigated questions undisposed of as we can until the final hearing.

It appears from the affidavits of both parties that there was a partnership entered into to do a milling and lumber business, (though there is some dispute as to the terms of this partnership, and we do not undertake to settle this disagreement), and that under this agreement the plaintiff and defendant commenced and carried on the milling and lumber business for some time, both parties alleging that they put money and labor into the concern.

After operating this business for some time a disagreement took place between them and work was suspended, and the defendant alleges that the partnership was dissolved, and plaintiff does not deny this allegation. A part of the agreement was that plaintiff should convey to the defendant an undivided half-interest in the mill and land upon which it was located, subject, as the plaintiff alleges, to two mortgages then existing upon said property, one to the Bank of Washington and (32) another to Thomas Lee for $3,500. The defendant admits that he was to take his moiety subject to the Lee mortgage, but denies that the other mortgage was named, and further alleges that he had no knowledge of the bank mortgage. It is also alleged and admitted that the defendant has taken possession of what money there was on hand belonging to the concern, and that he has taken possession of the logs and lumber on hand, also the books and accounts. And it is alleged and not denied that the defendant is insolvent. This ordinarily would seem to entitle the plaintiff to an account, to an injunction against the defendant's selling the property, and to a receiver.

But the defendant sets up two reasons why he says the plaintiff is not entitled to this order. First, that a part of the contract was that the plaintiff was to convey to him one-half of the mill, etc., which is real

estate; that the plaintiff has refused to do this, and that it is a contract within the Statute of Frauds, not being in writing, and the defendant pleads this statute. The plaintiff denies that he ever refused to convey this property to the defendant, and alleges that he is now ready and willing, and always has been, to convey to the defendant upon his complying with his part of the contract. So we see that this is one of the matters of dispute between the parties that we can not decide, but it is a question of fact necessary to be considered by us in passing upon the question of injunction. If the plaintiff is prepared and willing to make defendant a deed according to the contract, as he alleges he is, the defendant can not prevent it by pleading the Statute of Frauds. He is at the wrong end of the contract to do this. *Green v. R. R.*, 77 N. C., 95, and a dozen other cases cited by Womack under this case.

If the plaintiff is ready and willing to convey, as he alleges he
(33) is, equity will consider what should be done as done, and the defendant, in equity, a joint owner of this property.

But the defendant says further that since the dissolution of the partnership he has bought the Thomas Lee mortgage, and has paid, or has obligated himself to pay, $2,250 for it, and it is under this mortgage that he has advertised the property and is proposing to sell, and should not be interfered with by injunction, while, on the other hand, the plaintiff replies that there are at least two reasons why he should be enjoined, viz: That it was an encumbrance upon the partnership of which the defendant is a member; that the basic principle of partnership is good faith; that each partner is an agent, and even a trustee, of the partnership, (Beach on Mod. Eq. Juris., secs. 538, 882); and, as this purchase was a transaction in which the partnership was interested, that the partnership is entitled to share in the benefits of this purchase. These are interesting questions, or will become so if upon the trial the plaintiff is able and willing to make good his allegation to convey.

So, taking into consideration the allegations of the plaintiff, the admissions of the defendant, and his alleged insolvency, which is not denied, we are of the opinion that it is a clear case for an account, for a receiver and for an injunction. *Phillips v. Trezevant*, 67 N. C., 370.

NO ERROR.

Cited: Lassiter v. Stainback, post, 105; *Harty v. Harris*, 120 N. C., 411; *McNeill v. Fuller*, 121 N. C., 213; *Bank v. Loughran*, 126 N. C., 818; *Hall v. Misenheimer*, 137 N. C., 187; *Rogers v. Lumber Co.*, 154 N. C., 111; *Brown v. Hobbs, ib.*, 546, 552.

(34)

R. W. HARRIS v. MURPHY, JENKINS & CO.

Evidence—Modification by Parol of Written Contract—Singling Out Witness—Instructions.

1. The rule that parol evidence will not be admitted to contradict, modify, or explain a written contract does not apply where the modification is alleged to have been made subsequent to the execution of the contract.
2. An instruction to the jury that if they believe a certain witness told the truth, and that a fact is as testified to by him, they should find for the plaintiff; but that if they do not believe that such witness told the truth, and that the facts are as testified to by other witnesses, then they should find for the defendant, is not erroneous as being obnoxious to the rule which prevents the singling out one witness where the testimony is conflicting and directing the jury to find according to his evidence.

ACTION, tried before *Boykin, J.*, and a jury, at Fall Term, 1895, of BEAUFORT. From a judgment for the plaintiff the defendants appealed.

The facts and assignments of error appear in the opinion of *Montgomery, J.*

Chas. F. Warren for defendants (appellants).
W. B. Rodman and J. H. Small for plaintiff.

MONTGOMERY, J. This action was commenced in the court of a justice of the peace to recover of the defendant an amount alleged to be due to the plaintiff for work and labor performed for the defendant in raising a sunken flat or barge filled with coal, and for other services rendered in connection therewith. The first cause of action sets out an express contract, the second declares as for a *quantum meruit*. The defendant denies the right of the plaintiff to recover on the ground (35) that the contract was in writing and entire, and that the plaintiff has not performed his part of the same. The contract is in the following words and figures:

"WASHINGTON, N. C., 7 September, 1891.

"Received of E. V. Murphy fifteen dollars, in part payment for raising barge of coal, and taking up coal from bottom of river at S. R. Fowle & Son's wharf, and preparing the two barges for towing to Tarboro, and going and looking after them from Washington to Tarboro, the full amount being $55 for the entire contract.

"R. W. HARRIS."

During the trial the plaintiff offered evidence tending to show that the contract had been modified after its execution to the extent of relieving the plaintiff of every obligation thereunder except that of raising the

barge, and that for any services the plaintiff should render after the barge was raised the defendant was to pay him two dollars per day. The defendants excepted to the introduction of this evidence on the grounds, first, that there was an express contract in writing and entire, between the parties, and that the plaintiff could not recover for his services as on a *quantum meruit,* nor for part performance; and further, that parol evidence could not be allowed to contradict, alter or modify the written contract. The exception can not be sustained. In *Meekins v. Newberry,* 101 N. C., 17, it is said, "It is a settled rule of the law that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake, properly alleged, parol evidence can not be received to contradict, add to, modify or explain it." And this rule was recognized before and has been affirmed in numerous cases since that
(36) decision. But in all those cases the offer was to change or to modify or to alter the written contract by evidence in parol of declarations and understandings made either contemporaneous with or prior to the execution of the written contract. The rule, however, does not apply in cases like the one before the Court, where the modification is alleged to have been made subsequent to the execution of the writing. Browne Parol Ev., 99; Greenleaf Ev., 303; *Swain v. Seamens,* 9 Wallace, 271; *Emerson v. Slater,* 22 Howard, 41. In the last cited case the court cited the case of *Gross v. Nugent,* 5 Barn. & Ad., 65, and quote from it the rule as laid down by *Lord Denman:* "After the agreement has been reduced into writing it is competent to the parties in cases falling within the general rules of the common law at any time before the breach of it by a new contract, not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract." One of the witnesses, Walter Spencer, testified that *after* the contract in writing was entered into, while the work was going on at the wharf, Murphy (a deceased partner of the defendants) agreed that Harris should only raise the barge, and that he should be released from the balance of the contract, and that all the services that the plaintiff might render after the flat was raised should be considered extra, and that the plaintiff should receive therefor two dollars per day. Several other witnesses testified concerning the conversation between the plaintiff and Murphy, and these witnesses said that the only modification of the contract was that the plaintiff was not required to get up from the bottom of the river the coal which had slipped off the barge when it sunk. The testimony was irreconcilably contradictory. His Honor instructed the jury: "Now if the jury should believe that the witness, Walter
(37) Spencer, told the truth, and that the contract was so modified, that they should find that the defendants are indebted to the

plaintiff in the sum of forty dollars, that being the balance of the contract price; and also for any extra services after the flat was raised, at the rate of two dollars per day. The plaintiff claims that he was engaged five days in transferring the coal from the flat to the wharf, at two dollars per day; and that he was engaged five days in watching the flat, at two dollars per day. But, on the other hand, if the jury should believe that the witness, Walter Spencer, did not tell the truth, and should believe, as testified by the other witnesses, that the only modification of the contract was the plaintiff was not required to get up the coal from the bottom of the river, then, it being admitted that the other provisions of the contract on the part of the plaintiff, viz: the preparation of the barges for towing, and going with them, and looking after them from Washington to Tarboro, had not been performed by the plaintiff, the contract being entire and indivisible, the plaintiff would not be entitled to recover."

The defendants excepted to the charge. The exception can not be sustained. There are numerous decisions in our reports to the effect that the court can not single out a witness or witnesses where the testimony is conflicting and charge the jury that if such witnesses have told the truth, or that if they believe those witnesses, to let their verdict be so and so. *S. v. Rogers,* 93 N. C., 523; *Anderson v. Steamboat Co.,* 64 N. C., 399; *Weisenfield v. McLean,* 96 N. C., 248; *Jackson v. Commissioners,* 76 N. C., 282. If the instruction complained of seems to be obnoxious to the prohibition contained in the above-named cases, it is only *seemingly* so and not really so. In the case before the court, the witness, Spencer, was not singled out in the offensive sense of that word. The attention of the jury was sharply drawn to the contradiction between the testimony of that witness and that of the other witnesses, and the (38) jury were instructed in substance to weigh the testimony of them all. They were told that if they believed this witness, Spencer, had told the truth, and that the contract was modified as he had testified, then to find for the plaintiff; and in the same breath they were told, "But on the other hand if the jury should believe that the witness, Spencer, did not tell the truth, and should believe as testified by the other witnesses, that the only modification of the contract was the plaintiff was not required to get up the coal from the bottom of the river, then . . . the contract being entire and indivisible, the plaintiff would not be entitled to recover." The credibility and the character of the witness, Spencer, were no more on trial before the jury than were the credibility and character of the other witnesses. It was impossible for the jury to have been misled by this charge so as to have believed that it was his Honor's opinion that more weight was to be given to Spencer's testimony than to that of the other witnesses whose testimony was in conflict with his.

The other exceptions are not sustained, and, as they are connected with and are dependent upon these already discussed, it is needless to go into them.

NO ERROR.

Cited: Jones v. Rhea, 122 N. C., 726; *Williams v. R. R.,* 130 N. C., 120; *Ore Co. v. Powers, ib.,* 153; *Freeman v. Bell,* 150 N. C., 148; *McKinney v. Matthews,* 166 N. C., 580; *Palmer v. Lowder,* 167 N. C., 333.

---

(39)

D. V. WARREN v. BETTIE L. SHORT.

Deeds—What Passes by Deed—Conveyance of Standing Timber—Construction of Deed—Exceptions in Deed.

1. A conveyance, unless a contrary intent is expressed in the deed, relates to the date of its execution, and only such property passes as fulfills the description at the time of executing the conveyance.
2. An exception in the deed of a part of the thing granted must be described with the same certainty as the subject-matter of the conveyance, and the rule for ascertaining what is excepted is the same as that for determining what passes by the deed.
3. A conveyance of all the timber which measures twelve or more inches in diameter at the stump, growing on a certain tract, all of it to be cut and removed within ten years, includes only the timber of that dimension when the conveyance was executed.

CONTROVERSY, submitted without action, and heard before *Timberlake, J.,* at Spring Term, 1896, of BEAUFORT. From the agreed statement of facts it appeared that on 11 December, 1888, D. V. Warren sold and conveyed to E. M. Short, executor and devisor of the defendant, "all the timber which measure twelve inches in diameter at the stump, or more than twelve inches standing on a certain tract of land." The deed provided that "all the said timber above conveyed which shall remain standing, or which shall not be removed from said land within the period of ten years from this date, shall become the property of and revert to the party of the first part, it being the object and intent of the parties hereto that the said timber shall be cut and removed from the said land within the said period of ten years."

His Honor adjudged as follows:

"That the plaintiff, Deborah V. Warren, is the owner and en-
(41) titled to the immediate possession of all timber standing and

growing upon a certain tract of land described in a contract between Deborah V. Warren and E. M. Short, dated 11 December, 1888, and recorded in the Register's office of Beaufort County, which measured less than twelve inches in diameter at the stump at the date of said contract, although the said timber may exceed that size at this time, saving and excepting such of the timber upon said land as the defendant may need for constructing railroads and tramways on said land or for rafting the timber cut thereon under the contract aforesaid. It is further adjudged the plaintiff recover of the defendant the costs of this proceeding, to be taxed by the Clerk."

From this judgment the defendant appealed.

Chas. F. Warren for plaintiff.
W. B. Rodman for defendant (appellant).

AVERY, J. A conveyance of land at common law was deemed, unless a contrary intent was expressed in the deed, to relate to the date of its execution, and hence in construing the Statute of Wills (which contained the words "having an estate of inheritance") the courts decided that devises, being a species of conveyance, only land to which the devisor had title at the date of the execution of the instrument, not land acquired between that time and his death, passed by a general disposition of all of his land. 2 Blk., p. 378. A person may convey the whole mineral interest, or only a particular mineral, or the whole of the timber, or only certain trees designated by dimensions or species, or by both, and in either case such trees pass as fulfill the description at the time of executing the conveyance. The modification of the com- (42) mon-law principle, in so far as it relates to devises, in no way affects its application to deeds of conveyance. Upon this principle, as well as upon the reason of the thing, it was held in *Whitted v. Smith,* 47 N. C., 36, that an exception in a deed of "all the pine timber that will square one foot" embraced only such timber as had attained the size specified at the time. An exception in a deed of a part of the thing granted must be described with the same certainty as the subject-matter of the conveyance, and hence the rules for ascertaining what is excepted must be the same as those for determining what passes by the deed.

The conveyance contained no language which evinced a purpose to take the instrument out of the general rule. One may convey something that has no potential existence, subject to such restrictions as are imposed by public policy, provided, always, he expresses with sufficient clearness his intent to do so. *Williams v. Chapman,* 118 N. C., 943; *Brown v. Dail,* 117 N. C., 41; *Loftin v. Hines,* 107 N. C., 360. The deed might have been so drawn as to pass all trees that would attain the size mentioned within a reasonable, though not for an indefinite

period, but the terms of the deed cover none that did not fill the description at its date, and no others passed. *Robinson v. Gee,* 26 N. C., 186.

For the reasons given the judgment of the court below is

AFFIRMED.

Cited: Hardison v. Lumber Co., 136 N. C., 175; *Banks v. Lumber Co.,* 142 N. C., 50; *Isler v. Lumber Co.,* 146 N. C., 557; *Whitfield v. Lumber Co.,* 152 N. C., 213; *Kelly v. Lumber Co.,* 157 N. C., 178; *Veneer Co. v. Ange,* 165 N. C., 57; *Mfg. Co. v. Thomas,* 167 N. C., 111; *Gilbert v. Shingle Co., ib.,* 289.

---

(43)

JOSEPH D. KEATON v. G. B. JONES.

Receipt—Acknowledgment of Money Paid—Contract—Parol Evidence.

1. A receipt in full, when it is only an acknowledgment of money paid and does not constitute a contract in itself, is only *prima facie* conclusive, and the recited fact may be contradicted by parol testimony.
2. A memorandum signed by the parties to a transaction and stating "this is to show that J. & Co., and J. D. K. have this day settled all accounts standing between them to date and all square, except the balance of $300 as dealing with and through S. & Son, for which amount we hold both responsible," is not a contract, but only evidence of a settlement, and subject to be explained by parol proof.

ACTION, tried before *Robinson, J.,* and a jury, at Spring Term, 1896, of PERQUIMANS. The facts appear in the opinion of the Chief Justice. His Honor on the trial charged the jury that if they should find that there were sunken logs, and that they were not taken into consideration at the time of settlement between the plaintiff and defendant, then plaintiff could go behind the receipt and would be entitled to recover whatever amount the jury found to be the value of the lost logs at the contract price. Defendants excepted and appealed from the judgment rendered on the verdict for the plaintiff.

W. M. Bond and R. C. Strong for plaintiff.
E. F. Aydlett for defendants.

FAIRCLOTH, C. J. The contract alleged in the first article of the complaint and admitted by the answer was "that on or about.....February,

1893, defendants agreed and contracted with plaintiff to buy from (44) him, at five dollars and fifty cents per thousand, all the logs which he would cut and put in tug-boat water in Perquimans River during the year 1893. That plaintiff was to inform defendants when the logs were put in water, according to agreement, and defendants were at once to send rafting gear, measure said logs, receive them and pay plaintiff for them." Several rafts were received and paid for. One raft or lot was put in the water according to contract, but for want of rafting gear was lost.

On 20 January, 1894, defendants wrote to plaintiff "to come to Elizabeth City to settle for last raft received by defendants from him." The parties met accordingly at Elizabeth City, and the following writing marked "A" was signed by each party: "This is to show that Jones & Co. and J. D. Keaton have this day settled all accounts standing between them to date, and all square, except the balance of $302.54 as dealing with and through Speight & Son, for which amount we hold both responsible (Speight & Son and J. D. Keaton)." The evidence of both parties shows that the "lost" logs were not considered nor paid for in said settlement, and for their value this action was brought.

His Honor told the jury that if the parties had a settlement of all their matters the plaintiff could not recover; also, that if the sunken logs were not taken into consideration, then "plaintiff could go behind the receipt" and recover whatever amount they found to be the value by the contract price of the lost logs. Defendants excepted and appealed.

The defendants insist that the writing marked "A" is conclusive, and that parol evidence can not be heard in support of plaintiff's claim unless fraud or mistake be alleged and proved. This is a misconception. When the writing is the contract as well as a receipt, then it is conclusive except for fraud or mistake shown, but when the writ- (45) ing is only an acknowledgment of payment or delivery, it is only *prima facie* conclusive, and the fact recited may be contradicted by oral testimony. This rule is laid down in 1 Greenleaf Ev., sec. 305. The same was held by this Court in *Reid v. Reid,* 13 N. C., 247, and several subsequent cases, notably that of *Harper v. Dail,* 92 N. C., 394.

The writing marked "A" and relied on by defendants does not profess on its face to be a contract, nor does it recite the material parts of the contract, made about a year before, as it is admitted in the pleadings. It is only evidence of a settlement had, and was subject to be explained by parol proof.

The charge of the Court was agreeable to the uniform decisions in this State.

NO ERROR.

(46)

J. C. MEEKINS, SR. v. A. G. WALKER.

Agricultural Lien—Requisites—Form of Immaterial—Trial—Evidence —Written Contract Explained by Parol Testimony.

1. To create an agricultural lien no particular form of agreement is required. If the requisites prescribed by the statute are embodied in the agreement, and the intent of the parties to create the lien is apparent, the agreement will be upheld as a valid agricultural lien though it be in the form of a chattel mortgage.

2. Where an instrument intended to operate as an agricultural lien contains, on its face, the statutory requisites, except that it does not show that the money or supplies were furnished after the agreement, it is competent to show, *de hors* such instrument, that the supplies were furnished after the making of the agreement.

3. Where an instrument intended as an agricultural lien contains, on its face, the statutory requisites, except that it does not show whether the advances were made before or after the agreement, evidence to show that the furnishing was subsequent to the execution of the lien would not *contradict* the written instrument.

ACTION, tried at Spring Term, 1896, of TYRRELL, before *Robinson, J.*, and a jury, on appeal from a judgment of a justice of the peace. There was a verdict for the defendant, and from the judgment thereon plaintiff appealed. The facts appear in the opinion of *Montgomery, J.*

Pruden, Vann & Pruden and W. J. Griffin for plaintiff (appellant). Blount & Fleming for defendant.

MONTGOMERY, J. On 10 March, 1894, David Alexander executed a paper-writing to the plaintiff, who had it registered ten days afterwards, in the following words and figures: "I, David Alexander, of the
(47) county of Tyrrell, am indebted to J. C. Meekins, Sr., of said county in the sum of $250, for which he holds my note, to be due on 1 December, 1894 (said note having been given for money and fertilizers to enable said Alexander to cultivate a crop this year, 1894, on the lands on which he lives, in Tyrrell County), and to secure the payment of the same I do hereby convey to said Meekins these articles of personal property, to wit: All the crop of cotton or corn that I may cultivate, or cause to be cultivated this year, 1894, on the lands on which I live, in said county, Scuppernong Township, which land is known as the Ed. Davenport land, commonly known as the "Woodlawn Farm," and adjoining lands of Alfred Alexander, Andrew Bateman, and others, about 100 acres of said crop, all of which crops are not otherwise encumbered.

"But on this special trust: That if I fail to pay said debt and interest on or before the first day of December, 1894, then he may sell said property for cash, first advertising the same for twenty days at the courthouse, and two other public places in said county, naming the time and place of sale, and applying the proceeds of such sale to the discharge of said debt and interest on the same, and should there be a surplus of such sales in his hands after paying said debt, he shall apply the same to the credit of a note he holds against me, which note was made to A. G. Walker, and by him assigned to said Meekins.

"Given under my hand and seal, this 10 March, 1894.

"DAVID ALEXANDER. (SEAL.)"

Three months after the execution of that instrument Alexander executed to the defendants an agricultural lien upon the same crops conveyed in the paper-writing executed by Alexander to the plaintiff. The defendant took into his possession and converted a part of the (48) crop, and this action was brought by the plaintiff to recover the value of the same, the plaintiff alleging that he is entitled to it under his lien. The recovery is resisted by the defendant on the ground that his (defendant's) lien is the superior one. The question then is, can the instrument under which the plaintiff claims be upheld as an agricultural lien under section 1799 of The Code? If it can be, then the plaintiff ought to recover, if not, he can not. It is contended by the defendant that the form of the instrument is that of a chattel mortgage with a power of sale, and that therefore no statutory agricultural lien arises, or was intended by the parties thereto. Such, indeed, is the form of the paper-writing, but words are used therein which show a purpose to give effect to the statute, to wit, "(said note having been given for money and fertilizers to enable said Alexander to cultivate a crop this year, 1894, on the lands on which he lives in Tyrrell County)." And this Court has said in *Townsend v. McKinnon,* 98 N. C., 103, that "no particular form of agreement is prescribed whereby the lien is created. When, therefore, it embodies the requisites prescribed, and the intent of the parties to create the lien contemplated by the statute is clear, whatever the form, the lien at once arises. In such cases the agreement, though it have the form of a chattel mortgage, must be so treated as to effectuate the intent of the parties, and, in connection with and under the statute, the latter becomes a part of it, directs the intent, and gives character to the lien." The requisites prescribed to create the lien are: (1. That the advances must be in money or supplies; 2. To the person engaged or about to engage in the cultivation of the soil; 3. After the agreement is made; 4. To be expended in the cultivation of the crop made during that year; 5. And the lien must be on the crop of that year).

(49) *Clark v. Farrar,* 74 N. C., 686. In addition, the amount to be advanced is to be set out in the agreement, which was done in this case. The instrument itself shows on its face that the requisites have been complied with, except that it is not stated therein that the supplies were furnished *after* the agreement was made. The plaintiff offered to show this by witnesses, but the Court refused the testimony, and the plaintiff excepted. The exception is sustained. The statute does not require that the agreement should state that the supplies were furnished after the agreement had been made. And it is competent to show that fact by proof *de hors. Reese v. Cole,* 93 N. C., 90.

The instrument recites that the note was given for supplies "to make a crop," without stating whether they had already been furnished or were to be thereafter furnished (and from the date the latter is probable), and hence the evidence to show the furnishing after the lien was executed would not contradict the written instrument.

NEW TRIAL.

---

(50)

STATE ON THE RELATION OF J. H. BLOUNT, SOLICITOR, v. W. S. SIMMONS AND COMMISSIONERS OF PAMLICO COUNTY.

Costs—Liability of State—Judgment Against State.

Upon the failure of the litigation, the State is, under section 536 of The Code, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the solicitor, and judgment may be rendered in such action against the State for such costs. *Quœre,* as to how the judgment will be satisfied.

ACTION by the State on the relation of the Solicitor of the district to vacate an oyster bed entry under Laws 1893, chapter 287, section 4, pending in PAMLICO Superior Court.

At Fall Term, 1894, upon the hearing, the Court being of opinion, on the authority of *S. v. Spencer,* 114 N. C., 770, that the plaintiff was not entitled to recover, the plaintiff submitted to a nonsuit, and on its motion judgment was entered against the county of Pamlico for the costs of the action. From said judgment the county of Pamlico (having been made a party for that purpose) appealed to the Supreme Court, and on appeal said judgment was reversed as to taxing the costs against Pamlico County. *State on relation Blount v. Simmons,* 118 N. C., 9. On the hearing upon the certificate of the Clerk of the Supreme Court at Spring Term, 1896, of PAMLICO, *Robinson, J.,* on motion of counsel for defendants and the officers of the Court, rendered the following judgment, to wit:

"The Supreme Court having adjudged that so much of the judgment heretofore rendered as taxed the costs against the county of Pamlico was erroneous, it is, thereupon, on motion of Simmons & Ward, attorneys for the officers of the Court and the defendants, adjudged that the county of Pamlico is not liable for the costs, and further, that the State of North Carolina do pay the costs of this action, to be (51) taxed by the Clerk, and that the Clerk's office do recover of the State of North Carolina the costs. It is further ordered that W. J. Leary, present Solicitor, be added as a relator."

Plaintiff excepted to the judgment, and appealed, assigning as error the part of said judgment that taxes the State of North Carolina with the costs.

Attorney-General for plaintiff.
Simmons and Ward for defendants.

FAIRCLOTH, C. J. This action was authorized by Laws 1893, ch. 287, sec. 4. It has been held that the defendant is not liable for the cost consequent upon the failure of the action. *Blount v. Simmons,* 118 N. C., 9. His Honor below entered judgment against the State for the costs of the action, and the State has appealed. Is the State liable for the costs of its own action unsuccessfully prosecuted?

It is urged that no citizen can maintain an action against the State, and that is true. *Battle v. Thompson,* 65 N. C., 406. But this is not an action *against* the State, it is an action *by* the State, and the State has declared by its own legislation that in such cases it shall be liable for costs to the same extent as private parties. Code, sec. 536. The Attorney-General insists that the State can not be sued in any case, by reason of its sovereign character, and because the Constitution, Art. IV, sec 9, provides a remedy. That article is a relaxation of the rule that the State can not be sued, and enables the citizen to obtain the opinion of the Supreme Court as a recommendation to the Legislature, and no more. The application to the Court can not result in a judgment for the claim of the citizen. The costs in this case are (52) not strictly a claim against the State, as contemplated by article IV, sec. 9, but only an incident of an action by the State for which its agent has assumed that it will be liable to the same extent as private parties. We find nothing in the Constitution depriving the Legislature of power to enact, Code, sec. 536, and we do not think it will impair the sovereign character of the State to meet its just liabilities, whether in the form of costs or otherwise.

How the judgment will be satisfied is a question not now before us.

AFFIRMED.

Cited: Wikel v. Comrs., 120 N. C., 452; *Garner v. Worth*, 122 N. C., 253; *White v. Auditor*, 126 N. C., 612; *Miller v. The State*, 134 N. C., 271.

WILLIAM H. HUGHES v. W. W. LONG.

Void Probate—Certificate of Clerk—Notary Public Acting After Expiration of Term—Officer—De Jure and De Facto—Presumption—Rebutting Evidence.

1. The adjudication by the Clerk of the Superior Court that a certificate of probate is correct and sufficient is presumptively true, but such presumption may be rebutted by competent evidence.
2. Acts of *de facto* officers, who exercise their office for a considerable length of time, are as effectual when they concern the rights of third persons or the public as if they were officers *de jure*, but to constitute one an officer *de facto* there must be an actual exercise of the office and acquiescence of the public authorities long enough to cause, in the mind of the citizen, a strong presumption that the officer was duly appointed.
3. When it appears or is admitted that an act was not done by an officer *de jure*, it is incumbent upon the party relying upon the validity of his acts to show that he was an officer *de facto*.
4. Where, in the trial of an action, the probate of an instrument became material, it appeared that it was taken by one who had formerly been a notary public but whose commission had expired two years before, and there was no proof that he had at any other time during that period exercised the office, or that he was recognized as such an official in the community in which he lived: *Held*, that the probate was void and the certificate of the clerk adjudicating its correctness and the order of registration were invalid.

ACTION for the foreclosure of a mortgage, tried before *Robinson, J.*, at September Term, 1896, of WARREN, a jury trial being waived. The pertinent facts appear in the opinion of *Faircloth, C. J.* His Honor held that the probate of the mortgage upon which the plaintiff relied was void, and that the instrument had not been legally admitted to registration. There was judgment for defendant Richardson, and plaintiff appealed.

Cook and Green for plaintiff (appellant).
B. M. Gatling and R. O. Burton for defendant Richardson.

FAIRCLOTH, C. J. The plaintiff instituted this action to foreclose a mortgage executed to him by W. W. Long, on 21 January, 1891, convey-

ing a piece of land "known as a part of the Tom Thompson Alston tract," containing 613 acres, and described by the adjacent lands of other parties. This deed purports to have been registered in Warren County on 21 January, 1891.

On 20 February, 1890, said Long had executed to A. R. Shattuck a deed of trust to secure the British and American Mortgage Co., including "all those tracts or parcels of land lying in one body in (54) the counties of Warren and Halifax of which the late Samuel A. Williams was seized and possessed at the time of his death," bounded by the adjacent lands of other parties, containing 7,000 acres more or less. This deed was duly registered in Warren County 18 September, 1890.

This deed of trust, being of prior date and registration, would have precedence, provided it embraced the land conveyed in the mortgage deed to the plaintiff.

In an action to which the plaintiff was not a party, to foreclose the said trust deed, a sale was ordered, the land was sold in parcels, and one piece containing 1,344 acres was sold and purchased by the defendant, A. L. Richardson, and deed made accordingly. It was admitted on the trial that the land in controversy was owned by Samuel A. Williams at his death, and by W. W. Long at the date of the deed of trust. Section 16 of the answer avers that the lands claimed by the plaintiff are a part of the said 1,344 acre tract. At the trial a jury trial was waived and the Court was permitted to find the facts, and his Honor, among his findings of fact, finds that said section 16 of the answer is true, and adjudged that the defendant Richardson is the owner of the land in controversy. The defendant further contends that the plaintiff's mortgage deed has never been registered. The facts appearing in the record are as follows: The probate was taken before Douglass Williams on 23 January, 1891, who was appointed a notary public on 8 February, 1887. His commission expired on 8 February, 1889. On said probate the clerk of the Superior Court passed as follows: "State of North Carolina, Warren County—The foregoing certificate of Douglass Williams, a notary public of Warren county, is adjudged to be correct and sufficient. Let the instrument with the certificate be registered." Under the maxim *omnia presumunter bene gesta,* etc., which means that where the officer has (55) power by law to decide a question the decision is to be taken as true, and every presumption is to be made in support of it, unless rebutted by proper proof, so that the question of the validity of the certificate is left open, and where there is a want of authority the above maxim does not apply, and the absence of authority or jurisdiction may be shown *aliunde,* as it would be strange if a usurpation of authority could not be met by proof.

It is conceded in the case before us that Douglass Williams, at the time he took the probate of the deed in question, was not an officer *de jure*. Was he an officer *de facto?* The acts of *de facto* officers, acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual when they concern the rights of third persons or the public as if they were the acts of rightful officers. *Gilliam v. Reddick,* 26 N. C., 368. There may be some doubt in different cases what shall constitute an officer *de facto*. The mere assumption of the office by performing one or several acts, without any recognition of the appointing power or the public, may not be sufficient. There must be an exercise of the office and acquiescence of the public authorities long enough to raise in the mind of the citizen a strong presumption that he was duly appointed, so that he might be compelled to attend to the citizen's business and require submission to his authority as an officer. *Burke v. Elliot,* 26 N. C., 355; *S. v. Lewis,* 107 N. C., 967.

On the trial, when the probate of an instrument becomes material, it may be shown or disproved by competent evidence, and the presumption arising from the clerk's decision that "the certificate is correct and sufficient" may in this way be rebutted, and when it appears or is ad-
(56) mitted that the act was not done by an officer *de jure*, it is then incumbent on the party offering the instrument to show that he was an officer *de facto*. In the present case, there is no proof nor any attempt to prove that Douglass Williams, for a period of nearly two years after his commission expired, attempted any act as a notary public until in the present case, nor does it appear in any manner that he was recognized in the community in which he lived as such an official.

There are other exceptions in the record and other questions argued before us, but we need not consider them, as what we have said disposes of the appeal.

AFFIRMED.

Cited: Whitehead v. Pittman, 165 N. C., 91; *Spruce Co. v. Hunnicutt,* 166 N. C., 207; *Ferebee v. Sawyer,* 167 N. C., 204.

J. H. CRABTREE ET AL. v. C. J. SCHEELKY ET AL.

Appeal—Practice—Consent Orders.

1. Findings of fact as to whether land sold at judicial sale brought a full and fair price are not reviewable on appeal.
2. A consent order that judgment of confirmation of a judicial sale may be entered up in vacation, and outside the county where the action is pending, is valid, as also an agreement that motion for such confirmation may be made and heard before either the resident or riding judge of the district, at any time or place, either within or without the district, upon certain notice of the time, place, and judge, and a decree entered accordingly is legal and valid.
3. Consent orders, waiving objection to venue, when a court has general jurisdiction of the subject-matter, are valid, independent of ch. 33, Acts of 1883 (sec. 337 of The Code), which provides expressly that such orders may be made as to injunctions.

MOTION, on behalf of the plaintiffs, to confirm a sale of certain (57) real estate, heard before *Bryan,* resident Judge of the Second Judicial District, at chambers, in New Bern, on 22 September, 1896, said sale having been made under a judgment rendered in the action at Spring Term, 1896, of CRAVEN, which contained the following clause:

"And it is further ordered, by consent, that in case of a sale the Commissioner shall report the same to the resident judge, or the judge riding in the district, and a motion to confirm the said sale may be made before said judge at chambers, at any point in or out of said district and county of Craven, upon a notice of ten (10) days to the defendants, and upon the confirmation of said sale or sales, and the payment of the purchase-money, the said Commissioner is hereby authorized, instructed and empowered to make title to the purchaser or purchasers thereof for said land. And the Commissioner is authorized to employ a surveyor to definitely lay off said lots."

The defendants resisted the motion for confirmation of the sale upon the ground that the price bid was not a full and fair price, and offered affidavits to that effect, in opposition to affidavits offered on behalf of the plaintiffs to the effect that the price was fair, etc. His Honor confirmed the sale, and defendants excepted and appealed.

M. D. W. Stevenson and Clark & Guion for plaintiffs.
W. D. McIver for defendants (appellants).

CLARK, J. The finding of fact that the land at the sale under judicial decree brought a full and fair price is not reviewable on appeal. *Trull v. Rice,* 92 N. C., 572; Clark's Code (2 Ed.), pp. 567, 568, and Supp. to same, p. 85.

The consent order that judgment of confirmation might be entered up in vacation and outside the county was valid. *Skinner v. Terry,* (58) 107 N. C., 103; *Bank v. Gilmer,* 118 N. C., 668. The further agreement that motion for such judgment might be made either before the judge riding the district or the resident judge thereof, upon ten day's notice of the time, place and judge, was likewise valid. The resident judge had general jurisdiction, and his exercising it in this case was not a defect of jurisdiction, which can not be conferred by consent, but an objection to the venue, which is waived unless objected to. The parties having consented to the resident judge hearing the motion can not be heard to except. The Act of 1883, ch. 33, now The Code, sec. 337, expressly provides that such consent orders may be made as to injunctions (*Hamilton v. Icard,* 112 N. C., 589); but we take it that consent orders, waiving objections to the venue, when a court has general jurisdiction of the subject-matter, are valid, independent of that statute, and applicable in all cases. Practically, this must often be a convenience to suitors and counsel and, as such course can only be taken by consent, we can not see that any hardship therefrom is likely to arise.

AFFIRMED.

Cited: Cooper v. Cooper, 127 N. C., 493.

(59)

M. GOLDBERG & SONS ET AL. v. SOLOMON COHEN ET AL.

Action to Set Aside Fraudulent Conveyance—Fraudulent Conveyances—Presumption—Relationship of Parties to Deed—Badges of Fraud—Instructions.

1. If a transaction is secret and exclusively between near relations, the law imposes upon an insolvent member of the family who disposes of his property under such circumstances the burden of rebutting the presumption of bad faith.

2. In the trial of an action to set aside a deed of assignment as fraudulent, it was not error to instruct the jury that the purchase of a stock of goods at an assignee's sale by a brother of the assignor, and the placing them in the hands of another brother who was insolvent, and whose transactions in connection with the stock of goods both before and after the assignment were suspicious, were badges of fraud, since these circumstances, together with his near relationship to all the parties, tended to show the purchaser's entrance after the assignment into a conspiracy which had been formed by other members of the family, including the assignor, in contemplation of a fraudulent assignment of the property.

GOLDBERG *v.* COHEN.

ACTION, tried before *Graham, J.*, and a jury, at February Term of CRAVEN, for the purpose of setting aside and declaring fraudulent and void a deed of assignment executed by the defendant, Sol. Cohen, to defendant, P. H. Pelletier. The defendants, except J. Pizer, filed a joint answer, verified by Sol. Cohen. The defendant, J. Pizer, filed his separate answer, verified 21 January, 1896.

The following issue was submitted to the jury:

"Was the deed of assignment from Sol. Cohen to P. H. Pelletier, assignee, executed with intent to hinder, delay and defraud the creditors of Sol. Cohen, as alleged in the complaint?" Answer: "Yes."

Upon the trial the plaintiffs offered in evidence the examination of Sol. Cohen and P. H. Pelletier before the Clerk of the Court, under section 580, etc., of The Code. The plaintiffs introduced (60) evidence tending to show that Sol. Cohen was insolvent, and that he had no property except the assigned stock, which was insufficient to pay the preferred creditors; that he had started in business only 12 months before the assignment; that just prior to the assignment he had drawn numerous drafts in favor of his creditors, the plaintiffs, upon himself, which drafts were either never accepted, or, if accepted were not paid; that while in business he had sold on a credit from his stock of goods large amounts to his insolvent mother, Eliza Cohen, Sr., and his insolvent brother, W. H. Cohen, aggregating $6,191.42; that he had made fraudulent statements to his creditors to obtain some of the goods; that he had purchased large quantities of goods just prior to his assignment, from 15 August, 1894, up to the very date of the assignment, to wit, over $4,000 worth of goods; that just prior to his assignment he had also borrowed large amounts of money, to wit, over $2,500; that he had on hand, according to his inventory, on 1 August, 1894, $12,500; and that at the time of his assignment, according to the inventory of his assignee, he had on hand only a little over $6,500 in merchandise; that some goods were moved from his store just prior to his assignment, and after his assignment and after the sale of the stock of goods to Lee Cohen by the assignee were returned thereto, in broken packages; that Lee Cohen, his brother, the purchaser of the stock from his assignee, P. H. Pelletier, was not in the State of North Carolina at the time of his purchase, and had never been at the store and his place of business since his purchase, the stock being in the charge and custody of W. H. Cohen, another brother of the assignor, Sol. Cohen; that Sol. Cohen, Lee Cohen and W. H. Cohen were brothers, and Eliza Cohen, Sr., (61) was their mother; and that much evidence tending to prove fraud on the part of Sol. Cohen in making the assignment. The defendants introduced no testimony. There was no exception to the evidence. During the argument of the case before the jury L. J. Moore, one of the

attorneys for the plaintiffs, was proceeding to comment to the jury upon the failure of the defendants to put the defendant, Sol. Cohen in person, upon the stand at the trial to rebut the testimony of fraud in the assignment. The defendant's attorney interrupted Mr. Moore, requesting that the court require him to desist, as the plaintiffs had introduced Sol. Cohen's written examination in evidence. Mr. Moore stated that while he believed he had the right to comment upon Sol. Cohen's failure to testify at the trial orally in his behalf, to rebut the evidence of fraud, if the attorneys for the defendants objected he would desist from such comment, and he did so desist.

No ruling of the Court was insisted upon by the counsel on either side, and no further objection and no exception was made by the defendant's counsel at any time.

The court recapitulated and arrayed the evidence upon each point and explained the law applicable thereto. Among other things the court charged the jury that there was no evidence of fraud on the face of the deed, and there was no direct testimony to the perpetration of a fraud, but the plaintiffs claim to have furnished certain badges of fraud from which the jury would be justified in finding that the deed of assignment was executed with intent to hinder, delay and defraud plaintiffs and other creditors of said Sol. Cohen.

A "badge of fraud" is a fact calculated to throw suspicion on a transaction, and calling for an explanation. "Badges of fraud"
(62) afford an inference from which the jury are authorized to conclude that a transaction surrounded by them is fraudulent. They do not of themselves constitute the fraud. Almost any unusual and suspicious act accompanying or relative to the transaction may constitute a badge of fraud. But it is for you to say, first, whether these suspicious circumstances or "badges of fraud" have been proved. The plaintiffs claim to have shown you that during twelve months prior to the deed of assignment Sol. Cohen sold on a credit to his mother Eliza, who was insolvent, a married woman and not a free trader, and to his insolvent brother, W. H. Cohen, large quantities of goods; that just prior to his assignment, Sol. Cohen the defendant, drew numerous drafts on himself and sent them to his various creditors, which drafts were either not accepted, or, if accepted, were not paid when due; that just prior to the deed of assignment goods in unbroken packages were removed from the store of Sol. Cohen to a store across the street, and there kept until after the alleged sale by the assignee, Lee Cohen, a brother of the defendant, and then returned, still unbroken, to said store; the relationship of the parties, one being the mother and the other two brothers of the defendant Cohen, and the insolvency of all of them, and that Lee Cohen, who is alleged to have purchased the stock of goods from

the assignee, has not been in the State, but that the goods were placed in the possession of W. H. Cohen, the other insolvent brother of Sol. Cohen; the statement of defendant and other creditors in August and September, prior to his assignment, as to his financial condition, alleging that he was worth $11,000 net; the large amount of goods alleged to have been on hand in July and August, and the amount purchased between the time and the date of the assignment, together with the money alleged to have been borrowed shortly before the assignment, (63) and the small amount of goods on hand at date of assignment.

I charge you if you believe these circumstances to have been proven, taken together with the insolvency of the defendant, if you believe that, then they are "badges of fraud" from which, together with the other evidence in the case, you may infer the intent of the defendant in executing the deed of assignment. But if you believe the "badges of fraud" to have been proven, still if you believe that at the time of the execution of the deed of assignment the defendant did not have the intent to hinder, delay or defraud his creditors, or some of them, you will answer the issue "No."

There was a verdict for plantiffs. Motion for a new trial; motion denied; judgment and appeal by defendants who assign as error:

"1. The Court permitting counsel for plaintiffs to comment upon the failure of defendants to put Sol. Cohen upon the stand as a witness.

"2. In charging the jury that the alleged dealings between Sol. Cohen, his mother and brothers, all being insolvent, was a 'badge of fraud.'

"3. In charging the sale to his mother and brother, W. H. Cohen, on a credit, they being insolvent, of large amounts of goods shortly before the assignment was a 'badge of fraud.'

"4. In charging that Sol. Cohen's drawing many drafts upon himself just before his assignment, and sending them to his creditors, and said drafts not being accepted or paid when due was a 'badge of fraud.'

"5. In charging that Lee Cohen, who is alleged to have purchased the goods, did not come to this State, but put W. H. Cohen, the other insolvent brother, in charge of the goods, was a 'badge (64) of fraud.' "

The testimony of Mr. Pelletier was as follows:

"I am the assignee of Solomon Cohen. Took charge of the stock about ten minutes after the assignment was filed. My inventory filed in this court shows exactly what the consignment consisted of. Began to make sales of stock ten days after the registration of the assignment. I began the sale of stock on Saturday the 29 December, 1894. I mean by this the retailing of the stock of goods.

"On 7 March, 1895, I sold the balance of stock at public auction after public notice in the *New Bern Journal.* Lee Cohen was the

purchaser at the price of 45 cents in the dollar. Lee Cohen, the purchaser, is the brother of Solomon Cohen, I think.

"The sum total of the amount received for the goods and accounts sold to Lee Cohen on 7 March, 1895, received by me as assignee, was $2,697.35, as shown by my account filed.

"The sales by retail, including the amounts collected on account prior to the sale in bulk to Lee Cohen, amounted to $914.97, as shown by my account current filed.

"On the day I commenced the sale of the goods, 29 December, 1894, the summons in this action and a copy of the complaint was served on me. I had notice of everything alleged in the papers.

"I am the attorney, director, and stockholder in the Farmers and Merchants Bank of New Bern, N. C.

"I think Solomon Cohen is a cousin to Mrs. M. E. Sultan. Eliza Cohen, Sr., is Solomon Cohen's mother. W. H. Cohen is his brother.

(65) "I had Mr. Frank Hyman, who was in charge of the business for me, at work collecting the accounts from 29 December, 1894, to 7 March, 1895, when I sold the stock to Lee Cohen. He collected altogether about 50 or 60 dollars."

The other testimony is immaterial.

C. R. Thomas for plaintiffs.
Clark & Guion and W. D. McIver for defendants.

AVERY, J. The assignment of error upon which counsel for defendants relied on the argument was especially the last, in the order in which they appear in the statement of the case on appeal. If the court had charged the jury that the purchase of the remnant of the stock of goods at public auction, and through an agent of one Lee Cohen, of New York, the brother of the assignor, and the placing of another brother, W. H. Cohen, in charge of the goods purchased, considered apart from all other proportions of the testimony, constituted a badge of fraud, such instruction would have been clearly erroneous. *Banking Co. v. Whitaker,* 110 N. C., 345. But circumstances, which of themselves are not sufficient to arouse just suspicions of fraud, very frequently, when considered, as it is proper to do, in their relation to other portions of the evidence, are calculated to challenge close scrutiny into the good faith of a party to an alleged fraudulent transaction. Thus, the sale of goods by an assignor for the benefit of creditors to an insolvent clerk or brother who pays no money, but gives his note, though it does not raise a presumption of fraud, and may be consistent with honesty of purpose without further explanation, is nevertheless calculated to excite suspicion and is therefore deemed a badge of fraud. *Beasley v. Bray,* 98 N. C.,

266. The sale by the assignor, Sol. Cohen, who was then insol- (66) vent, during the year preceding the assignment to his mother, a married woman, who was then incapable of binding herself by contract, and to his insolvent brother, W. H. Cohen, of large quantities of the goods on credit, and the removal of large quantities of goods to a room just across the street before assignment, together with the bringing of the same back to the store after Lee Cohen had placed W. H. Cohen in charge, and in packages still unbroken, were all circumstances pregnant with suspicion, and, if believed by the jury, invited scrutiny. The evidence of the near relationship of Lee Cohen to the assignor, and to W. H. Cohen and the mother, considered in connection with his entrusting the goods to another near relative of the assignor, who, after being already under suspicion for transactions prior to the assignment, subsequently covinously brought back goods which had been fraudulenty concealed and made them a part of the common stock claimed under the purchase for his brother Lee, was properly called to the attention of the jury as a badge of fraud, in the sense that in the light of the surrounding circumstances it gave stronger color to the suspicion that overhung the conduct of the assignor and his near relations, both before and after the assignment. True, the purchase by the absent brother, after the asignment was a fact accomplished, was of itself no evidence of fraud, but his entrusting the management of the goods to a brother whose previous conduct had been suspicious and whose subsequent management of the stock was covinous, tended to show that the concealed goods were brought into the store after, but in pursuance of, a conspiracy to cheat, entered into before the assignment. It is not just to the trial judge to detach a part of a sentence, or an entire sentence in that portion of the charge enumerating the facts relied on to show the fraud, and insist that the judge meant, or the jury (67) understood, that every single fact mentioned of itself constituted a badge of fraud. If a transaction is secret and exclusively between near relations, the law, under a familiar rule of evidence, where the circumstances are known only to those parties present, imposes upon an insolvent member of the family, disposing of his property under such circumstances, the burden of rebutting the presumption of bad faith. *Helms v. Green,* 105 N. C., 251. In *Bank v. Bridgers,* 114 N. C., 383 the court said: "The evidence of near relationship between the parties to a suspicious transaction often constitutes additional evidence of fraud for the jury," but was not *prima facie* evidence of fraud. *Bank v. Gilmer,* 116 N. C., 684. While Lee Cohen was not a party to the assignment, nor present when it was executed, yet his purchase of the residue of the stock, and turning it over to an insolvent brother whose conduct was so suspicious before and after the execution of the deed,

together with his near relationship to all of the other parties, tended to show his entrance after the assignment into a conspiracy to defraud creditors, formed by other members of the family, including the assignor, in contemplation of making a fraudulent disposition of the property.

While counsel did not abandon, he did not insist upon the other assignments of error. They have been carefully considered, however, and are all without merit. As they would have been disposed of by a *per curiam* but for the exception already passed upon, it is not necessary to discuss them in detail. In defendant's appeal the judgment is affirmed.

NO ERROR.

---

(68)

N. GOLDBERG & SON ET AL. v. SOLOMON COHEN ET AL.

Action to Set Aside Fraudulent Assignment—Creditor's Bill—Parties Defendant Becoming Plaintiffs Entitled to Share Fruits of Recovery.

1. A creditor who is made a defendant in a creditors' bill to set aside a common debtor's deed of assignment as fraudulent may become a plaintiff by conforming to the usual requirements, and, by concurring in and actively aiding the establishment of the allegations of the complaint, becomes entitled to share in the fruits of the recovery. (*Hancock v. Wooten*, 107 N. C., 9, distinguished.)

2. Where, in a suit begun in December, 1894, by creditors to set aside a deed of assignment as fraudulent, P., a preferred creditor in the deed, was made a party defendant in 1895, after having himself begun an independent action attacking the deed as fraudulent, and filed an answer in 1896, in which he disclaimed any purpose to claim under the deed and concurred in the allegations of the complaint, except such as assailed the *bona fides* of his debt, and was allowed to become a plaintiff as other creditors who had come in after the commencement of the action, and thereupon the plaintiffs withdrew their attack upon P's debt and accepted his active participation in the prosecution of the suit, in which the only issue related to the fraudulent character of the deed: *Held*, that P. was entitled to be treated as a party plaintiff and to share *pro rata* in the recovery upon setting aside the deed.

General creditor's bill, tried before *Graham, J.*, and a jury, at February Term, 1896, of CRAVEN.

The summons was issued 29 December, 1894, returnable to February Term, 1895, and complaint was filed at date of issuing summons; Jacob Pizer was made party defendant in said summons and complaint, but service was not then made upon him. At February Term *alias* summons, and at May Term, 1895, *pluries* summons was issued, and

service made by publication, and at Fall Term, 1895, time was (69) allowed said Pizer to file answer as of that term. At February Term and May Term, 1895, additional parties plaintiff were made and an amended and supplemental complaint was filed. Jacob Pizer is a preferred creditor in the deed of assignment set out in the complaint.

On 1 August, 1895, said Pizer instituted a separate action against defendant Cohen to set aside the deed of assignment upon the grounds of fraud.

At February Term, 1896, said Pizer filed an answer in this case, disclaiming any participation with Sol. Cohen in the fraud alleged to have been perpetrated, and asking that he be made party plaintiff and allowed to assist in the prosecution of this case to set aside the deed of assignment, which motion was allowed, and his counsel thereupon, all through the trial, sat with the counsel for other plaintiffs and rendered efficient assistance in examination of witnesses and the argument of the case to the Court and the jury. When the trial was called and pleadings read the plaintiffs withdrew all allegations in their complaint raising issues with defendants' answer, he having withdrawn his denial of their claims, and only the issue of fraud was submitted to the jury.

The counsel for the plaintiff stated that while they had no objection to such assistance as the defendant Pizer might render, they wished to give notice, before the trial, that they claimed priority in any recovery that might be had, and denied the right of Jacob Pizer to share *pro rata* with them, by reason of the fact that they had made themselves parties and instituted their creditors' bill as aforesaid prior to the time that Pizer instituted his separate creditors' bill or filed his answer in this action.

The Court stated that the question of priorities, being one of (70) law, would be determined by the Court in rendering judgment.

The jury rendered a verdict in favor of the plaintiffs; plaintiffs tendered a judgment giving plaintiffs, exclusive of Pizer, a first lien upon all money and property described in the deed of assignment from Sol. Cohen to P. H. Pelletier, and giving Jacob Pizer a second lien upon the same, which the court declined to sign, and rendered judgment permitting Pizer to share *pro rata* with the others.

Plaintiffs excepted and appealed.

C. R. Thomas for plaintiffs.
Clark & Guion and W. D. McIver for J. Pizer.

AVERY, J. This is the appeal of the other plaintiffs from so much of the judgment as allows Jacob Pizer to share equally with the creditors who instituted the suit. Jacob Pizer was preferred as a creditor of the

second class in the deed of assignment which the suit was brought to set aside as fraudulent. The summons was issued by the other plaintiffs on 29 December, 1894, and the complaint was filed on the same day, Jacob Pizer being named in both as a party defendant. *Alias* and *pluries* summons and publication were resorted to before Jacob Pizer was brought into court at the Fall Term, 1895, when further time was allowed him to answer. Pizer had meantime instituted a second action on 1 August, 1895, to set aside the same assignment as fraudulent, though he was preferred therein in the second class. At February Term, 1896, Pizer filed his answer, in which he set forth that he was debarred from joining in the suit in December, 1894, because the other plaintiffs in their complaint charged that his claim was fraudulent. He disclaimed any purpose to claim under the deed, and an-
(71) nounced his concurrence in the complaint, except in so far as it assailed the *bona fides* of his debt. Meantime, accepting the invitation of the original plaintiffs, Emigh & Dobdel, Hartman & Richards, Wallace, Elliot & Co., Wm. Everett House and others were allowed to come in at February Term, 1895, and make themselves parties. Of the number then allowed to make themselves parties plaintiff, judgment of nonsuit was entered against Mark H. Cohen at the Spring Term, 1895, for failure to contribute to the expenses of the action. But on the coming in of Pizer's answer, he not only disclaimed any purpose to uphold the deed, but concurred in the charge that it was fraudulent, and asked to be made a party plaintiff, and the court on motion ordered that he be allowed to come in as plaintiff, after which order he personally and through his counsel actively participated in the conduct of the suit up to the rendition of the verdict on the issue as to the fraudulent character of the deed. Upon the trial the other plaintiffs withdrew all allegations in the original complaint that Pizer's claim was fraudulent, for the reason that he had withdrawn all objections to their claims, and only the issue mentioned was finally submitted because of that understanding.

The relation sustained by Pizer to the original plaintiffs, therefore, was very widely different from that occupied by Wooten, in *Hancock v. Wooten,* 107 N. C., 9, which the plaintiffs seem to rely on in support of their contention.

1. Pizer was allowed on motion, to which there appears to have been no objection, to become a plaintiff instead of a defendant. The original plaintiffs entered no exception, as they might have then done, and in the exercise of due diligence ought to have been done, but on the contrary availed themselves of the assistance rendered by him, and treated him in all respects as they did Emigh & Lobdell and other parties who
(72) accepted their invitation and joined in the prosecution of the

action on motion and order at February Term, 1895, and went so far as to withdraw their attack on his claim for the purpose of securing his coöperation on the trial of the issue of fraud. It is manifestly too late now to object to Pizer's sharing the fruits of the recovery, which he has the same right to claim as those plaintiffs who began to contribute under an order of the Court in February, 1895, and continued to be parties till after the hearing. Having treated the suit as a general creditors' bill by recognition of the others, who asked to come in, it is too late now for the original plaintiffs, and those who joined them by leave of the court up to the February Term, 1895, to set up a claim to the whole fund acquired by the assistance of another party, whose help they seemed so anxious to have that they admitted, what they had previously questioned, the *bona fides* of his claim. Whatever may be the last moment at which a creditor can be admitted as a party plaintiff, as a rule, in view of all the circumstances, the plaintiff appellants can not, in the face of the invitation and orders mentioned, avail themselves of the exception against a co-plaintiff because he has been permitted to change from an adversary to an assisting party. Pizer, in every aspect of the question, came in without objection and in apt time. *Dobson v. Simonton,* 93 N. C., 268.

2. The principle laid down in *Wooten v. Hancock, supra,* was that the creditors, who attacked a deed of assignment and succeeded in having it set aside for fraud, are entitled to share *pro rata* in the recovery, and are entitled to the preference over other creditors who either fail to become parties at all, or, as parties defendant, unite with the assignor in defense of the fraudulent assignment. 107 N. C., at p. 19, the Court said, "He (Wooten) has never abandoned his adverse position, and is even now insisting upon a new trial (73) upon the issue involving the validity of the trust." Upon the issue of fraud Pizer was actively assisting the affirmative, while Wooten fought against the finding that the deed was fraudulent, even upon the hearing in this Court.

Without entering further into the discussion of the doctrine laid down in *Hancock's case, supra,* it is sufficient to say that Pizer must be treated just as if his name had appeared as a plaintiff instead of as a defendant in the original summons issued 29 December, 1894.

NO ERROR.

Cited: Williams v. R. R., 126 N. C., 921.

JOSEPH L. HAHN v. ROBERT G. MOSELY.

Code, Section 433—Indexing Judgments—Administrator—Payment of Taxes and Insurance.

1. The purpose of Code, section 433, requiring index and cross-index of docketed judgments, being to facilitate the search for encumbrances created by such judgments, each of several judgment debtors must be specifically mentioned, but the name of only one of several plaintiffs need be mentioned.

2. Where a judgment, in which recoveries were awarded to divers plaintiffs and for different amounts, was indexed against the defendants, but only in the name of one of the several plaintiffs, such indexing is sufficient to fix an interested person with notice of all that the examination of the judgment itself would have disclosed.

3. Where, in a suit against an administrator who has sold lands of his intestate for payment of debts, the holder of a docketed judgment against the decedent is adjudged to be entitled to the proceeds of the sale of the lands, the administrator is not entitled to retain the amount paid by him for taxes and insurance on the property, but is entitled to commissions on the amount necessary to pay the plaintiff's judgment.

ACTION, tried before *Graham, J.*, at Spring Term, 1896, of
(74) CRAVEN. The defendant administrator had sold certain land of his intestate for the payment of debts, and held the proceeds, out of which the plaintiff sought by this action to have paid his judgment rendered and docketed against the decedent in his lifetime. The administrator claimed the proceeds should be applied to the payment of mortgages which he held and to the reimbursement of himself for taxes and insurance which he had paid.

In an action entitled *"Simmons & Manly v. Isaac Forbes et al.,"* a judgment had been rendered for these plaintiffs and for various other parties (among them the present plaintiff) for different amounts, but the index of the judgment showed a judgment in favor of Simmons & Manly only.

It was admitted that the mortgage under which the defendant claimed the proceeds of sale had been duly executed by the decedent and that the administrator had paid certain taxes and insurance on the property; and further that all debts had been paid excepting the mortgage debt to defendant and the docketed judgment in favor of plaintiff.

His Honor gave judgment for the plaintiff for the amount of the proceeds of sale of the lands, and the defendant appealed, his exceptions being as follows:

"1. Because said judgment rendered in said action of *Simmons & Manly v. Isaac Forbes* and wife and others, in favor of A. & M. Hahn

and George Allen & Co., have never been indexed in the office of the Superior Court of said county on the Index Book of "Judgment Creditors," in the names of said A. & M. Hahn, or George Allen & Co., or properly indexed in said Index Book in the name of any party.

"2. Because said judgment rendered in favor of said A. & M. (75) Hahn or George Allen & Co., in said action of *Simmons & Manly v. Isaac Forbes* and wife and others, has never been docketed in the Index Book of Judgment Debtors in the office of the Clerk of the Superior Court of said Craven County in the names of said A. & M. Hahn, or George Allen & Co., or properly indexed on said Index Book in the name of any person.

"3. Because plaintiff is not entitled to the said judgment rendered by court, because as administrator of said Isaac Forbes, even if said judgment in favor of said A. & M. Hahn, or George Allen & Co., had been properly docketed and indexed, it would have been the duty of the defendant as such administrator to have sold said land and to have his commission as such administrator out of the proceeds of said sale and charges of administration, costs, and expenses of said sale.

"4. Because the defendant is entitled to be reimbursed the amounts of money paid by him for taxes on said land and for insurance premiums."

Clark & Guion for plaintiff.
M. D. W. Stevenson for defendant.

CLARK, J. The object of the statute, The Code, sec. 433, requiring an index and cross-index of judgments, is stated in *Dewey v. Sugg,* 109 N. C., 328, 334, to be that "the inquirer is not required to look through the whole docket to learn if there be a judgment against a particular person. When there are several judgment debtors in a docketed judgment the index should and must specify the name of each one, because the index as to one would not point to all or any one of the others." The docketing creates a lien, and the index and cross-index are provided to facilitate the search for such encumbrances, and hence the name of each defendant must be indexed (*Redmond* (76) *v. Staton,* 116 N. C., 140), but as to the plaintiffs, it is sufficient that one name appear, since that indicates the case in which the encumbrance accrued by judgment against the specified defendant, and by turning to the judgment recorded or the judgment roll in such case the full nature and extent of the judgment will appear. It could serve no purpose to index the names of additional plaintiffs in the same judgment, when there is more than one. In the present instance the index and cross-index showed that a judgment had been docketed in favor

of Simmons & Manly against Forbes and the other defendants named. Had the defendant in this action turned to that judgment as recorded, he would have found its scope and purport and amounts recovered therein and to whom payable. He is fixed with notice of all that an examination of such judgment itself would have disclosed. Though recoveries were adjudged divers parties and for different amounts, they were all embraced in the same judgment, and by virtue of such judgment alone were liens on the property of the defendants therein named. The administrator is not entitled to be reimbursed the taxes and insurance, for these were volunteer payments on his part, but the decree should be reformed below to allow him commissions on so much of the proceeds of the sales of realty as is necessary to be paid on the plaintiff's judgment.

MODIFIED AND AFFIRMED.

Cited: Valentine v. Britton, 127 N. C., 59.

---

(77)

SNOW STEAM PUMP WORKS v. WM. DUNN ET AL.

Practice—Creditor Not Joining in Creditors' Bill—Independent Action—Estoppel.

Where, during the pendency of a creditors' bill, a claimant having two separate debts against the debtors, one an unsecured account and the other secured by mortgage, declined to participate as a party plaintiff, and was not made a party defendant, but asked and was allowed to interplead as to the unsecured account, and, upon the appointment of receivers of the debtors, obtained leave of court to bring and did bring an independent action upon the mortgage debt, and the court twice refused motions of the defendant to consolidate such action with the pending creditors' bill: *Held*, that the plaintiff is not estopped to maintain the independent action upon the mortgage debt by the judgment rendered in the creditors' bill, which did not purport to pass upon such claim.

ACTION, instituted by the plaintiff, to enforce the lien of a chattel mortgage, tried before *Graham, J.*, at May Term, 1896, of CRAVEN. It was agreed by counsel that his Honor should pass upon the questions of law raised by the pleadings, first, as to the defendant's contention that plaintiff is estopped by the judgment in the suit of *Delafield et al. v. Mercer Construction Co.* (118 N. C., 105); and, second, that the chattel mortgage was insufficient as to execution and probate to create a lien against the material therein scheduled. His honor held that the

plaintiff was estopped, as contended by defendants, and rendered judgment accordingly, and plaintiff appealed. The essential facts upon which the contention was based are stated in the opinion of *Associate Justice Clark.*

Allen & Dortch and C. R. Thomas for plaintiff (appellant). (78)
Clark & Guion and M. D. W. Stevenson for defendants.

CLARK, J. The plaintiff held two claims against the defendant, one for an open, unsecured account of $92, the other for $2,573, secured by mortgage. In the creditors' bill, brought by Delafield and others against the defendant, the Snow Steam Pump Co. was not a plaintiff, nor was it made a defendant by service of summons, nor by general appearance either in the action or before the referee. Indeed, the Snow Pump Co., when summoned before the referee, refused to take any part, and, appearing specially, excepted, so there was no ground to hold that the Snow Pump Co. was a party to the Delafield action generally so as to be estopped by any judgment therein. In truth, the Snow Pump Co. asked and was allowed to interplead, but only "as to the $92 claim," the order of *Graves, J.*, reciting "that said Snow Steam Pump Co. be made party defendant for said purpose." For no other purpose and to no other extent was said Snow Steam Pump Co. a party to the Delafield action. Its application to withdraw even that claim was denied by the Court, and hence it is estopped as to the said $92 claim by the judgment in that case, but no further. As to the $2,573 mortgage, which is the subject of this action, the Snow Steam Pump Company was not only never a party in the Delafield action, but when receivers were appointed in that action it applied to the *judge* who appointed the receivers and obtained leave to bring this action against said receivers.

Thus, not only the Snow Steam Pump Co. was never a party to the Delafield action, as to the claim which is the subject of this action, either by service or general appearance, but it appears (to exclude a conclusion) that, on the contrary, during the pendency of that action, it brought the present action, not only with the knowl- (79) edge but with the assent of the judge having jurisdiction of the Delafield action, and said Court twice refused motions by this defendant to consolidate this action with the Delafield action. The Snow Steam Pump Co., not being a party thereto as to this matter, the judgment therein did not purport to pass upon the claim which is the subject of this action, and could not have passed upon it. It is true in the Delafield action, in which this plaintiff was a party as to the $92 claim, it appealed, but on the ground that there should be no final judg-

ment till this independent action and another independent action had been decided. (*Delafield v. Construction Co.,* 118 N. C., 105), thus emphasizing that the subject-matter of this action was not before the Court in the Delafield case so as to be passed upon by the judgment therein. This independent action was not then before the Court, and any reference to it in the former opinion of this Court was merely incidental and *obiter.* In holding that the plaintiff is estopped as to this action by the judgment in the Delafield case there was error. *Jones v. Beaman,* 117 N. C., 259, 263; *Jordan v. Farthing, ib.,* 181, 188; *Temple v. Williams,* 91 N. C., 82. Upon the agreed state of facts the judgment should be entered below in favor of the plaintiff.

REVERSED.

---

(80)

C. J. SCHEELKY v. W. F. KOCH.

Action for breach of Contract—Landlord and Tenant—Lease—Surrender of Lease by Lessee—Rerenting by Lessor.

1. A lessee for a year, with privilege of renewal for a year, who occupies the premises and pays rent therefor for a month into the second year, and then vacates with no understanding that the lease shall be canceled, is bound for the second year's rental.
2. If in such case the lessor rerents the premises to another tenant for a less price than the original lessee contracted to pay, he may recover from the latter the difference between such price and what the original lessee was to pay during the year.

ACTION, commenced before a Justice of the Peace, for the recovery of $44.98, alleged to be due as damages for breach of contract of a lease of certain property in the city of New Bern, heard on apeal before *Graham, J.,* at May Term, 1896, of CRAVEN. It having been agreed by the parties that the Judge might find both the law and the facts, his Honor found the following facts: That the defendant leased from the plaintiff a certain lot of land in the city of New Bern for the term of one year, from 1 February, 1894, with the privilege of one year more, at the monthly rate of ten dollars; that on 28 February, 1895, the defendant vacated the said premises and paid the rent therefor up to 1 March, 1895; that on .....March, 1895, the plaintiff took possession of the premises and rented the same to one J. R. Watson, and continued in the possession thereof up to the commencement of this action; that the plaintiff received as rent for the said premises for the year ending
(81) 1 February, 1896, from the various parties to whom it had been rented, the sum of $76.

Upon the facts found his Honor found as a conclusion of law that the plaintiff was entitled to recover $44.98, with interest from 1 March, 1896, and from the judgment therefor the defendant appealed.

M. D. W. Stevenson and Clark & Guion for defendant (appellant).
No counsel contra.

FAIRCLOTH, C. J. "If the lease had been surrendered with the understanding that it should be canceled" the plaintiff could not recover. *Everett v. Williamson,* 107 N. C., 213, 214. The case stated fails to show any such understanding or consent on the part of the plaintiff.

AFFIRMED.

Cited: Holton v. Andrews, 151 N. C., 341; *Murrill v. Palmer,* 164 N. C., 53.

GEORGE BRANCH v. EDWARD CHAPPELL & SON.

Action on Contract—Tort as Counterclaim—Pleading.

1. Under section 244 (1) of The Code a *tort* can be pleaded as a counterclaim to an action in contract "if connected with the subject of the action."
2. In an action for work and labor done in cutting timber trees, the defendant may plead as a counterclaim damage sustained through the negligence of plaintiff in permitting fire to escape, whereby property was destroyed and expense incurred in preventing greater damage.

(FAIRCLOTH, C. J., and FURCHES, J., dissent.)

ACTION, heard before *Graham, J.,* at HALIFAX, March, 1896, on appeal from judgment of a Justice of the Peace. A jury trial was waived.

The plaintiff claimed $13.05 for work and labor done for defendants. (82)

The defendants set up counterclaim for $15.30 for services of themselves and twenty hands in putting out fire which the defendant alleges was ignited by the carelessness of the plaintiff while cutting lumber in woods for defendants.

His Honor, being of opinion that a counterclaim sounding in *tort* could not be maintained in this action, gave judgment for plaintiff, and defendant appealed.

MacRae & Day and E. T. Clark for defendants (appellants).
No counsel contra.

CLARK, J. The plaintiff sued the defendants for work and labor done in cutting timber trees. The defendants offered, as a counter-

claim, to show that the plaintiff, while so engaged at work for defendants, negligently permitted fire to escape, damaging the defendants, who were put also to much expense to put out the fire to prevent greater damage. The sole question is whether the damage caused by the negligence of the plaintiff while engaged in work for defendants is a counterclaim in an action for compensation for such work.

The spirit of The Code is to prevent multiplicity of actions, and by section 244, subsection (1), a *tort* can be pleaded as a counterclaim to an action either in contract or *tort,* if "connected with the subject of the action." The subject of the action here is cutting timber for the defendants. Injury sustained from carelessness of the plaintiff while doing work for defendants is held to be "connected with the subject of the action," in an action by the workman for his wages. *Eaton v. Wooly,* 28 Wis., 628; *DeWitt v. Cullings,* 32 Wis., 298; 1 Boone Code Pl., sec. 90, (83) n. 1. Among instances somewhat similar to an action by mortgagee after foreclosure sale for deficiency, the mortgagor was allowed to plead a counterclaim for waste committed by mortgagee while in possession. *Smith v. Fife,* 2 Neb., 10; *Allen v. Shackelton,* 15 Ohio St., 145. To an action on rent, note tenant may set up counterclaim for injury sustained by landlord's interference with leased property. *Goobel v. Hough,* 26 Minn., 252; or damages for false representations by landlord that the farm was underdrained. *Norris v. Thorp,* 65 Ind., 47. Many similar cases are collected. Maxwell Code Pleading, 544, and Bliss Code Pl. (3 Ed.), sec. 374. In an action by a mechanic for wages a counterclaim was allowed for material converted by him. (*Wadley v. Davis,* 63 Barb., 500), and in *Bitting v. Thaxton,* 72 N. C., 541, in an action against employee for converting the employer's property, a counterclaim was allowed the mechanic for his unpaid wages. In *McKinnon v. Morrison,* 104 N. C., 354, to an action to enforce a lien on a horse for the purchase-money, a counterclaim for breach of warranty was held good.

It is not necessary to consider here whether the measure of damages is the cost of putting out the escaped fire, as the defendants seem to have intended to claim, for the judge rejected entirely, as not allowable, the defendant's offer to set up as a counterclaim that they had been damaged by the negligence of plaintiff while prosecuting the work for which he seeks to recover pay. It would seem that this was "connected with the subject-matter of the action," and that justice and the terms of The Code would permit the whole matter to be settled in one action. In rejecting evidence to sustain such counterclaim there was

ERROR.

Cited: Smith v. Loan Assn., post, 261; *Slaughter v. Machine Co.,* 141 N. C., 473.

(84)

M. L. T. DAVIS & CO. v. J. W. SANDERLIN ET AL.

Limited Partnership—Publication of Articles Necessary, Otherwise Partnership General—Jurisdiction of Justice of Peace—Several Contract—Joint and Several Contract—Contract When Several Not Merged in Judgment Against Two of Three Persons Severally Liable —New Action Proper When Contract is Several—Motion in the Cause When Contract is Joint—Constable of City or Town, Service of Process by.

1. In addition to a compliance with the other requirements of section 3096 of The Code, publication of the terms of the partnership in a newspaper, as directed by said section, is indispensable in order to constitute a limited partnership; if such publication be omitted, the partnership is general.

2. Where the liability of a defendant sued in a justice's court as a general partner of a partnership indebted to plaintiff depended upon the legal sufficiency of the articles of limited copartnership and matters connected with their registration and publication, and there being no equities to adjust, the justice had jurisdiction and a motion to dismiss for want of such jurisdiction, and on the ground that it was necessary to bring an action in the Superior Court to declare the articles void, was properly refused.

3. A justice of the peace when out of his township may issue a summons returnable and hearable within his township.

4. Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered, it is only when the liability is joint and not several that the motion in the cause is proper.

5. A city or town constable has no authority to serve beyond the limits of his town or city process directed to "a constable or other lawful officer of the county." To authorize him to make such service the process must be directed to him, not necessarily in his individual name as such officer, but in the name of the office he holds.

ACTION, heard on case agreed, before *Boykin, J.*, at Special (85) Term, 1896, of BERTIE, on appeal from a judgment of Justice of the Peace.

There was judgment for the plaintiffs and defendant Mebane appealed. The facts sufficiently appear in the opinion of Associate Justice MONTGOMERY.

Martin & Peebles for plaintiff.

F. D. Winston and St. Leon Scull for defendant Mebane (appellant).

MONTGOMERY, J. The parties to this action agreed upon the facts and submitted the same to the Court below, that judgment might be

entered according to the opinion of his Honor. It appears from the facts agreed on that the articles of limited partnership between the defendant Mebane and his former partners were drawn according to the requirements of the law, and that they were registered in the proper county. But it does not appear that they were published in a newspaper as required by the statute. Section 3096 of The Code provides that "the terms of the partnership (limited) must be published, immediately after its formation, for six successive weeks in at least one newspaper in the same county, or near the place of said partnership business, and if such publication be not made the partnership shall be deemed general." The partnership, therefore, was a general one because of this failure to have the articles limiting the same published. We are not inadvertent to the fact that the argument of counsel for both the plaintiffs and defendant contained in their printed briefs make no point of this failure to publish the articles of the intended limited partnership. The main contention of counsel was over another point, viz: Whether the articles were not void because the amount contributed by Mebane consisted of a bond and mortgage for three hundred dollars with which it is admitted
(86) three hundred dollars worth of goods were bought and put into the partnership business, *instead* of being in actual cash. It might be that the contribution of the bond and mortgage in this particular case would be a compliance with the statute, for the reason that with the security as much in value of goods was bought and put into the common stock as three hundred dollars in money would have purchased, without discount. But the arguments of counsel do not necessarily set forth the ground on which the Court gave judgment for the plaintiffs. The judgment was based on the facts agreed upon; and as we have seen those facts do not show that the articles of partnership (limited) were published; and hence, as a matter of law, the partnership was a general one, and his Honor was bound so to declare.

The defendant *in limine* moved, both in the Court below and in the court of the justice in which the action was originally begun, to dismiss, first, because "that a court of the justice of the peace has no jurisdiction to try the subject-matter of this action; to charge Mebane, as a general partner, it was necessary to bring an action in the Superior Court to declare void said articles of partnership."

The plaintiffs sought to recover from the defendant $189, due by account for goods sold to the firm, and the liability of the defendant was a question of law depending upon the legal sufficiency of the articles of limited partnership and matters connected with their registration and publication. No equities were to be adjusted between the partners. It was a naked question as to whether the defendant Mebane was liable with the other defendants for the price of the goods. There is nothing in the motion.

The second objection was (2) "That a justice of the peace, while out of his township, can not issue a summons returnable to his township, as was done in this case, but must always be in his town- (87) ship when issuing process." It nowhere appears in the record that the justice issued the summons outside of his township. If he had issued it in the county, however, it would not have been objectionable, provided he heard the matter in his own township.

The third ground urged for dismissal was (3) "That a motion in the action tried before Gilliam, J. P., in which judgment on his account was rendered as set out in the answer, was the legal mode of binding the defendant Mebane by said judgment, and not an original action as in this case."

The plaintiffs in a former action had procured a summons to be issued by Gilliam, J. P., against all three of the partners, including the defendant Mebane, for the same cause of action, and they had recovered judgment against the other defendants only, the defendant Mebane not having been served with the summons. No part of that judgment had been paid when the last action was brought against the defendant Mebane.

A new action was the proper remedy in cases like this, as is admirably shown in the opinion of *Smith, C. J.*, in the case of *Rutty v. Claymore*, 93 N. C., 306. In that case the manner of procedure was exactly as the defendant contended ought to have been followed by the plaintiffs in this action, and the Court held the motion the beginning of a new action.

The procedure by motion is only to be had in cases where the contract is joint only, and not in cases where the contract is joint and several, as in the case at bar. The contract in the case before us is several (section 187 of The Code), and it does not merge in the judgment as it would have done if the contract had been joint only. Section 223 of The Code refers to contracts joint only. (88)

But the last objection is a valid one. It is as follows: "4. That J. D. Perry, being constable only of an incorporated town, and not a township or general constable, had no power or authority to serve the summons in this action." Section 3810 of The Code provides that "it shall be lawful for city and town constables to serve all civil or criminal process that may be directed to them by any court within their respective counties, under the same regulations and penalties as prescribed by law in the case of other constables."

Before the enactment of that statute the constables of cities and towns, as constables, were not authorized under any circumstances to serve process outside of the limits of their respective cities and towns, although the process was directed "to any constable or other lawful officer of said

county." These words referred to the constables appointed or elected for the several townships of the county, to the sheriff, to the coroner under certain circumstances. They refer to the same officers now; and to authorize a town or city constable to execute process outside of his town or city the process must be directed to him in that capacity. It is not necessary that the process should be directed to him in his individual name as town or city constable, but it must be directed to him in the name of the office he holds, that is as constable of a certain city or town.

We have discussed all of the exceptions because they are almost certain to arise in another trial of this matter. This action ought to have been dismissed because the summons was served upon the defendant by an officer not authorized by the law to serve it.

ERROR.

Cited: Cullen v. Absher, post, 442; *Appomattox Co. v. Buffalo,* 121 N. C., 38; *Lowe v. Harris, ib.,* 289; *Fertilizer Co. v. Marshburn,* 122 N. C., 414; *Baker v. Brem,* 126 N. C., 369; *Carson v. Woodrow,* 160 N. C., 147; *Daniel v. Bethell,* 167 N. C., 219.

---

(89)

ABRAHAM SILLIMAN AND WIFE v. T. H. WHITAKER AND WIFE.

Devise—Construction of Will.

A devise to "S. and all her children, if she shall have any," vests in S. a fee-simple if she has no children of S. at testator's death, and such estate cannot be divested by the subsequent birth of a child; if she have children at testator's death, she and they take as tenants in common.

(92) EJECTMENT, tried at April Term, 1896, of FRANKLIN.

The plaintiffs appealed from the judgment rendered.

W. M. Person, F. S. Spruill and Shepherd & Busbee for plaintiffs (appellants).

J. B. Batchelor, A. C. Zollicoffer and N. Y. Gulley for defendants.

CLARK, J. The devise was to trustees "in trust for Sarah Ward and all her children, if she shall have any." It was settled in Wild's case, 6 Rep., 17 (3 Coke Rep., 288), decided in the 41st year of Elizabeth, that a devise to B and his (or her) children, B having no children when the testator died, is an estate tail. If he have children at that time, the children take as joint tenants with the parent. This has been uniformly

followed in England. In the late case in the House of Lords, *Clifford v. Koe,* 5 App., 447, Wild's case was reaffirmed, opinions being delivered *seriatim* by Lord Chancellor *Selborn,* Lord *Hatherly,* Lord *Blackburn* and Lord *Watson,* unanimously sustaining Wild's case, and stating that "for these three hundred years it has been the uniform ruling" in England. Theobald on Wills, 334; Hawkins on Wills, 198.

In this country, estates tail having been turned into fee simple, while Wild's case has been as uniformly followed as in England, it has been with the necessary modification that where the devise is to B and his children, if he have no children at the testator's death, B takes a fee simple instead of an estate tail, and further (by virtue of our (93) statutes), if there are children of B at the testator's death, the father and children take as tenants in common instead of joint tenants. *Wheatland v. Dodge,* 10 Metc., 502; *Nightingale v. Burrell,* 15 Pick., 104 (on p. 114); 3 Jarman on Wills, 174; Schouler on Wills, secs. 555, 556. This has always been the ruling in North Carolina, as was held in *Hunt v. Satterwaite,* 85 N. C., 73, citing with approval Wild's case and precedents in our reports, and SMITH, C. J., adds that the interposition of a trustee is obviously to secure the property for the use of the mother and her children, and can not change the construction of the devise. This case in turn was approved by MERRIMON, J., in *Hampton v. Wheeler,* 99 N. C., 222, in which he cites the additional cases of *Moore v. Leach,* 50 N. C., 88; *Chestnut v. Meares,* 56 N. C., 416; *Gay v. Baker,* 58 N. C., 344, and states that "the rule is clearly settled and we need not advert further to it."

It is true the words here are to "Sarah and her children, *if she shall have any.*" We do not see that these added words change the construction in any wise. At most, they merely indicate that at the time of writing the will the testator knew his daughter had no children, and doubtless the same was true in all the numerous cases above cited in which the devise was to "B and his children," in which uniformly when B had no children at the testator's death he was held in England to take an estate tail, and in this country a fee simple. In the present case there is nothing on the face of the will to show a contrary intent to take it out of the long-settled rule. From the allegations of the complaint it appears that Sarah was eleven or twelve years of age at the testator's death, but *non constat* that he might not have expected that at his death she would have been married and the mother of a child.

In a very similar case—*Gillespie v. Shumann,* 62 Ga., 252 (1879), where the devise was to a woman and "her children, if any living," it was held to mean living at the death of the testator— (94) almost our very case—and as none were then living, the woman took a fee-simple estate, and the birth of a child subsequently to the

death of her testator could not divest the fee—and parol testimony to show a contrary intent in the testator was held inadmissible. The rulings above cited are not only uniform in England and in this country, but they are consonant with our public policy, which is adverse to tying up estates; and further, in the present case the ruling is consonant with justice, which would be outraged by turning out the parties who have held the realty undisturbed for forty years under *mesne* conveyances from a purchaser who bought in reliance upon the decree of a court of equity, which, after careful investigation, had adjudged that it had power to order the sale, and by whom the purchase-money in full (which is doubtless more than the property would bring now) was paid over to the trustee named in the will for the benefit of the mother, whose only child is now seeking to recover the premises which have passed from hand to hand in reliance upon the solemn adjudication of the court of equity.

It is proper to say that if the devise had been to A for life, remainder to such children as may be living at her death, a very different case would have been presented. *Williams v. Hassell,* 73 N. C., 174; *S. c.,* 74 N. C., 434; *Young v. Young,* 97 N. C., 132; or even if the devise had been to A for life, with remainder to her children. But here the devise to "B and her children (if she shall have any)" is in substance that which has been construed in Wild's case and others above cited to confer upon B, when she has no children at the death of the testator, not a life estate, but an estate tail in England and a fee simple in this country. When words used in a will have received a settled judicial construction the testator is taken as using them in that sense, unless a different intent plainly appears. Applying that rule, the devise here was, in legal effect, to "Sarah and her children, if she shall have any at the death of the testator, and if not, then to Sarah in fee simple," and the law hath been so written "these three hundred years," say the authorities.

(95)

NO ERROR.

Cited: Weeks v. McPhail, 128 N. C., 131; *Whitehead v. Weaver,* 153 N. C., 90; *Lewis v. Stancil,* 154 N. C., 327; *Elkins v. Seigler, ib.,* 375; *Tart v. Tart, ib.,* 506; *Propst v. Caldwell,* 172 N. C., 598.

HENRY WILKINS ET AL. v. J. C. JONES ET AL.

Action to Recover Land—Vague and Indefinite Description—Parol Evidence May Explain, When.

A description of land contained in a deed as follows, "Thirty acres of land situated in Stony Creek Township, adjoining the lands of W. J. and B.," is not too vague and indefinite to be explained by parol testimony.

ACTION to recover land, tried before *Boykin, J.*, and a jury, at Spring Term, 1896, of NASH. The usual issues were submitted, and as the main issue depended upon the validity of a certain mortgage through which defendants claimed title, his Honor held that the description of the land was so vague and indefinite as to render the instrument void, and that it could not be aided by parol testimony.

The defendants excepted and appealed from the judgment rendered in the verdict for plaintiffs. The description in the mortgage was as follows: "Thirty (30) acres of land, situated in Stony Creek Township, adjoining the lands of the lates James Woodruff, James Carter Jones and Richard Barnes." (96)

B. B. Massenburg for plaintiffs.

B. H. Bunn and Jacob Battle for defendants (appellants).

AVERY, J. There was error in the ruling of the Court that the description was too vague and uncertain to be explained by parol testimony. *Perry v. Scott,* 109 N. C., 374.

NEW TRIAL.

Cited: Sherman v. Simpson, 121 N. C., 130; *Hinton v. Moore,* 139 N. C., 46.

ALFRED MAY AND WIFE v. STIMSON LUMBER COMPANY.

Judgments—Erroneous and Irregular Judgments—Remedy for—Practice.

1. An irregular judgment is one contrary to the course and practice of the court, and the remedy against it is a motion in apt time to set it aside, while an erroneous judgment is one rendered according to the course and practice of the court, but contrary to law, which can only be remedied by an appeal.

2. When an erroneous judgment was rendered at one term of court in an action in which the defendant had appeared and answered, it was error at a subsequent term to set it aside on motion.

(97) MOTION by defendant to set aside a judgment rendered at January Term, 1896, of PITT, by *Boykin, J.*, heard before *Graham, J.*, at chambers in Williamston, on 16 September, 1896. The motion was granted and plaintiff appealed. The facts are sufficiently stated in the opinion of *Chief Justice Faircloth.*

Swift Galloway and J. B. Batchelor for plaintiffs (appellants).
Blount & Fleming for defendant.

FAIRCLOTH, C. J. Judgment was rendered in this action at January Term, 1896, by *Boykin, J.*, and no appeal was taken. On 10 September, 1896, the judgment was set aside by *Graham, J.*, on affidavit of the defendant, alleging that it was erroneous in that only one issue was submitted to the jury, although three issues were raised by the pleadings.

The defendant having appeared by attorney and filed an answer to the complaint, he was then in court, although no summons had been served, and there was no irregularity in the course of the Court in that respect.

The complaint now made is that the Court erred in submitting only one issue to the jury. If that is true, as alleged by defendant, it was error in law, and the judgment rendered was an erroneous one, and the defendant's remedy was by appeal, and not by motion at a subsequent term to have the judgment set aside. That would be his remedy if the judgment was irregular only, in proper cases.

The distinction has been frequently stated by this Court, to wit: An irregular judgment is one contrary to the course and practice of the court, as judgments without service of process. An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law, as where it is for one party when it ought to be for the other; or for too much or too little. *Wolfe v. Davis,* 74
(98) N. C., 597. The remedy in the latter event is by appeal; in the former, by motion in apt time.

Issues arise out of the pleadings and must be submitted to the jury. If the Court shall be of opinion that one or more issues are enough to reach the merits of the case, without depriving the parties of an opportunity to have their rights heard by Court and jury, then no more issues need be submitted, and if in that opinion the Court is mistaken, the parties have no remedy except to appeal. *Simmons v. Dowd,* 77 N. C., 155.

We then have a case in which there was no irregularity; and, if there was no error, the defendant has no case for relief, and if there was error, he has lost his remedy by failing to appeal. He can not appeal from one Superior Court Judge to another.

ERROR.

Cited: *Alexander v. Alexander,* 120 N. C., 474; *Cowles v. Cowles,* 121 N. C., 276; *Timber Co. v. Butler,* 134 N. C., 52; *Cobb v. Rhea,* 137 N. C., 298; *Becton v. Dunn,* 142 N. C., 173; *Mann v. Hall,* 163 N. C., 60; *Dockery v. Fairbanks,* 172 N. C., 530.

(99)

J. A. RICKS AND W. B. RICKS, EXECUTORS OF G. E. TAFT, ET AL., v. R. W. STANCILL, ADMINISTRATOR OF T. J. STANCILL, ET AL.

Fraudulent Conveyance—Voluntary Conveyance—Burden of Proof—Issues.

1. The refusal to submit issues tendered by a party is not error when under those submitted by the trial judge the party has an opportunity to present fully his testimony and the law arising thereon.

2. Where, in the trial of an action to set aside a deed for fraud, it was admitted that the conveyance was voluntary and that the donor owed the plaintiffs a large sum of money at the time such conveyance was made, the burden was properly imposed upon the defendants to show that the donor retained at the time the deed was executed sufficient and available property to pay his debts.

ACTION, tried before *Boyken, J.,* and a jury, at April Term, 1896, of PITT.

The complaint alleged that T. J. Stancill was administrator of the estate of Wiley Stancill, and that G. E. Taft and R. E. Mayo were sureties on his bond; that a judgment was obtained against the principal and sureties on said bond, which was paid by the sureties; that, prior to the recovery of said judgment, T. J. Stancill, for the purpose of defrauding his creditors, executed voluntary conveyances of his land to certain of the defendants, who were his children; that, after the payment of the judgment by the sureties, T. J. Stancill executed to them a mortgage to secure its repayment on the land previously conveyed to defendants, and on certain personal property which has since become destroyed, or has passed out of existence. Plaintiffs prayed judgment setting aside the voluntary conveyances, and declaring their claim a lien on the lands, and that they be subrogated to the rights of the plaintiffs in the judgment which they had paid. (100)

Blount & Fleming for plaintiffs.
James E. Moore for defendants.

MONTGOMERY, J. The defendants tendered five issues, all of which the Court refused to submit, and the defendants excepted. Those issues were as follows:

"1. Was there an assignment of the judgment mentioned in the pleading to the use of the plaintiffs?

"2. At the time of bringing the suit, was the deed of T. J. Stancill to his children made without retaining sufficient property to pay his then existing creditors, without consideration, and with intent to hinder, delay and defraud the plaintiffs?

"3. What was the value of the personal property of T. J. Stancill?

"4. Was the property conveyed in the mortgage of T. J. Stancill to G. E. Taft and others sufficient to pay plaintiff's debt?

"5. Was the property mortgaged by T. J. Stancill to R. E. Mayo and G. E. Taft wasted and lost by the carelessness and negligence of plaintiffs?"

The Court submitted the following issues:

"1. Were the conveyances made by T. J. Stancill to his children made without any consideration other than that of natural love and affection? Answer: 'Yes.'

"2. Did G. A. Stancill, G. E. Taft and R. E. Mayo agree at the time of the execution of the mortgage to them by T. J. Stancill to accept said mortgage in full satisfaction of all indebtedness of said Stancill to them? Answer: 'No.'

(101) "3. Were the conveyances made by T. J. Stancill made with the intent to hinder and defeat his creditors? Answer: 'Yes.'

"4. What amount, if any, is due R. E. Mayo on account of money paid on the judgment mentioned in item two of the complaint? Answer: '$224, and 8 per cent interest from date, 20 May, 1889.'

"5. What amount if any is due G. E. Taft on account of money paid on the judgment mentioned in item two of the complaint? Answer: '$224, and 8 per cent interest from date, 20 May, 1889.'"

There was no need for the first issue tendered by the defendants, for the plaintiffs on the trial had admitted that the judgment had not been assigned to them. The defendants were not entitled to their second issue, for the question was not whether Stancill did or did not do anything at the time of the commencement of this suit, but whether, at the time he made the voluntary conveyances to his children, he retained a sufficiency of property to pay his then existing creditors, the defendants having agreed on the trial that the first issue submitted by the Court should be answered "Yes," and that the deeds were voluntary; and it appears that that part of the defendant's second issue, as to whether the deeds were made to hinder, delay and defeat his creditors, was submitted in number three of the issues submitted by the Court. The third issue

tendered by the defendants was properly rejected, for the reason that the personal property of Stancill, the deceased donor, whatever its value might have been, had been administered in due course of law by his personal representatives. The 4th and 5th of the defendant's issues the Court properly refused to submit. It was in evidence that none of the property conveyed by Stancill to plaintiffs ever came into (102) the plaintiffs' possession; but on the other hand, it appeared that the mortgagee, Stancill, used the whole of it for his own benefit and purposes.

Under the issues submitted by the Court, the defendants had the opportunity to present fully their testimony and the law arising thereon. *Patton v. Garrett,* 116 N. C., 847; *Alpha Mills v. Engine Co., ib.,* 797.

The complaint sets out with sufficient plainness and conciseness to enable the plaintiffs to maintain their standing in court that they were compelled to pay the amount of a judgment recovered against them as sureties on the administration bond of Stancill, and that in good time they commenced this action with the view of deriving the rights and remedies against their principal and his estate provided under section 2096 of The Code.

The main contention, however, in the case is whether or not Stancill, at the time he made the voluntary conveyances of his land to his children, retained a sufficiency of property to pay his then existing creditors. The plaintiffs introduced no evidence on this point. The defendants' evidence went to show that the property retained after the exemptions should be allowed was not sufficient for that purpose. The defendants' counsel asked the Court to instruct the jury that there was no evidence that Stancill did not retain sufficient property to pay his debts, and that they should answer the third issue "No." This was refused and the defendants excepted. There was no error in this refusal. In this connection the Court charged the jury that the "burden was upon the plaintiff not only to show that the conveyances were voluntary and without consideration but by the weight of testimony that Stancill did not retain property sufficient and available to pay his then existing creditors, and that unless the plaintiff had proved by the weight of the evidence that Stancill did not retain property sufficient (103) and available for the satisfaction of his then creditors, they would answer the third issue "No." That instruction was erroneous, but as the jury found for the plaintiffs, no harm has been done. As we have said, the defendants had admitted that the conveyances from Stancill to his children were voluntary, and that he owed the plaintiffs a large sum of money at the time they were executed. Upn these admissions, the deeds having been attacked for fraud by the plaintiffs, the burden was imposed on the defendants to show that the donor retained

at the time when the deeds were executed sufficient property, and available to pay his debts. *Brown v. Mitchell,* 102 N. C., 347. We have examined the other exceptions, and they are of no force.

NO ERROR.

Cited: Coley v. Statesville, 121 N. C., 316.

JAMES H. LASSITER v. W. T. STAINBACK ET AL.

Partnership—Trust—Individual Indebtedness of Partner to Partnership.

1. While, as to matters pertaining to the partnership business, each partner is a trustee for the partnership, such relation is not created between the individual partners as to transactions not connected with the partnership business.

2. Where a partner, with the knowledge and consent of the other partner, used the firm's money to pay for improvements on his own land, charging himself with the money upon the books of the firm, he became the individual debtor of and not a trustee for the firm, and the other partner cannot follow the fund and have it declared a lien upon the improvements.

(104) ACTION, heard before *Boykin, J.,* upon exceptions to a referee's report, at February, 1896, Term of VANCE.

The principal matter and issue arising upon the pleadings and submitted to the referee for his determination was whether or not the defendant, Charles E. Stainback, during the continuance of the firm of Lassiter, Stainback & Co., took and applied to his own use, without the plaintiff's knowledge or consent, assets of the firm in erecting a dwelling house in the town of Henderson. It was to the referee's decision in favor of the defendant upon this contention, and to the conclusion of the law thereon that the partnership had no lien upon such dwelling house for the moneys so used by Stainback, that the plaintiff filed his exceptions. The referee's report and findings of fact and law upon such issue were sustained by his Honor, and the plaintiff appealed.

T. M. Pittman and T. T. Hicks for plaintiff (appellant).
A. C. Zollicoffer for defendants.

FURCHES, J. Plaintiff and defendants were partners in a mercantile business. The plaintiff was indebted to the defendant at the time of forming this partnership $1,694.43. But defendant said to plaintiff,

"I will not put this in the partnership; I want to buy a lot and build for me a house out of this money." The plaintiff replied, "That is right; I want to sell you a lot," which he afterwards did at the price of $300, and the price was credited to the plaintiff on the $1,694.43 debt, and plaintiff made him a deed for the lot. Soon thereafter the defendant commenced building on this lot, and to pay for the same out of the partnership assets, and to charge the same to his individual account on the books of the concern. The plaintiff had full knowledge of this, as the books were examined by him daily, and he made no (105) objection to this course of the defendant until some three years after, when it was found that the partnership and the defendant were both insolvent. He now seeks to follow this fund, used for building the house, and have it declared a lien thereon.

The law constitutes each partner an agent and trustee for the partnership, as to such matters as pertain to the partnership business. *Taylor v. Russell, ante,* 30. But the partnership does not create these relations of agent and trustee between the individual members of the partnership as to other transactions not connected with the partnership business. Therefore, while the defendant was the agent and trustee of the partnership as to the business of, or connected with the partnership, he was not its agent or trustee to buy a lot and build a house on it for himself. So we see that plaintiff can not follow the fund and have it declared a lien on the house because the defendant was a member of the partnership.

If he can follow the fund and have it declared a lien, it is upon the ground that the defendant had used the partnership funds, and that equity will declare a trust from this fact. But where there are no contractual relations between the parties that create a trust, a court of equity will not do so, unless there is fraud or bad faith. 2 Pom. Eq. Jur., sec. 1044. If I give A $1,000 to buy a tract of land for *me,* and A buys the land and pays for it out of the thousand dollars, but takes the deed to himself, he has acted in bad faith, and equity will declare him my trustee and compel him to convey. If A takes $1,000 of my money without my knowledge or consent, and buys land with it, and takes the deed to himself, equity will declare him my trustee and compel him to convey on account of the fraud.

But if A says to me there is a tract of land to be sold that I want to buy, but I have not the money; I give him the money and say, "Go and buy it," and he does so, pays the thousand dollars I gave (106) him and takes the deed to himself, equity will not declare him my trustee and compel him to convey, because there has been no fraud or bad faith practiced by A, and the money I let A have will be regarded as a loan. And this action, to declare a lien on the house, involves the same principle as that we have been discussing, and plaintiff would ask

to have the defendant declared a trustee and for a conveyance but for the fact that the lot upon which the house was erected was the defendant's lot and not involved in this controversy. When the defendant used the money of the partnership in building the house, with the knowledge and consent of the plaintiff, and charged it to his individual account, he then became the individual debtor of the partnership, and the funds used became his individual funds, so in legal contemplation the defendant did not build the house out of the partnership assets, but out of his own means. The whole trouble has arisen from the fact that the defendant has become insolvent and the firm has to lose its debt against him. It is from the result and not from the cause.

It was questioned whether money used in the improvement of real estate belonging to another could be followed and made a charge on such real estate. It seems to be held in some of the States that it could, but no authority was cited where it has been so held in this State; but we have not considered this question, as the case goes off on other grounds. There is no error, and the judgment is

AFFIRMED.

Cited: Norton v. McDevit, 122 N. C., 758; *Flanner v. Butler,* 131 N. C., 157.

---

(107)

W. T. STAINBACK v. G. J. HARRIS ET AL.

Motion to Reinstate Appeal—Appeal—Dismissal—Failure to Print—Negligence of Appellant.

1. A motion to reinstate an appeal dismissed for failure to print will not be granted when it appears that the judgment appealed from was rendered on 24 August, that the clerk was directed 1 October to make transcript and to send it up by express on 10 October, that it reached this Court and was docketed on 12 October, with two other cases, that when it was called for hearing on 13 October the record was not printed, although the other cases accompanying it had, through the care of the appellants therein, been printed and were argued.

2. Printing the record on appeal, as required by the rule of Court, is the duty of the appellant, and neglect to have it done is his fault and not that of his attorney.

T. T. Hicks and T. M. Pittman for plaintiffs.
L. C. Edwards and J. B. Batchelor for defendant (appellant).

Motion on five days notice under Rule 30 to reinstate this appeal, which was dismissed for failure to print.

CLARK, J. It appears that the judgment was filed below 24 August, 1896, and the appellant filed his appeal bond August 31. The appellant avers that he directed the clerk to send up the transcript forthwith, but does not specify at what time. The clerk of the court below certifies that the appellant's counsel did not send the fees for making up the transcript to him until 1 October, and then for the first time directed the transcript to be made out, and that on October 6th. The said counsel directed him to send the transcript up on October 10th by express, which he did. To these statements of the clerk there is no denial. It also appears that in the same express package there came the transcripts in two other cases. All three cases were delivered to (108) the clerk of the court on Monday, 12 October, by whom they were docketed simultaneously. When the three cases were called the other two, by the care of the appellants therein, were properly printed and were argued, (one of them on 13 October, the same day this case was called), but in this case, the record not having been printed, the Court would not hear the appeal, and the appellee was compelled either to continue or move to dismiss. He took the latter course, as was his right.

The appellant has shown no good cause for reinstatement. He does not deny the clerk's averment that the transcript was not directed to be sent up till 1 October (though the judgment had been filed 24 August), and that thereafter he directed it to be sent up on 10 October, which was done. Other cases sent up in the same package were printed and heard, and there is no reason shown why that was not done in this case. If a party will delay sending up his transcript to the last minute he should either send it up with the requisite parts of the record printed, or arrange to have it promptly done here. It is inexcusable for an appellant to delay docketing his appeal till the time between the docketing and calling the case for argument is perhaps too brief to print the record.

In *Avery v. Pritchard,* 106 N. C., 344, the transcript was docketed 30 November, and the appeal was dismissed for failure to print when reached 2 December, and in *Stephens v. Koonce,* 106 N. C., 255, the transcript was docketed 12 March, and the appeal was dismissed for failure to print when reached 13 March. Printing the record on appeal is not a professional duty, and the neglect to have it done is the fault of the appellant himself. *Dunn v. Underwood,* 116 N. C., (109) 525, and cases there cited.

Every presumption is in favor of the correctness of the result of the trial below. When a party is sufficiently dissatisfied to desire it reviewed on appeal, he should pursue the orderly steps requisite for that purpose. If he does not think the matter of sufficient importance to

require that much attention, and this neglect on his part must either impose six months delay on the appellee or a dismissal of the appeal on himself, he must not grumble that the penalty falls upon the one who alone could have prevented the default.

MOTION DENIED.

Cited: *Ice Co. v. R. R.*, 125 N. C., 22.

W. E. ROSS v. AMANDA ROSS ET AL.

Practice—Supplemental Proceedings—Receiver.

1. Where supplemental proceedings had discovered that the defendant held, partly in money and partly in choses in action, a specific fund which, in a suit brought for the purpose, the jury had found to belong to the plaintiff, and for the recovery of which the plaintiff had judgment according to the verdict, and the clerk by his order forbade the transfer of the securities and money and directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal, after approving the findings of fact by the clerk, to reverse the latter's order and appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund.
2. In such case, as soon as the supplemental proceedings had disclosed the existence of the fund in the defendant's hands which had been adjudged to belong to plaintiff, it only remained for the clerk to order the delivery of the fund to the plaintiff and to compel obedience to the order by attachment for contempt.
3. The old equity practice of granting a restraining order in one action until another can be brought between the same parties is foreign to the present Code system under which the court, when possessing jurisdiction of the parties and subject-matter, will proceed to administer all rights of the parties pertaining to the subject-matter.

(110) PROCEEDING supplementary to execution, heard on appeal from the judgment of the Clerk of the Superior Court of VANCE, before *Boykin, J.*, at chambers, on 14 April, 1896. The facts appear in the opinion of *Associate Justice Clark.* From his Honor's judgment appointing a receiver, etc., the defendant appealed.

T. T. Hicks and A. C. Zollicoffer for plaintiff.
T. M. Pittman for defendants.

CLARK, J. The plaintiff sued for the recovery of specific articles and money constituting a fund which had been conveyed to the plain-

tiff by the defendant. The jury found upon issues submitted to them that no specific articles were detained by the defendant, but that she had three hundred dollars of the money of the specific fund which she should have delivered to the plaintiff. The verdict was made a part of the judgment, which decreed that the plaintiff should recover of the defendant $300, with interest "according to the verdict."

Upon supplemental proceedings it was found as a fact that the defendant still held (partly in money and partly in the choses in action and securities in which she had invested the balance thereof) this specific fund. The Clerk thereupon properly forbade the transfer or conveyance of the choses in action and money (Code, sec. 488 (6), and directed the same to be paid over to the plaintiff (Code, sec. 493), and upon noncompliance issued a notice to show cause why the defendant should not be attached for contempt. Code, sec. 500. The defendant was not entitled to her personal property exemption in (111) a fund already adjudged to be the property of the plaintiff. Upon appeal the Judge approved the findings of fact by the Clerk, but reversed his judgment, and on his own motion appointed a receiver to take possession of the fund until the plaintiff should institute an action to recover the specific fund. This was error. The appointment of a receiver and another action were alike unnecessary, for this action itself had been brought for the recovery of the specific fund, the jury had found it belonged to the plaintiff, and the judgment had directed the $300 to be paid over to the plaintiff "according to the verdict." When the supplemental proceedings disclosed that part of the fund was still in defendant's hands, and that the remainder had been since loaned out and invested in choses in action, it only remained to enforce the execution of the judgment by ordering the defendant to pay over the specific money and the notes taken for the other part of the money to the plaintiff, and to compel the enforcement of the order if not obeyed by attachment for contempt. *Wilson v. Chichester,* 107 N. C., 386. Had the judgment not been so clearly drawn in accordance with the verdict, the remedy would have been by motion in the cause on notice to the defendant to amend and correct the judgment in accordance with the verdict, and not by a new and independent action for the same cause of action. And in any view it was error to restrain defendant and hold the fund till the plaintiff could bring an independent action against her to recover the specific property. Granting a restraining order in one action till another action can be brought between the same parties was an incident of the old procedure when law and equity were divided; but is foreign to the present simpler system in which, when the Court (112) possesses jurisdiction of the parties and subject-matter, it will proceed to administer all rights of those parties pertaining to that sub-

ject-matter. Under The Code, sec. 497, when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the Court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such action is brought by the receiver as the agent of the Court, and is an entirely different matter from restraining a conveyance till the plaintiff may bring an independent action against the same defendant. Whatever rights the plaintiff has as against the defendant are determined by the judgment which is the foundation of the supplemental proceedings, which are merely to assist in the execution of the judgment by appropriate investigation and orders.

The judgment of the Court below is reversed, and the case is remanded that judgment may be entered affirming the action of the Clerk in accordance with this opinion.

REVERSED.

---

(113)

W. C. HOLMAN v. JAMES WHITAKER.

Chattel Mortgage—Vague and Uncertain Description—Patent Ambiguity—Parol Evidence.

A description in a chattel mortgage of the property conveyed as "a one-horse wagon," the mortgagor having at the time of making the mortgage four one-horse wagons, is a patent ambiguity which cannot be explained by parol testimony.

CLAIM AND DELIVERY, tried before *McIver, J.*, and a jury, at March Term, 1896, of WAKE. The action was commenced in a magistrate's court, and a claim and delivery was had for the possession of a "two-horse phaeton with driver's seat in front" and a "single-horse wagon," which were articles of personal property mentioned in a certain chattel mortgage made by the defendant to the plaintiff to secure a note of $100. The mortgage was put in evidence. It was in evidence that the Sheriff went to seize the wagon mentioned in the mortgage, but found at the defendant's house more than one "single-horse wagon." The defendant pointed out to him which wagon was the one mentioned in the mortgage. The Sheriff took the wagon so pointed out by defendant; but, plaintiff having refused to receive it, he returned it and seized another wagon. Upon the trial the plaintiff was asked to state which one of the wagons he "thought he had a mortgage on," and to this question the defendant

objected. The objection was overruled, and the defendant excepted on the ground that the description in the mortgage was such a patent ambiguity that it could not be explained by parol testimony, as the defendant had several wagons at the time of making the mortgage, and that they were not separated except as hereinafter stated, (114) and that there was no mutual understanding between the plaintiff and the defendant as to which wagon was meant. All testified that at the time the mortgage was made the defendant was working for the plaintiff, using, as needed, a two-horse and a one-horse wagon. The defendant said that he had four one-horse wagons at that time, and that the one last seized by the Sheriff was the one he was using in hauling while working for the plaintiff.

The following were the issues submitted and the responses thereto:

"1. Is the plaintiff the owner and entitled to the possession of the carriage and wagon described in the complaint? Answer: 'Yes.'

"2. How much is the defendant indebted to the plaintiff? Answer: '$91.50 and interest.'"

There was judgment for the plaintiff, and defendant appealed.

J. B. Batchelor and E. A. Johnson for defendant (appellant).

No counsel contra.

FAIRCLOTH, C. J. This is an action to recover possession of personal property claimed under a mortgage. The description was a "one-horse wagon," the defendant having at the time of making the mortgage four one-horse wagons. This case is governed by *Blakely v. Patrick,* 67 N. C., 40. There the language was "ten new buggies," the mortgagor having more than ten new buggies in the same lot, and the plaintiff could not recover. Here a "one-horse wagon" was the description, the mortgagor having four one-hourse wagons, and the plaintiff can not recover. Suppose one wagon, in the meantime, had been stolen; whose wagon was lost? The doctrine was so well discussed in *Waldo v. Bel-* (115) *cher,* 33 N. C., 609, that we need not repeat it. The ambiguity is patent, and parol testimony to explain it is inadmissible. If one of the wagons had been set apart and in some way distinguished at the time of making the mortgage, or if the mortgagor had owned only one wagon, then such evidence could be heard for the purpose of identification. *Spivey v. Grant,* 96 N. C., 214; *Lupton v. Lupton,* 117 N. C., 30. We notice that there is no judgment for possession of the wagon in the record, unless the words in the judgment, "that the sale was in all respects regular," can be so construed. We, however, give the plaintiff the benefit of a judgment for possession, according to the finding on the first issue. There is no controversy about the phaeton. There is

ERROR.

M. S. CLARK v. C. B. EDWARDS ET AL.

Mechanic's Lien—Subcontractor—Notice to Owner.

1. While, under section 1789 of The Code, a mechanic's or laborer's lien, or lien for material, when filed, relates back and takes priority over all liens attaching, or purchases for value made subsequent to the beginning of the work or of furnishing the first material, yet it is good only for the amount due the contractor, laborer, or material man.
2. A subcontractor can enforce his right of lien against the owner of property only to the extent of any unpaid sums due the contractor at the date of giving notice to the owner of his (the subcontractor's) claim.
3. Until a subcontractor gives to the owner of property notice of his claim he has no lien, and the owner is justified in making payment to the contractor.
4. The mere fact that laborers and subcontractors are working on a building is not notice to the owner not to pay out to the contractor until it is ascertained how much is due by the latter to each and every subcontractor, laborer, material man, etc.

(116) ACTION, tried at February Term, 1896, of WAKE, before *McIver, J.*, and a jury.

J. C. L. Harris for plaintiff (appellant).
W. N. Jones for defendant.

(119) CLARK, J. It is true, under section 1789 of The Code, that where a mechanic's or laborer's lien, or lien for material, is filed as required, it dates back and takes priority of all liens attaching, and against all purchases for value (though without notice) made subsequent to the beginning of the work, or furnishing the first material. *Burr v. Maultsby,* 99 N. C., 263; *Lumber Company v. Hotel Company,* 109 N. C., 658. But such lien is only good for the amount due the contractor, laborer or material man, and the subcontractor can be put in no better condition. As defendant's counsel said forcibly and pertinently on the argument, the subcontractor can only sue into the contract. Accordingly The Code, section 1801, affords the subcontractor giving notice of his claim a right to a lien "not exceeding the amount due the original contractor at the time of notice given," and section 1802 confers on the subcontractor the right to enforce such lien if the owner fails "to retain" the amount thereof "out of the amount due the said contractor." In this case the plaintiff, who was subcontractor, did not give the owner of the property notice of his claim till after the contractor, who was paid up to that date, had failed in business and abandoned the work. Neither at that time nor at any time thereafter

was anything due the contractor—the owner completing the building himself. There was, therefore, no sum due the contractor out of which the owner should have "retained" the plaintiff's claim. The plain language and intent of the statute controvert the plaintiff's contention, which, if correct, would prevent owners from paying anything to contractors till twelve months after the completion of their work. The mere fact that laborers and subcontractors are working on the building is not notice to the owner not to pay out to the contrac- (120) tor till it is ascertained how much is due by the contractor to each and every subcontractor, laborer, material man, etc. The statute requires that the subcontractor must give notice, and till he does this he does not have a lien, and the owner is justified in making payment to the contractor.

NO ERROR.

Cited: Baker v. Robbins, post, 292; *Woodworking Co. v. Southwick, post,* 615; *Dunavant v. R. R.,* 122 N. C., 1001; *Weathers v. Borders,* 124 N. C., 613; *Hall v. Jones* 151 N. C., 424; *Roper v. Ins. Co.,* 161 N. C., 160; *Supply Co. v. Eastern Star Home,* 163 N. C., 515; *Brick Co. v. Pulley,* 168 N. C., 375; *Granite Co. v. Bank,* 172 N. C., 358.

STATE EX REL. W. H. GOODWIN v. CARALEIGH PHOSPHATE AND FERTILIZER WORKS.

Action for Penalty—Qui Tam Action—Party Plaintiff—Tax on—Fertilizers—Constitutionality—Interstate Commerce.

1. In an action for a penalty the person suing therefor is the proper party plaintiff unless the statute directs otherwise.

2. Under sections 2190, 2191, and 2193 of The Code, requiring each sack of fertilizer sold to have a tag attached and affixing a penalty for noncompliance therewith, to be recovered by any one suing therefor, the person suing for the penalty, and not the Department of Agriculture or the State, is the proper party plaintiff.

3. A statute providing for the recovery of penalties by private persons is not in conflict with section 5 of Art. IX of the Constitution which appropriates the net proceeds of all fines and penalties to the school fund. (*Sutton v. Phillips,* 116 N. C., 502, followed.)

4. The statute (sections 2190, 2191, and 2193 of The Code) requiring each sack of fertilizer sold in this State to have a tag affixed thereto is not in violation of clause 3 of section 8 of Article of the Constitution relating to interstate commerce.

(121) ACTION for a penalty, heard on complaint and demurrer before *McIver, J.*, at February Term, 1896, of WAKE. The complaint was as follows:

"1. That defendant is a corporation, etc., and is doing business in this State, to wit, in the manufacture and sale of fertilizers.

"2. That defendant, having manufactured the 'Eclipse' brand of fertilizer, with which, according to law, said defendant is required to tag each sack of said fertilizer as provided in sections 2190, 2191 and 2193, sold to W. H. J. Goodwin, in Wake County, and delivered to him twenty sacks of said Eclipse brand of fertilizer during the months of April and May, 1895, without affixing the tag as required by the aforesaid sections of The Code to each of said twenty sacks of fertilizer.

"Wherefore, plaintiff demands judgment against the defendant for $200 and costs."

Defendant's demurrer was as follows:

"1. Because there is a defect of parties in that the Department of Agriculture should be made a party.

"2. Because there is a defect of parties in that the State of North Carolina should be made a party.

"3. Because the act of the General Assembly under which the plaintiff brings this action is unconstitutional and void, in that it is in violation of the Constitution of North Carolina, section 5, Article IX, providing for the appropriation of fines and penalties to the common school fund.

"4. Because the act of the General Assembly under which plaintiff brings this action is unconstitutional and void, in that it is in violation of the Constitution of the United States, Article I, section 8, clause 3."

The demurrer was overruled, and the defendant appealed.

J. C. L. Harris for plaintiff.

No counsel contra.

(122) FURCHES, J. This is an appeal from the judgment of the Court below upon complaint and demurrer. The demurrer admits the facts stated in the complaint, and assigns four grounds upon which it is contended the plaintiff should not recover.

The first assignment can not be sustained, as the party suing is the proper plaintiff, unless the statute creating the penalty provides otherwise. *Burrell v. Hughes,* 116 N. C., 430.

The second assignment can not be sustained, as the party claiming the penalty is the proper plaintiff, and not the State. *Middleton v. Railroad,* 95 N. C., 167.

The third assignment can not be sustained, as this question has been decided and has been expressly held to be constitutional in *Sutton v. Phillips,* 116 N. C., 502, and a number of other cases there cited.

As to the fourth assignment, we are somewhat at a loss to see its relevancy to this case. And we regret that the case was not argued for the defendant in this Court. As we understand the facts from the pleadings, the defendant is a domestic corporation and the plaintiff is a resident of Wake County. And it is not plain to us how it is that a question of interstate commerce is involved, as we understand from plaintiff's attorney it was contended in the court below. But if there is such a question involved it can not be sustaind by defendant. This statute and this very question have been discussed in a well-considered opinion by *Judge Seymour* of the United States District Court and held to be constitutional. And while we do not consider ourselves bound by this opinion as authority, still we believe it to be (123) founded on sound reasoning and authority and a correct exposition of the law. 52 Fed., 690. We find no error, and the judgment is AFFIRMED.

Cited: Carter v. R. R., 126 N. C., 444; *S. v. Maultsby*, 139 N. C., 584.

T. A. ARNOLD v. JOHN PORTER, RECEIVER OF PARK LUMBER COMPANY.

Practice—Controversy Without Action—Prerequisites to Jurisdiction.

When a case containing facts upon which a controversy depends is sought to be submitted under section 567 of The Code, an affidavit to the effect that the controversy is real, and the proceeding in good faith to determine the rights of the parties is a prerequisite to jurisdiction, and in the absence of such affidavit the proceeding will be dismissed.

CONTROVERSY without action, heard upon facts agreed before *Boykin, J.*, at chambers, on 3 October, 1896. The affidavit required by section 567 of The Code was not made or filed. Judgment was rendered against the party named as defendant, and he appealed.

Shepherd & Busbee for plaintiff.
S. G. Ryan and Armistead Jones for defendant (appellant).

MONTGOMERY, J. It was intended, it seems, to submit without action a case containing facts upon which the controversy depends, under section 567 of The Code. It appears that the affidavit required by the statute, to the effect that the controversy is real and that the proceeding is in good faith to determine the rights of the parties, was never (124)

made or filed. Such an affidavit is a prerequisite to the exercise of jurisdiction in the matter. *Jones v. Commissioners,* 88 N. C., 56; *Grant v. Newsom,* 81 N. C., 36. The proceeding must be

DISMISSED.

Cited: Grandy v. Gulley, 120 N. C., 177.

THE FARMERS STATE ALLIANCE OF NORTH CAROLINA
v. WILLIAM MURRELL ET AL.

Action Against Administrator—Venue—Application to Remove Cause to Proper County.

1. Under section 193 of The Code an action against an administrator of a decedent, whether upon the official bond of the administrator or for the purpose of holding him liable for any act of his, or for any liability of his intestate incurred in his lifetime, must be brought in the county where the bond was given if the principal or any of his sureties is in such county.
2. If the application for removal of an action to the proper county be made before time for answering expires, it matters not when the motion is heard.

MOTION to remove the cause to another county for trial, for that the action was brought in the wrong county, contrary to section 193 of The Code, heard before *McIver, J.,* at February Term, 1896, of WAKE.

It appeared from the pleadings that Elijah Murrell, one of the sureties on the bond sued on, had died before the commencement of the action, and that the principal in the bond, William Murrell, (also a (125) defendant in this action), had with John F. Cox, another surety, and also a defendant in this action, qualified as administrator of said Elijah Murrell, deceased, before the commencement of this action. These facts also appear by affidavit filed at the time the motion was made at the return term of the summons; and the affidavit itself not being found, the plaintiff admitted that it had been duly filed as alleged.

The plaintiff contended that section 193 of The Code applied only to suits on official bonds of executors and administrators, and not to suits like this, the purpose of which is to establish a debt or claim against the estate of Elijah Murrell and enforce it against other parties defendant also. His Honor granted the motion, and plaintiff appealed.

W. J. Peele for plaintiff.
J. B. Batchelor for defendants.

FURCHES, J. This is a motion to remove the cause for trial from the county of Wake to the county of Onslow. The motion was allowed, and plaintiff appealed. There is no dispute but that the Court has jurisdiction of the subject-matter of this action, and this motion only affects the venue. Two of the defendants are sued as administrators of Elijah Murrell, who were appointed, qualified and gave bond as such in the county of Onslow; and all the defendants reside in that county, and all join in the application to remove. *Clark v. Peebles,* 100 N. C., 348.

The plaintiff being a domestic corporation, it has no residence as provided under section 192 of The Code. *Cline v. Mfg. Co.,* 116 N. C., 837. But if it had, and resided in Wake County, section 193 provides that "all actions upon official bonds, *or against* executors and administrators in their official capacity, shall be instituted in the county where the bond shall have been given, if the principal or any of (126) the sureties on the bond is in the county; if not, then in the plaintiff's county." This section has been construed to apply to all actions against executors and administrators sued in their official capacity, whether on their official bond or for the purpose of holding them liable for any act of theirs as such personal representative, or for any liability their testator or intestate incurred in his lifetime. *Stanly v. Mason,* 69 N. C., 1; *Foy v. Morehead,* 69 N. C., 512; *Bidwell v. King,* 71 N. C., 287. It is true there is an intimation in *Clark v. Peebles,* 100 N. C., 348, that seems to doubt the ruling in *Stanly v. Mason, supra,* as to debts due by the intestate or testator before his death. But it was not overruled, as it was not necessary to pass upon that point in that case; and after considering the question in this case we have concluded not to do so, as the statute seems to be plainly written in that way. *Wood v. Morgan,* 118 N. C., 749.

This would seem to dispose of the case, but for the fact that the action was returnable to April Term, 1894, and this motion was not heard until April Term, 1896. And section 195 of The Code provides that application must be made in writing before the time for answering expires, which was at April Term, 1894. But it was found as a fact that this application was made by the defendants at the return term of the court. This finding of fact cures what seems to be a ground for reversing the ruling of the Court in making the order of removal. For that, after the motion was properly made, it was then a matter with the parties and the Court as to when it should be heard. It may be the plaintiff did not ask a hearing until April Term, 1896, and defendants should not be prejudiced on that account. The facts found we cannot review, and, upon the facts as found, we find no error (127) in the ruling of the Court.

AFFIRMED.

Cited: Roberts v. Connor, 125 N. C., 47; *Brown v. Cogdell,* 136 N. C., 32; *Robeson v. Lumber Co.,* 153 N. C., 123; *Rackley v. Lumber Co., ib.,* 173; *Craven v. Munger,* 170 N. C., 426.

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

Practice—Appeal—Case on Appeal—Rule—Printing Record—Dismissal for Failure to Print Case on Appeal.

Under rule 28 the whole of the case on appeal, as settled by the parties or the judge below, and not such parts only as the appellant may select as material in his opinion, must be printed, and for a noncompliance with the rule in this respect the appeal will, on motion, be dismissed.

MOTION to dismiss appeal, taken from a judgment rendered for the defendant at April Term, 1896, of WAKE. The plaintiff, appellant, deeming certain parts of the case on appeal as settled by counsel to be immaterial and unnecessary to the proper presentation of his assignments of error, omitted them in printing the record. In this Court the appellee, deeming such omitted parts to be material to the hearing on appeal, moved to dismiss under Rule 30. Motion granted.

W. J. Peele and R. O. Burton for plaintiff (appellant).
F. H. Busbee for defendant.

CLARK, J. The requirement that at least the essential parts of the record (which are designated in the rule) shall be printed is not an uncalled-for rule, but a necessity. It is impossible for each of (128) the five judges to examine the record, as should be done, unless it is printed, without great delay in the decision of causes. Should there be only one record, and that in manuscript, or so defectively printed that the manuscript must be referred to in order to see that the essential parts are printed, the delay caused thereby would result in large arrearages on our docket, much to the detriment of suitors. This Court has become the ultimate tribunal for the litigation in the courts of a State containing nearly two millions of people, a State whose population, wealth and volume of litigation are steadily increasing. The Court has again and again called the attention of the bar to the absolute necessity of an inflexible adherence to this rule. It is in the interests of suitors themselves that they may have a prompt examination of their appeals, and by each and every member of the Court. The requirements

as to what shall be printed have from time to time been somewhat extended; but from the very beginning, now many years back, it has been always required, without ever an exception in any case, that the entire "case on appeal" shall be printed. The Judge is presumed to put in the case on appeal all that is essential to present the errors alleged to have occurred on the trial below, and nothing that is non-essential. As counsel frequently differ as to the case, the Judge is made the final arbiter when there is disagreement. In this case, counsel did not disagree and themselves "settled the case." In making up the statement of the case, when they reached long articles or pieces of evidence, etc., which were excepted to, instead of copying them out in full, referred to them as exhibits "A," "B," etc., and thereby directed the Clerk to send them up as parts of the case on appeal, who did so. This is not unusual or improper, and such exhibits are integral parts of the case on appeal, and the counsel below agreed that they (129) were essential parts, or they would not have included them. In printing this case on appeal, the appellant substituted himself for the agreement with the opposite counsel, and omitted the exhibits as immaterial and failed to print them. The appellee insisted on the materiality of the unprinted parts. The appellant might, with equal propriety, go through the case and omit as immaterial any other parts thereof which are required to be printed. The result would be, if this was allowed here, that to save a little cost to appellant there would be a wrangle in every case whether the *material* parts of the case on appeal had been printed, taking up the time of the Court on this collateral matter, which should be applied to hearing the argument on the merits. To prevent such unseemly proceedings, the rule has always required the whole of the "case on appeal" printed. Indeed, at the last term (Rule 28, 118 N. C., 1272), we required that when the proceedings were printed the exhibits referred to in them should be printed, being integral parts thereof. If a party is too poor, he can always appeal in *forma pauperis,* in which case we cause the Clerk of this Court to make the five copies of the "case on appeal" on the typewriter, but we can not tax him with this labor when the party is not an appellant as a pauper.

The repeated and reiterated notices given by this Court that the requirement as to printing was necessary and would be adhered to, leave the appellant no excuse for his default. Such parts of the transcript on appeal as are required to be printed must be printed in full, and we can not open a Pandora's box by setting a precedent in this case of permitting the appellant to select such parts of the "case on appeal" to be printed as he thinks necessary, which has led, of course, to the appellee's controverting the selection and the calling on this Court to umpire the controversy. The rule is plain. The whole (130)

"case on appeal" was settled below and is essential, and as such our rules require it to be printed. Our rules designate the parts of the record to be printed. We can not accept printed parts of such parts, at the option of the appellant, as a compliance, and will not set a precedent of that kind. Most courts of last resort require, we believe, the entire transcript of the record on appeal to be printed.

We trust that appellants and our brethren of the bar will recognize the necessity of this rule and our determination to adhere to it. Appeal DISMISSED.

AVERY, J., being related to one of the parties, and MONTGOMERY, J., having been of counsel, did not sit on the hearing of this case.

Cited: Mining Co. v. Smelting Co., post, 416; *Barbee v. Scoggins,* 121 N. C., 141; *Fleming v. McPhail, ib.,* 184; *Hicks v. Royal,* 122 N. C., 406.

MARY M. CHRISTMAS, EXECUTRIX OF T. B. BRIDGERS,
v. JOSEPH A. HAYWOOD.

Action to Foreclose Mortgage—Agreement Concerning Land Void for Inability of Seller to Convey Good Title—Issues—Practice—Trial—Leading Questions—Irrelevant Testimony—Parol Evidence of Acknowledgment of Debt Not Sufficient to Revive Debt.

1. A mortgagor from whom the mortgagee, after receiving various payments on the debt, agrees to take in final payment so much of the land as will equal, at a stated price per acre, the balance of the debt due, cannot profit by the agreement when the land is so encumbered by other mortgages and judgments as to disable him from conveying a good and unencumbered title to the land.
2. The refusal to submit issues not raised by the pleadings is not error.
3. It being discretionary with the trial judge to permit or disallow a leading question to be asked of a witness, his refusal to allow it is not error.
4. Parol evidence is not competent to show an acknowledgment of a debt barred by the statute of limitations for the purpose of repelling the bar.
5. A question propounded to a witness concerning a matter not referred to in the pleadings or involved in the issues is rightly rejected as irrelevant.

(131) ACTION, tried before *McIver, J.,* and a jury, at February Term, 1896, of WAKE. The facts are sufficiently stated in the opinion of *Associate Justice Montgomery.* There was judgment for plaintiff, and defendant appealed.

CHRISTMAS *v.* HAYWOOD.

Battle & Mordecai and Argo & Snow for plaintiff.
S. G. Ryan and Armistead Jones for defendant (appellant).

MONTGOMERY, J. This was an action for the foreclosure of a mortgage. The debt was a balance of purchase-money due by the defendant to the plaintiff, as executrix of Thomas B. Bridgers, for the land conveyed in the mortgage. There were other mortgagees and also judgment creditors of the defendant, of subsequent date and lien to the mortgage of the plaintiff's testator, and they were made parties to the suit. The defendant in his answer sets up an agreement in writing, which was signed by the testator, in which he agreed to receive, upon a final settlement of the debt due upon the land purchase (numerous payments having been made prior to the agreement), so much of the land, at the price per acre originally agreed to be paid by the defendant for the same, as would be equal to the balance of the debt; and he (132) averred that he had offered to the plaintiff to carry out the agreement, and that he was, at the time of filing the complaint, ready and willing to do so. This feature of the case can be eliminated from the controversy for the reason that no proof whatever was offered on the trial about the matter; and further, because in the answer it is admitted and in the verdict of the jury it is established that the land which is conveyed in the mortgage is encumbered by numerous judgments and mortgage liens. The defendant, therefore, could not get the benefit of the agreement, because he could not convey to the devisees under the will of the testator a good and unencumbered title to any part of the land. The persons entitled under the will would have the right to demand that the land which the defendant might convey under the agreement, in satisfaction of the debt, should be free from encumbrances and that the title should be good. That is the true construction of the agreement.

The first exception of the defendant is to the refusal of the Judge to submit two issues tendered by him, viz:

What is the present value of the land purchased by Haywood of Bridgers?

What is the value of the land agreed by Bridgers to be taken back from Haywood?

His Honor properly refused the issues. They do not arise upon the pleadings. There is not a word in the complaint and answer which raises such. It can not be error to refuse to submit issues not raised by the pleadings. *McElwee v. Blackwell,* 82 N. C., 345; *Miller v. Miller,* 89 N. C., 209, and the numerous cases cited in Clark's Code, sec. 393.

The second exception of the defendant is to the refusal of his Honor to allow the question, "What was the value of the stone taken by Emery

(133) from your land and carried to Bridgers' premises?" to be asked of the defendant, a witness on his own behalf. The ruling of his Honor was on the ground that the question was a leading one. Emery, a witness for the defendant, had testified that he took rock from defendant's land, hauled it to the testator's in his lifetime to be used in building barns for the testator, and that the testator had said that he would make it all right with the defendant. Emery did not know the value of the rock. The question was undoubtedly a leading one. It assumed that Emery had taken rock from the defendant's land and had carried it to that of the testator—a controverted fact; and the Judge had discretion to allow or not allow such a question to be asked. But if it were otherwise the defendant had no cause for complaint, because his Honor, after all, permitted the defendant to testify that Emery had taken and carried rock from the defendant's premises, and that it was worth $75 or $100, and Emery had testified that he had carried the rock to the testator's land. The defendant therefore got the benefit of the subject-matter of the excluded question.

On the trial the Judge allowed the defendant to offer proof of the value of certain rents for the years 1873 and 1874, which defendant averred that the testator owed him, and which he claimed as a credit on, or a counterclaim to, the plaintiff's debt. This counterclaim, as it appears in the answer, was not sufficiently pleaded to allow the proof offered to be given in; but as the Judge allowed such a course, he also permitted the plaintiff to plead the statute of limitations to it.

The defendant offered to show by parol testimony that the rents were due in 1873 and 1874, and that the testator agreed to account for them, at the time of the agreement heretofore referred to, to wit, on 18 February, 1893. The plaintiff objected to the testimony on the ground that it appeared that the alleged claim for rent was barred by (134) the statute of limitations at the time of the alleged declaration of the testator, and that parol evidence was not competent to show an acknowledgment or promise whereby to repel the statute. The objection was sustained, and the defendant excepted. There was no error in this ruling. The claim thus attempted to be used being barred by the statute, by all the proof offered before the declaration concerning it by the testator, could only be revived by a promise or acknowledgment in writing signed by the party to be charged thereby. Code, sec. 172.

The defendant was asked by his counsel "if there was a gin and engine on the land when he bought it, and if they were there now?" The plaintiff objected, and the objection was sustained. The question was irrelevant. There was no averment in the answer that the testator had converted the engine or gin of the defendant. There was no issue about it. Proof without allegation will not be allowed. It is a well-settled

legal principle, repeatedly recognized by this Court, that a recovery can not be had without corresponding allegations. *Smith v. B. and L. Assn.*, 116 N. C., 102. There is

NO ERROR.

Cited: *Watkins v. Mfg. Co.*, 131 N. C., 540.

(135)

VAUGHAN & BARNES v. C. W. JEFFREYS ET AL.

Subrogation—Following Trust Fund.

J., being indebted to H., assigned to him an unsecured note of P. for $983. H. insisting upon security, J. induced P. to execute a mortgage to secure a note for $1,618, covering the aggregate of other indebtedness and the $983 note, which latter, however, was in no wise mentioned in the new note or mortgage. J. then assigned the $1,618 note before maturity to V. & B. as collateral security for a debt due by him to them, the latter having no notice of the fact that the $1,618 note included the debt which had been assigned to H. Subsequently J. made a general assignment of all his property to a trustee, giving a preference to the debt due to V. & B. By a foreclosure of the P. mortgage, the debt of V. & B. was paid without intrenching upon the funds in the hands of the trustee, which were sufficient to pay V. & B's debt and prior preferences: *Held*,

(1) That the fact that V. & B. had two securities for their debt does not entitle H., who had no lien upon the property appropriated to the payment of V. & B's debt to be subrogated to the rights of the latter under the trust deed.

(2) That while H. may have enforced his equitable lien against J. and P. before the mortgage was paid off by the foreclosure sale, he cannot follow the fund arising from such sale either into the hands of V. & B., since they took the P. note and mortgage for value and without notice of H's equity, or into the hands of the trustee of J., since it is not, and never has been, in his hands.

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

ACTION, commenced in EDGECOMBE Superior Court, against C. W. Jeffreys and J. C. Powell, 4 April, 1893; and at April Term, 1893, of said court, H. L. Staton, assignee of C. W. Jeffreys, and in his own right, and Geo. Howard and Donnell Gilliam came into court and by consent were made parties defendant. At October Term, 1895, (136) J. T. Howard was permitted to interplead. At June Term, 1896, said action was heard by *W. A. Hoke*, Judge presiding at said term, upon the following case agreed, to wit:

"1. That at and prior to 1 January, 1891, C. W. Jeffreys, W. A. Hart and Eli Howell were doing a mercantile business in the town of Tarboro, N. C., under the style of Howell, Hart & Jeffreys, and on said day, or thereabout, C. W. Jeffreys, acting for said firm, borrowed of J. T. Howard $1,770.04, payable on 1 January, 1892, and to better secure the same endorsed to said Howard a certain sealed note or bond of J. C. Powell, made payable to Howell, Hart & Jeffreys, for the sum of $983.72, due and payable 1 January, 1891, and by said endorsement said firm became responsible for the payment of said note or bond then due, as well as each member thereof.

"2. That thereafter, to wit, on or about 1 January, 1892, said firm dissolved partnership and C. W. Jeffreys continued business, assuming the liabilities of said firm and receiving all accounts, etc., belonging to or due said firm, and continued business under the firm name of C. W. Jeffreys & Co. until 2 December, 1892, when he made an assignment for the benefit of his creditors, appointing H. L. Staton his assignee. Said assignment provided, among other things, as follows: 'Second, he (meaning the trustee) shall pay Vaughan & Barnes, Norfolk, Va., the sum of $3,000, due by note maturing 1 December, 1892, and for the further sum of $1,954.70, due on open account, all collaterals held by said parties to be surrendered at once to said party of the second part' (meaning the trustee).

"3. That the said sealed note or bond due said Howard is still unpaid, and amounts to $1,770.04, and interest at eight per cent from 3
(137) January, 1891, and said Howard still holds said note or bond endorsed to him by said firm of Howell, Hart & Jeffreys.

"4. That at the time, or soon thereafter, the said firm of Howell, Hart & Jeffreys dissolved partnership, the said Howard holding said note and the note of said Powell as additional security, both of which were due; saw the said Jeffreys, who had assumed to pay the same, and told him that the said note due the said Howell must be paid or better secured. Thereupon said Jeffreys agreed to better secure said note. That in a few days after the said Jeffreys, as this affiant is informed and believes, had the said J. C. Powell to secure by mortgage or trust deed the note which had been assigned to said Howard, together with other claims due the said Jeffreys, and perhaps others. Said mortgage or trust deed was executed by said J. C. Powell and his mother, M. B. Powell, and conveyed therein certain lands fully described, amply sufficient to pay all the claims therein secured. That at the time of taking the security said Jeffreys took from said Powell a new note for $1,618.47, carrying interest at eight per cent from date and payable 1 November, 1892, being dated 4 January, 1892. Of this amount $1,141.61 was for the note held by the said Howard (being the $983.72 note and interest to 4 Jan-

uary, 1892), the remainder being the account then due by said Powell to said Jeffreys. Soon after taking this note and security, said Jeffreys informed this plaintiff (Howard) that he had secured the amount due by Powell to said firm, and by them assigned to him by mortgage or trust deed, together with certain funds due him. Thereupon the said Howard did not enforce the payment of said note.

"5. That at the time the said Jeffreys made his assignment as hereinbefore stated, said note of $1,618.47, secured by said mortgage, was held by the firm of Vaughan & Barnes, commission merchants of Norfolk, Va., without the knowledge or consent of the said (138) Howard.

"6. On 4 April, 1893, said Vaughan & Barnes brought this action in the Superior Court of Edgecombe County to foreclose said trust deed or mortgage for the payment of said debts as aforesaid. At the Spring Term, 1893, a judgment of foreclosure was entered, as fully appears from said judgment as filed among the papers in this action, authorizing the sale of the property therein conveyed. And said sale was made by virtue of said judgment, and the purchase-price of said property was ample to pay all claims therein, and interest and costs.

"7. That at June Term, 1895, of said court, the following order was entered, to wit:

" 'This cause coming to be heard, and it appearing to the Court that Vaughan & Barnes only held the claims sued upon in this action as collateral security for a claim against C. W. Jeffreys, who executed a trust deed to H. L. Staton, trustee, and that since this suit was brought H. L. Staton, trustee, has paid the plaintiff (meaning Vaughan & Barnes) their debt against C. W. Jeffreys in full, it is therefore ordered that H. L. Staton, trustee, be made a party to this action, and that said trustee shall in all respects take the place of the plaintiffs as to the liability for costs, if any, and also to recover, as trustee, all such sum or sums as the plaintiff shall recover of the defendants in this action, and that Vaughan & Barnes be in all respects discharged from liability by reason of this suit from all costs heretofore or hereafter to accrue.

'JAS. D. MCIVER,
'Judge Presiding.'

"8. That by the assignment of C. W. Jeffreys to H. L. Staton (139) much property and valuable *choses in action* passed to said Staton, such assignee, from which he has realized a large sum, to be expended under said assignment, to wit: $15,000, which sum is amply sufficient to pay all claims in said assignment preferred to that of the said Vaughan & Barnes, and still leave a sufficiency to pay all costs and ex-

penses of executing said trust, and the said debt due said Vaughan & Barnes, and take up said collaterals held by them as provided in said assignment.

"9. That said Staton, trustee as aforesaid, now has in his hands of said funds received under said assignment from C. W. Jeffreys, funds more than sufficient to pay the claim of this plaintiff, and all costs and expenses of said assignment, and the executing the same, and after paying all claims preferred in said assignment to that of the said Vaughan & Barnes.

"10. That said Staton received from the property assigned to him by C. W. Jeffreys about $15,000; that a short time after the execution of said assignment an action was instituted against Staton by several of the creditors of the said C. W. Jeffreys, the purpose of which was to avoid said deed, and in said action an injunction was issued enjoining and restraining the said assignee from paying the debts secured or otherwise disposing of the said assets. That said action was pending in this court until Spring Term, 1895, when the said action was determined favorably to the validity of said assignment. That the plaintiffs, Vaughan & Barnes, desiring to realize on the collaterals deposited with them, at the Spring Term, 1893, instituted this action for the purpose of collecting the said note of $1,683, and at ..... Term, 1893, a judgment was rendered in this action by which, as will appear by reference to said judgment, providing for the payment of said
(140) note from the proceeds of the sale of the property of said J. C. Powell. That said note was paid to the plaintiffs Vaughan & Barnes in the manner provided by said judgment. No part of the said note of $1,683 ever came into his hands as assignee, or otherwise, nor did he at any time have any control over the said note, or the proceeds thereof, or the application of the same. That on or about 1 January, 1893, J. T. Howard gave him notice of the facts as set out in section 4, and that said Staton has notice of said claim of the said Howard. That he had in his hands an amount more than sufficient to pay debts preferred in said assignment prior in order of preference to debt of Vaughan & Barnes, but he never at any time had in his possession any portion of the proceeds of the note of $1,683 in controversy. He has in his hands from the proceeds of the assets of the said C. W. Jeffreys by virtue of said assignment an amount sufficient to pay the cost and expenses of executing the said assignment, but has not an amount sufficient to pay the debts secured and directed by said assignment to be paid from the said assets."

(The facts in the foregoing paragraph, No. 10, are admitted to be true, subject to the contention of the said J. T. Howard that said Staton

is conclusively bound by the judgment set out in paragraph 7 thereof, and if this Court shall so hold, then this admission is to be stricken out).

"His Honor rendered judgment as follows: It is adjudged that the plaintiff, J. T. Howard, is entitled to be, and is, subrogated to the right of Vaughan & Barnes under the assignment of C. W. Jeffreys to H. L. Staton, trustee, for the purpose of having his debt paid, viz: One thousand, one hundred and forty-one dollars and sixty-one cents, with interest on same at eight per centum per annum from 4 January, 1892, to 17 May, 1893, until paid. And it appearing that H. L. Staton, trustee as aforesaid, now has in his hands funds belonging to said (141) trustee that is available under said assignment for the payment of Vaughan & Barnes' debt, and sufficient to pay all claims in said assignment preferred to said debt of Vaughan & Barnes, and all cost of administering and settling said trust, and more than sufficient to pay said sum of $1,141.61, with interest on same as aforesaid.

"It is therefore ordered and adjudged that said H. L. Staton, trustee, pay out of said trust funds now in his hands as aforesaid, to the said J. T. Howard, the sum of $1,141.61, with eight per cent interest from 4 January, 1892, until 17 May, 1893, and six per cent from 17 May, 1893, until paid, and the cost of J. T. Howard in this action, to be taxed by the Clerk."

From this judgment H. L. Staton, trustee, appealed.

H. G. Connor for appellant.
G. M. T. Fountain and W. O. Howard for interpleader.

FURCHES, J. This case comes before us by appeal from a judgment of the Court below upon a case agreed. And the interpleading plaintiff, Howard, insists that the judgment appealed from is correct and should be sustained on two grounds: First, under the doctrine of subrogation; and, secondly, under the doctrine of trusts and the right to follow the fund.

The doctrine of subrogation is entirely one of equitable origin, and means to substitute, to put one person in the place of another, and is usually exercised where one person has become liable for or has been compelled to pay money for another. In such cases equity will put such party so paying or so liable in the place of the other party for whom he has become so liable, or for whom he has so paid his money, and will give him all the benefits of secureties that the other (142) party had. Sheldon on Subrogation, 1, 2, 3. Thus understanding the doctrine of subrogation, we see no grounds for its application in this case. The plaintiff, Howard, has paid the debt of nobody, nor has he obligated himself to pay the debt of anybody. To whose place or to whose rights will he be subrogated? Not to Vaughan & Barnes; he has

paid no debt for them. They only collected a debt out of the defendant Jeffreys that he justly owed them, by enforcing a security placed in their hands. And the doctrine of subrogation never interferes with equal or superior rights of others. 3 Pomeroy Eq. Jur., sec. 1419, note 1. He can not be subrogated to the rights of Jeffreys. He has paid no debt for him. But he needs no subrogation to Jeffreys' rights, as Jeffreys is his debtor, and he is entitled to such securities as he has for his debt on other principles. But the security which he alleges that Jeffreys held for his benefit has been legally paid and discharged. He can not be subrogated to the rights of Staton, the trustee, who is but the hand of Jeffreys for the collection and administration of the assets of Jeffreys under the deed of assignment. And besides, he has paid no debt, nor has he obligated himself to pay any debt for Staton as trustee, nor for the trust estate.

But it is contended that Vaughan & Barnes had two securities for their debt, the note and mortgage of Powell, assigned to them as collateral security by Jeffreys, and the trust deed of Jeffreys to the defendant Staton. And the plaintiff Howard had but one, to wit, the note of Powell, assigned to him by Jeffreys as collateral security, and the mortgage of Powell to Jeffreys.

As it finally turned out, after a long litigation and after the Powell mortgage had been foreclosed, the debt of Vaughan & Barnes was
(143) secured by the deed of trust of Jeffreys to Staton. And it is true that Vaughan & Barnes collected the Powell debt and applied it in satisfaction of their debt due from Jeffreys. And it is further contended by Howard that Vaughan & Barnes should have collected all their debt out of the trust funds in the hands of Staton; and as they did not, but collected it out of the Powell debt and mortgage, that Howard should be subrogated to the rights of Vaughan & Barnes, and allowed to collect his note on Powell out of Staton.

But the fact that Vaughan & Barnes had two securities for their debt does not entitle Howard to the right of subrogation, unless he had a lien on the property of Powell conveyed in said mortgage, as he does not claim to have any lien on the funds in Staton's hands, unless it be by subrogation.

This brings us to a consideration of the facts under which Howard claims. Jeffreys owed Howard, and Powell owed Jeffreys a note of $983.72, and Jeffreys assigned this note to Howard as collateral security. Some time after this Howard applied to Jeffreys for additional security, and Jeffreys promised to have Powell to secure the note, so assigned, by mortgage, which he afterwards told Howard had been done.

But it seems that Powell was owing Jeffreys other sums besides the note which Jeffreys had assigned to Howard, amounting to $1,618.47,

including the Howard note, for which aggregated sum of $1,618.47, Powell executed a new note to Jeffreys, and secured this new note by mortgage.

This new note and mortgage Jeffreys assigned to Vaughan & Barnes to secure a debt he owed them.

It is admitted that Vaughan & Barnes had no notice of the existence of the Howard note until after the failure and assignment of Jeffreys. There was no mention of the Howard note in the mort- (144) gage that could constitute constructive notice, nor was the registration of the mortgage any notice to them on the Howard debt, as it was not mentioned in the mortgage. The date of the assignment to Vaughan & Barnes not being stated, it is presumed that it was before the note became due. And Vaughan & Barnes, taking it without actual or constructive notice, took it discharged of all equities of either Powell or Howard. It therefore appears that Howard had no claim on Vaughan & Barnes. Howard does not claim that he has, but claims that he has a right to be subrogated to their rights as against Staton. To entitle him to this equity, he must show that he had a lien on the property appropriated by Vaughan & Barnes. 1 Pomeroy Eq. Jur., secs. 165, 166. This he attempts to show by the mortgage of Powell to Jeffreys. But this mortgage, in our opinion, fails to show this. It is to secure a note of even date with the mortgage for $1,618.47, payable to Jeffreys. Neither Howard nor the note he holds is mentioned in it. The mortgage does not, therefore, secure the Howard note by its terms and conditions, and can only be made to do so by extrinsic evidence, that would induce the Court, in the exercise of its equitable jurisdiction, *to declare* the lien. This the Court can not do, for the reason that Howard took this note long after it was due, and therefore subject "to any sets-off, or any other defense existing at the time of or before *notice* of the assignment." Code, sec. 177. There is nothing in the case to show that Powell had any notice of the assignment to Howard at the time he renewed the note and made the mortgage, or at the time the money was collected by Vaughan & Barnes. And this being so, the mortgage and pay- (145) ment of the new note was a satisfaction and discharge of the Howard note, so far as Powell is concerned. If Howard were to sue Powell on this note, the facts disclosed in this case make a good defense for Powell, and Howard would not be able to recover judgment against him. Code, sec. 177. If Howard is entitled to the right of subrogation he claims, it is upon the ground that property has been taken by Vaughan & Barnes, upon which he had a lien and the right to have it applied to the payment of a debt due him from Powell. But, as we have seen, his right as against Powell is gone—that Powell, in legal contemplation, has paid off the debt and discharged himself from any

liability on account of this note. And it would be a legal solecism to say that a court of equity would enable a man to collect a debt that had been paid.

But if the note assigned to Howard had not been past due at the date of the assignment, so as not to affect him with the new note, mortgage and payment, there still appears to us to be another reason why he is not entitled to this right of subrogation. The mortgage, as we have stated, was not made to him, nor does it mention his debt or pretend in any way to secure the same. This being so, he had no estate in or lien on the property. At most, he only had a right—an equitable interest—which equity might declare and enforce. But until it is *declared* there is no specific lien on the property. And after the property has been taken and appropriated to the payment of another debt, under a mortgage that was a specific lien, there is no property for the court to *declare a lien upon,* and the plaintiff Howard's equitable relief against the *property* must fail on that account; and if he had no lien on the property taken, he has no right to be subrogated to.

There is no doubt but he has a right of action against Jeffreys and the other obligors on their note, and also an action against
(146) Jeffreys on his breach of trust; but he has no lien on their property. And the defendant Jeffreys having assigned his property to the defendant Staton, in trust for creditors, it is his duty to administer and pay it out as the trust deed directs.

So it seems clear to us that the judgment below can not be sustained under the doctrine of subrogation.

Neither can it be sustained under the doctrine of trusts and of following the fund. The mortgage from Powell to Jeffreys, at most, was only an equitable mortgage to the plaintiff Howard, as is stated above. It was not taken to him, nor was the debt assigned to him named in it, though it appears that this debt constituted a part of the consideration of the new note taken by Jeffreys and assigned to Vaughan & Barnes. And it is expressly agreed that Vaughan & Barnes had no notice of the note that Howard held. It may be that Howard might have enforced his equitable lien against Jeffreys and Powell before this mortgage was paid off and discharged by a sale of the property. But the foreclosure sale of the property and the payment thereby of the mortgage due from Powell, in which the note assigned to Howard was a part, discharged any equitable claim Howard may have had in it. And the only thing remaining to be considered is as to whether he can follow the fund arising from the sale under the mortgage. This, it seems to us, he can not do, as between him and Vaughan & Barnes, as they took the note in the course of business for a valuable consideration and without notice of any equity the plaintiff Howard had upon it. Sheldon on Subroga-

tion, p. 239, sec. 155. Indeed, it was not contended on the argument that Howard had any claim on Vaughan & Barnes. And it is stated in the record that they are discharged from any liability on (147) account of said transaction.

But plaintiff Howard contends that he may follow the fund in the hands of the trustee Staton. But he can not do this, as the proceeds of sale under the Powell mortgage (under which Howard claims he had an equitable interest) are not in the hands of Staton, and never have been. This is admitted. And it is impossible to follow a fund into the hands of a party, when it is not in his hands and never has been. There is error and the judgment below is

REVERSED.

CLARK, J. (dissenting). The point presented, stripped of immaterial circumstances, is this: Jeffreys endorsed for value to Howard a bond of Powell. Howard pressing for further security of Powell or payment, Jeffreys procured Powell to execute a new bond secured by mortgage. Jeffreys notified Howard, who ceased thereupon to press for collection, but instead of turning the new bond with its security over to Howard, Jeffreys wrongfully assigned it, without knowledge of Howard, as collateral, to Vaughan & Barnes for a debt due them, without any knowledge on their part of Howard's claim to the bond. Soon thereafter Jeffreys made an assignment to Staton, trustee, for benefit of creditors, Vaughan & Barnes being among the preferred creditors. This action was begun by Vaughan & Barnes against Jeffreys & Powell to foreclose said mortgage. Staton, trustee, was subsequently substituted as party plaintiff, the Court adjudging that he recover of Powell, as the order recited that Vaughan & Barnes had been paid in full, though it is agreed as a fact that in truth Vaughan & Barnes received the sum collected from the Powell mortgage, but that after paying off all the (148) indebtedness of Jeffreys to Vaughan & Barnes, and all other creditors holding preferences prior to theirs, there is still a balance in hands of Staton, trustee.

On these facts Howard, who has interpleaded, claims:

1. That Staton, trustee, is bound by the recitals in the judgment of foreclosure. (2) That if he is not, still the Powell mortgage was in equity held by Jeffreys as trustee for Howard, and by its tortious conversion to the payment of Vaughan & Barnes the fund now in the hands of Staton, trustee, has been that much wrongfully swollen by use of the fund belonging to Howard, and that therefore Howard should now be subrogated (to the extent of the amount realized from the Powell mortgage) to the priority, or preference, which Vaughan & Barnes held under the deed of assignment, upon the general assets of Jeffreys in the hands of

his assignee, H. L. Staton. The court below so held, and in this there was no error. It is true that if a trustee tortiously convert a trust fund to his own use, it becomes a debt having no priority or lien over other indebtedness, but if he pays off an encumbrance with the trust fund, in equity it is an investment for the *cestui que trust,* who is subrogated as owner of the encumbrance. So, on an assignment for creditors, a preferred debt is an encumbrance, so to speak, on the general assets in the hands of the assignee, and the use of the specific trust fund in favor of the preferred debt to Vaughan & Barnes subrogates Howard, the equitable owner of the trust fund, in their places as preferred creditor.

The principle applicable is the well-established one that a creditor whose fund has been taken to pay a prior debt is subrogated to the lien of that debt on other funds. Sheldon on Subrogation, secs. 61 and 62 and cases there cited. As between Howard and Jeffreys, Howard had a right to have Jeffreys decreed trustee of the Powell mortgage
(149) for his benefit. By its tortious transfer to Vaughan & Barnes without notice, they were enabled to apply it on their claim, which, by the terms of Jeffreys' general assignment for benefit of creditors, became a preferred debt on all the assets of Jeffreys in the hands of Staton, his trustee. But there being sufficient assets to pay off Vaughan & Barnes (and all liens prior to theirs) without touching this fund, which in equity belonged to Howard—as between Howard and Jeffreys—it should not have been applied to Vaughan & Barnes' debt, and having been so applied Howard is subrogated to the rank and priority of the debt which his fund paid. If Jeffreys had not passed the Powell mortgage to Vaughan & Barnes without notice, and it had gone with his other assets into the hands of his assignee, as against such trustee, since he stands in Jeffreys' shoes, Howard would be entitled to a decree that the mortgage be applied to the payment of the bond assigned to him by Jeffreys as a security to which bond the mortgage was executed, and which therefore inured to the benefit of Howard, the assignee and owner of the bond.

AVERY, J. I concur in the dissenting opinion.

Cited: Bank v. Trust Co., post, 555; *Cutchen v. Johnston,* 120 N. C., 56; *Grainger v. Lindsay,* 123 N. C., 218.

(150)

N. HOLLEMAN v. HARWARD & HUNTER.

Action for Damages—Husband and Wife—Husband's Right of Action for Injuries to Wife and Loss of Her Services and Companionship—Sale of Laudanum to Wife Under Protest of Husband—Liability of Seller for Consequent Injuries.

1. A husband being entitled to the services and companionship of his wife, whoever joins with her in doing an act which deprives the husband of such rights is liable to him in damages.
2. One who, despite the protests and warnings of a husband, persistently sells laudanum or similar drugs or intoxicating liquors to the latter's wife, knowing that she buys it for use as a beverage, whereby she contracts a habit destructive to her mental and physical faculties, and causing loss to the husband of her companionship and the services pertaining to the domestic relation, is liable in damages to the husband for the injuries so sustained.

ACTION, for damages, heard on *demurrer ore tenus* before *McIver, J.*, at February Term, 1896, of WAKE. The demurrer was sustained, and plaintiff appealed. The nature of the action and grounds of demurrer are set out in the opinion of *Associate Justice Montgomery.*

Argo & Snow for plaintiff (appellant).
Battle & Mordecai and H. E. Norris for defendants.

MONTGOMERY, J. This action was brought to recover of the defendants damages for injuries alleged to have been sustained by the plaintiff in consequence of the defendants having sold laudanum to his wife, the defendants being druggists and knowing that the plaintiff's wife was using the same in large quantities, and as a beverage, to the injury of her health. A demurrer *ore tenus,* on the ground that (151) the complaint did not state facts sufficient to constitute a cause of action, was sustained by his Honor. The defendants had answered, denying all the material allegations of the complaint, but for the purpose of this action, the demurrer having been entered and sustained, the matters alleged in the complaint are to be taken as true. The complaint shows that the plaintiff's wife many years before this action was brought, while suffering from some temporary illness, was forced to take preparations of opium for relief, and from this was formed the habit of taking laudanum. The plaintiff, as soon as he discovered the habit, set to work to cure or prevent it, and so informed the defendants, who lived in the same town with him, and forbade them to sell to his wife opium in any form except upon his own order, the defendants then and before having sold her the laudanum, knowing that she was addicted to

the use of it as a beverage. It is further alleged in the complaint that notwithstanding these protests and orders to the contrary of the plaintiff, the defendants have almost daily through a series of years, against the frequent protests and warnings of the plaintiff, sold to the plaintiff's wife large quantities of laudanum, which they knew she was using as a beverage; that the defendants knew that, at the times when they were selling the laudanum to the plaintiff's wife, she was using it as a beverage; that she was becoming and had become what is known as an opium-eater; that she was, through the use of the drug, wrecking her mind and body, and that the plaintiff was doing his utmost to prevent such use and to counteract the effects of the ruinous drug. The plaintiff alleges in his complaint "that his wife, by reason of the use of the drug as a beverage, had become a mental and physical wreck, and almost deprived of moral sensibility, unfitted and disqualified to attend to her household duties or to the care and nurture and direction of her
(152) children, and that by the means aforesaid, so furnished by the defendants knowingly, willfully and unlawfully, the plaintiff has been deprived of the society of his wife, of her services in her home, and his children have suffered from neglect and want of motherly care." That the plaintiff's family consists of his wife and six children, some of them very young, and all under age. That the plaintiff himself is dependent on his daily toil for a living, and the care of his household and children is dependent upon the services and attention of his wife, and that by the sale and use of the laudanum she has become physically and mentally incapable of attending to her duties. The complaint further alleges that but for the conduct of the defendants in selling and furnishing the plaintiff's wife laudanum, the plaintiff would have been able to have counteracted the habit, which was only forming at the time the defendants began to furnish her with the said deadly drug; and his said wife, instead of being a burden from mental and physical and moral imbecility, would have been a comfort and helpmeet.

The question then is, Can the plaintiff, upon the facts set out in the complaint, maintain an action? The action is a novel one. With the exception of the case of *Hoard v. Peck,* 66 Barb., 202, which, in its most important aspects, resembles the one before us, we have been able to find no precedent in the English Common Law Courts, or in the courts of any of our States. It does not follow, however, that, because the case is new the action can not be maintained. If a principle upon which to base an action exists, it can be no good objection that the case is a new one. It is contended for the defendants, though, that there is no principle of the common law upon which this action can be
(153) sustained, and that our own statutory law gives no such remedy as the plaintiff seeks in this action for the wrong done to him by

the defendants; and that the novelty of the action, together with the silence of the elementary books on the subject-matter of the complaint, while not conclusive, furnishes strong countenance to their contention. It is claimed for the defendants that, while in the abstract such facts as are stated in the complaint would make the parties charged guilty of a great moral wrong, there would be no legal liability incurred therefor. It was argued for the defendant that there was no legal obligation resting upon themselves not to sell the drug, as is alleged, to the plaintiff's wife, or upon the wife not to use it; that many of the ancient restrictions upon the rights of married women had been repealed by recent legislation, or modified by a more liberal judicial construction; that a married woman was ordinarily free to go where she would, and that the husband could not arbitrarily deprive her of her liberty, nor use violence against her under any circumstances, except in self-defense; and that, if he could not restrain her locomotion and her will, he could not prevent her from buying the drug and using it; that the wife's duty to honor and obey her husband, to give to their children motherly care, to render all proper service in the household, and to give him her companionship and love, was a moral duty, but that they could not be enforced by any power of the law if the wife refused to discharge them. But notwithstanding the claim of the defendants, we think this action rests upon a principle, a principle not new, but one sound and consistent. The principle is this:

"Whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property, or the reputation of another." *Story, J.*, in *Dexter v. Spear*, 4 Mason, 115. And also in the third book of Blackstone's Com- (154) mentaries, chapter 8, p. 123, it is written: "Wherever the common law gives a right or prohibits an injury, it also gives a remedy by action." A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship and of rendering all such services in his home as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings and the product of her labor, skill and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name, and it seems to be a most reasonable proposition of law that whoever willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying mind and body, and thereby causing loss to the husband. The defendants and

the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her, after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband.

There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife. That assaults and batteries are made criminal offenses makes no difference, the foundation of the husband's suit being not for the public offense, but for
(155) damages, compensation for the injury which he has sustained on account of the loss of his wife's services. The sale of the laudanum by the defendants to the plaintiff's wife, under the circumstances set out in the complaint, was willful and unlawful, and the husband's injury is just as great as if his wife had been disabled from a battery committed on her, although the unlawful act is not indictable.

The defendants' counsel also insisted that the selling of laudanum is a lawful business, that it is on the same footing as the sale of spirituous liquors unrestrained by the statute. It is true that there is no statutory provision in North Carolina prohibiting the sale of laudanum as a beverage or medicine, but it does not therefore follow that a sale of it under all circumstances is lawful. As is well said in *Hoard v. Peck, supra,* "Its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied." It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's compying with the license laws, except in the cases prohibited by statute. Certainly, no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum or intoxicating liquors to a wife in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action. We have in our State, The Code, section 1077, a statute which makes it unlawful to sell liquor in any quantity to a minor (except he is a married man), and section 1078 gives to the person injured damages therefor. But suppose we had no statute on the subject of liquor selling to minors, would the law permit with impunity a dealer or other person to sell liquor to a man's child, without his knowledge or consent, in such quantities
(156) as to produce habitual intoxication, or to render him unfit for employment? But laudanum is well known to be a poisonous drug. As a beverage, it can not be drunk without injury to the body, affecting the health of the physical and moral powers; and this is known to most persons of ordinary intelligence and to all druggists. The defendants

knew, taking the complaint in this appeal to be true, that the plaintiff's wife did not buy the laudanum for medicine. They knew that she was buying it as a beverage; that she was violating her duty to her husband in destroying her health, and thereby rendering herself unfit as a companion for him, and to render proper service in the household. They assisted her and encouraged her, for gain, with the means of doing all this in face of his frequent protests and warnings. The habit she had formed was the direct result of the use of the drug which the defendants sold to her in such large quantities, and they knew it and persisted in it, although repeatedly warned and entreated by the husband not to do so.

His Honor erred in sustaining the demurrer. It ought to have been overruled.

REVERSED.

Cited: Wilkinson v. Dellinger, 126 N. C., 464; *Spencer v. Fisher,* 161 N. C., 120.

---

(157)

L. B. SMITH, EXECUTRIX, v. A. D. FRAZIER ET AL.

Practice—Foreclosure Sale—Compensation of Commissioners—Commissions, When Not Allowed.

1. Trustees and commissioners to sell land under judicial order (other than in partition proceedings) are not allowed commissions, either by statute or common law, but only such just compensation for time, labor, services, and expenses as the circumstances of each case warrant.

2. Where, in foreclosure proceedings, commissioners were appointed to sell land, and the decree provided that they should receive 5 per cent commissions, and pending an advertisement of the sale the plaintiff agreed to sell the land privately to the defendant for $2,400, and such private sale was reported to and confirmed by the court: *Held,* that it was error to allow 5 per cent commissions to the commissioners, and the decree making such allowance will be modified so as to provide for reasonable compensation for the time, services, and expenses of the commissioners.

ACTION, heard before *Coble, J.,* at January Term, 1896, of GRANVILLE. The facts appear in the opinion of the Chief Justice.

W. B. Shaw and Shepherd & Busbee for plaintiff (appellant).
Edwards & Royster for defendants.

FAIRCLOTH, C. J. The object of this action was to foreclose a bond for title to land purchased by the defendants, and for a judgment in favor

of the plaintiff for the balance of the purchase-money. At July Term, 1895, the cause was tried, and the plaintiff recovered judgment and the land was ordered to be sold by two commissioners then appointed, with a further order that the proceeds be applied first to the cost and
(158) expenses of the sale, including five per cent commissions on the sale, and the balance in payment of the judgment. Accordingly, the commissioners advertised to sell the land, and, pending the advertisement, the parties settled the matter. It was made to appear to the court at January Term, 1896, that the plaintiff sold the land to the defendants at $2,400 with the sanction of the commissioners after they had duly advertised to sell the land, and they reported that the price was a full and fair one, and recommended the confirmation of the sale. No sale was made under the advertisement, and the sale (as above stated) was confirmed. It was further ordered that the commissioners be allowed five per cent upon the purchase-price, to be retained out of the purchase-money as aforesaid.

The plaintiff appealed from so much of the order as allows five per cent commissions to the commissioners, and this is the only question for us to consider.

At common law no commissions were allowed, and that rule has been followed by our Court, both at law and in the court of equity. By statutes executors and administrators and sheriffs are allowed commissions under the circumstances mentioned in the statutes, but there is no such statute in relation to trustees and commissioners in a state of facts like the present. In an early case, the rule established was a *just* allowance for time, labor, services and expenses, under all the circumstances that may be shown before a master, and that rule has been since observed. *Boyd v. Hawkins,* 17 N. C., 329; *Dawson v. Grafflin,* 84 N. C., 100. In a recent case the same principle is repeated. *Pass v. Brooks,* 118 N. C., 397. The Code, sec. 1910, applies to partition proceeding.

The order allowing five per cent commissions on the purchase-
(159) price is reversed with direction to the Superior Court to allow a just and reasonable compensation for labor, services, time and expenses, under all the circumstances, actually rendered by the commissioners.

REVERSED.

Cited: *Turner v. Boger,* 126 N. C., 303.

H. A. FOUSHEE v. W. J. CHRISTIAN ET AL.

Election Law—Construction of Statute—Justices of the Peace—Ballot Boxes.

Under sec. 18, chap. 159, Laws 1895, a separate ballot box is not required to be provided at each voting precinct for the election of justices of the peace. Such officers are to be voted for on the same ticket and in the same ballot box as members of the General Assembly, county officers, and constables.

PROCEEDING under section 7, ch. 159, Laws 1895, for a rule upon the defendant, Clerk of Superior Court of DURHAM, to provide a separate ballot box at each precinct for the election of justices of the peace, heard before MONTGOMERY, Justice of the Supreme Court. The order for an additional ballot box was denied and plaintiff appealed to the full bench.

Shepherd & Busbee and J. S. Manning for petitioner.
John W. Graham for respondent.

CLARK, J. The election law of 1895 (ch. 159, sec. 18) provides for only two ballots, upon one of which the State officers, presidential electors, members of Congress, judges and solicitors are to be voted for, and on the other, the members of the General Assembly and county officers, besides a constable in each township; and section 19 requires the clerk or board of electors to provide ballot boxes for each class, (160) *i. e.*, ballot boxes to be voted in at every precinct (besides the two duplicate boxes for the preservation of the ballots). Section 23 of said act specifies how the abstract of the election returns are to be made, subsection 2 thereof, providing for a return on one sheet of clerk Superior Court, county treasurer (if any), register, surveyor, sheriff, coroner, constable "and such other county and township officers as shall be provided by law." The justices of the peace, though not specifically named in this act, come within this description and are to be voted for on the ticket above, which contains the names of the candidates for General Assembly, county and township officers. The justices of the peace are certainly embraced in "such other county or township officers provided by law." Ch. 157, Acts 1895, sec. 4, provides for the election of the number of justices therein specified, in and for each township.

Each township elects its own justices of the peace; consequently, while the names of the candidates for that position must be placed on the ticket which contains the names of the candidates for General Assembly and county and township officers, the names of candidates for justices only appear on such ticket for their respective townships, as is the case with constables, who, in like manner, are voted for only in their

own townships; and, in the same manner as on the other ballot, candidates for Congress and solicitor are voted for only in their respective districts. In refusing an order for an additional ballot box there was no error.

AFFIRMED.

---

(161)

JOHN H. FERREE ET AL. v. JOHN W. COOK.

Action of Claim and Delivery—Fraudulent Conveyance—Burden of Proof—Bill of Sale—Subsequent Insertion of Other Property Without Noted Change of Consideration—Conveyance as Security—Erroneous Rejection of Testimony Cured by Admission of Fact Intended to be Proved—Instructions.

1. In the trial of an action of claim and delivery of personal property, in which defendant alleges that the bill of sale under which plaintiff claims is fraudulent, the burden is upon the defendant to prove the fraud, unless the instrument is fraudulent upon its face or enough appears therein to raise a presumption of fraud, and a finding by the jury that such bill of sale is not fraudulent will not be disturbed unless based on improper evidence or erroneous instructions.

2. The erroneous rejection of testimony on a trial is cured by a subsequent admission of the fact attempted to be proved thereby.

3. Where, in the trial of an action of claim and delivery of personal property, to which the defense was that the bill of sale under which plaintiffs claimed was fraudulent, it appeared that the grantor, after executing the bill of sale for certain property upon a recited consideration of $4,000, the estimated value of the property, agreed to include other property if the grantees would assume and pay other debts of his for which they were sureties, and did subsequently insert such other property in the instrument without changing the recited consideration: *Held*, that it was not error to refuse an instruction that, if plaintiffs and the grantor in the bill of sale agreed on a consideration of $4,000 for the transfer of certain personal property, and subsequently other property was inserted in the bill of sale without change of consideration, the instrument was fraudulent.

4. An insolvent debtor may, in good faith, pay one or more of his creditors, though nothing remains for his other creditors.

5. Although an insolvent debtor, in selling his property to a creditor in payment of a debt, may have the intent to secure a benefit to himself, or to hinder, delay or defraud his other creditors, the transaction will be upheld if the creditor who is paid does not participate in or know of the debtor's fraudulent purpose.

6. The refusal to give an instruction not warranted by the testimony is not error.

FERREE *v.* COOK.

ACTION of claim and delivery, tried at July, 1895, Special Term of GUILFORD, before *Boykin, J.*, and a jury. The action was brought by the plaintiffs, claiming to be the owner and to have right of recovery of the property named in the complaint, under a bill of sale made to them by one L. F. Ross. The defendant admitted the taking and holding the same, and justified the same on the ground that said bill of sale was fraudulent and void as to creditors, that he had levied upon and held the property as sheriff, under and by virtue of the authority of three several warrants of attachment against the said Ross. In the course of the trial when Newell, a witness on the part of the plaintiff, was under examination, the defendant, in support of his defense, proposed to show by him that L. F. Ross, on the day, and just a few days before, the making of the bill of sale under which the plaintiffs claim, told him that he was insolvent, and on objection by plaintiffs his Honor excluded the evidence, to which defendant excepted.

In the course of the argument to the jury the counsel for plaintiff admitted that L. F. Ross was insolvent, and in the charge to the jury the Court called the attention of the jury to this admission, and stated that there was no denial that he was insolvent.

Two issues were submitted, the first relating to the ownership (167) of the property, and the second to the value of the property at the time of seizure.

The defendant asked the Court for the following instructions:

"1. If the jury shall find that the bill of sale executed by L. F. Ross was so executed with the intent to hinder, delay or defraud his creditors or to secure a benefit to himself, the burden is upon the plaintiffs to show that a consideration actually passed in the shape of (168) money paid, something of value delivered or the discharge of a debt actually due from L. F. Ross to them, and that they acted in good faith.

"2. If the jury shall find that L. F. Ross executed said bill of sale with such intent to hinder, delay or defraud creditors or to secure a benefit to himself, and that plaintiffs participated in his purpose, or knew of his intent at the time, though the consideration may have been a pre-existing debt, it is their duty to find that said bill of sale was executed to defraud creditors.

"3. The notice or knowledge of L. F. Ross's fraudulent intent on the part of plaintiffs does not mean that they must know as a matter of law that said bill of sale was fraudulent, but did they know the circumstances which the law says makes the transaction fraudulent, if it was so, on the part of L. F. Ross (which have been explained), and if they did know of such circumstances the jury will find that said sale was fraudulent and that plaintiffs are not entitled to recover.

"4. Even if the plaintiffs paid a full price for the property conveyed in said bill of sale, yet, if the jury shall find that they purchased with the intent to aid L. F. Ross to defeat his creditors or any of them, or to secure a benefit to himself, their purchase is void, and the jury will answer that plaintiffs are not entitled to recover.

"5. If the jury shall find as a fact that the plaintiffs and L. F. Ross agreed upon the sum of $4,000 as the consideration for the transfer of the buggies, carts, wagons and harness, and that subsequently other property, mules and wagon and harness and hosiery-mill stock notes were inserted in the bill of sale without change of consideration, such insertion of property being without consideration was fraudulent,
(169) and hence plaintiffs would not be entitled to recover.

"6. If the jury shall find that the bill of sale was executed in whole or in part as a security, and not as an absolute sale of property, then the same is in law fraudulent and void, and the plaintiffs are not entitled to recover.

"7. The plaintiffs having testified that the hosiery-mill stock was inserted in the bill of sale as a security, the same was fraudulent, and the jury will answer the first issue, 'No.'"

The Court gave all the prayers, save the 5th and 7th. Defendant excepted to refusal of the Court to charge as requested in those prayers.

It was admitted by plaintiff's counsel, and the admission was called to the attention of the jury, that L. F. Ross was insolvent.

His Honor explained the contention of the parties to the jury and, among others, instructed them as follows: "That an insolvent debtor had the right to pay one or more of his creditors, though it resulted in not having enough property left to pay his other creditors, but the transaction must be *bona fide,* without intent to hinder, delay or defraud his other creditors or any one of them, and without purpose to secure a benefit to himself; and although a debtor did sell his property to a creditor as a payment of his debt, in order to secure a benefit to himself or with the intent to hinder, delay or defraud other creditors, still the law will uphold the contract unless the creditor participated in his purpose or knew of his intent at the time.

"That a conveyance of property absolute upon its face, but intended as a security for a liability, is fraudulent and void as to creditors.

"It being admitted that L. F. Ross was insolvent at the time
(170) of the execution of the bill of sale, the jury should inquire, first, if he intended by said transfer of his property to the plaintiffs to hinder, delay or defraud any of his creditors or to secure a benefit to himself; second, if he did so intend, did the plaintiffs participate in his purpose or know of his intent; third, was the alleged consideration

for the transfer of said property reasonably fair and just; fourth, whether the bill of sale was executed, in whole or in part, as a security or as an absolute sale of the property.

"If the jury finds that L. F. Ross conveyed the property to the plaintiffs with the intent to hinder, delay or defraud any of his creditors, or to secure a benefit to himself, and shall also find that the plaintiffs participated in his purpose and knew of his intent, then the conveyance was fraudulent and void, and the plaintiffs can not recover, and are not the owners of the property; or, if the jury shall find that the bill of sale was executed in whole or in part as a security, and not as an absolute sale of the property, then the same is in law fraudulent and void, and the plaintiffs are not the owners of the property and are not entitled to recover.

"But if the jury shall find that L. F. Ross conveyed the property in good faith for a reasonable, fair consideration, without any intent to secure a benefit to himself, or to hinder, delay or defraud any of his creditors, or if he did so with such intent and purpose, if the plaintiffs did not participate in such purpose, or know of such intent, then the plaintiffs are entitled to recover and are the owners of the property, unless the conveyance and transfer of the property was made, in whole or any part thereof, as a security.

"If the conveyance and transfer of the property was made, in whole or in part, as a security, then the same is void and fraudulent as to creditors, and the plaintiffs are not the owners of and are not (171) entitled to recover the same."

There was a verdict for the plaintiffs; prayer for judgment by the plaintiffs; motion for a new trial by the defendant for refusal by his Honor to give defendant's fifth and seventh special instructions, and for error in excluding the proposed evidence of witness Newell as to declarations of insolvency by L. F. Ross. Motion denied, and judgment for plaintiffs, from which defendant appealed.

J. T. Morehead for plaintiff.

Dillard & King, R. M. Douglas and Shepherd & Busbee for defendant (appellant).

FURCHES, J. This is an action for the possession of personal property, and comes to this Court on the appeal of defendant. Plaintiffs claimed title under a bill of sale bearing date 15 August, 1893, which defendant alleged was fraudulent, as to creditors under whom he claimed, being intended to hinder and delay the creditors of L. F. Ross from collecting their debts. And further, that this transaction between L. F. Ross and

the plaintiffs was not an absolute sale, but in fact an assignment to secure plaintiffs as his sureties, and was, therefore, a fraud on the registration law, and void on that account.

It is not contended by the defendant that the bill of sale contains such evidence of fraud on its face that it was the duty of the court to declare it void, as a matter of law. Nor is it contended that sufficient appears on its face to create a presumption of fraud, which must be rebutted by the plaintiffs. *Cheatham v. Hawkins,* 76 N. C., 335; *S. c.,* 80 N. C., 161; *Booth v. Carstarphen,* 107 N. C., 395; *Cowan v. Phillips, ante,* 26. This being so, it devolved on the defendant to establish
(172) the fraud. And this was a question of fact for the jury and the jury has passed upon it, and found there was no fraud. This ends the case, unless this finding was based upon improper evidence, or erroneous instructions from the Court.

There is but one exception to evidence assigned as error, and that is that the defendant was not allowed to prove that "Ross told witness (Newell) that he was insolvent." This exception was virtually abandoned on the argument, and it was admitted on the trial that he was insolvent. So we see no ground upon which it should be sustained.

The defendant's only other exception is that the Court declined to give his 5th and 7th prayers for instruction, which are as follows:

"5. If the jury shall find as a fact that the plaintiffs and L. F. Ross agreed upon the sum of $4,000 as the consideration for the transfer of the buggies, carts, wagon and harness, and that subsequently other property, mules and wagons and harness, and hosiery mill stock and notes, were inserted in the bill of sale without change of consideration, such insertion of property being without consideration was fraudulent, and hence the plaintiff would not be entitled to recover."

"7. The plaintiffs having testified that the hosiery mill stock was inserted in the bill of sale as a security, the same was fraudulent, and the jury will answer the first issue 'No.'"

This case discloses the fact that the plaintiffs, Ferree and R. R. Ross, were the sureties of L. F. Ross for considerable amounts, over and above $4,000, the estimated value of the property L. F. Ross at first agreed to sell them; that he afterwards agreed with the plaintiffs that, if they would agree to pay other debts for which they were his sureties, and to assume a liability of his to one Gwynn, he would sell them other
(173) property, which was then inserted in the bill of sale. The evidence in the case tends to establish this state of facts, and in our opinion justified the Court in declining to give the defendant's fifth prayer.

We fail to find that the seventh prayer is sustained in fact. There may be sufficient evidence for the defendant to argue that the hosiery

mill stock was inserted as a security. But we do not find that the plaintiffs testified that it was. This being so, the defendant's exception to the Court's refusing to give this prayer must fail.

Whatever might be our opinion if we were sitting as a jury, we find no error of law committed by the Court on the trial. The defendant's prayers for instruction, and the judge's charge, (which the reporter will set out in full), show that the defendant has no cause to complain of the Court in this trial. Failing to find error, the judgment is

AFFIRMED.

Cited: McBrayer v. Haynes, 132 N. C., 611.

(174)

JOHN WYCHE ET AL. v. W. E. ROSS, ADMINISTRATOR OF CHARLES ROSS.

Judgment by Default—Motion to Set Aside—Discretion of Judge—Covenant of Quiet Enjoyment—Damages.

1. The setting aside a judgment by default is a matter of discretion with the judge below and is not reviewable unless it clearly appears that such discretion has been abused.
2. Where there are successive administrations on an estate, they are in law one and the same, and the successor of an administrator who has been removed is not entitled, as a matter of right, to have set aside a judgment rendered against his predecessor by default.
3. It was not an abuse of discretion in the judge below to refuse to set aside a judgment by default against a former administrator in order to permit an administrator *de bonis non* to plead the statute of limitations or other technical defense, such pleas not being meritorious.
4. In an action on a covenant for quiet enjoyment it was not error to refuse to allow the defendant credit for rents where plaintiff does not claim interest on the price paid for the land.

ACTION, tried before *Coble, J.,* and a jury, at April Term, 1896, of GRANVILLE. From a judgment for the plaintiff the defendant appealed. The facts appear in the opinion of Associate Justice FURCHES.

Winston, Fuller & Biggs for plaintiff.
T. T. Hicks for defendant (appellant).

FURCHES, J. In 1885 the plaintiff, Wyche, bought a tract of land from Charles Ross, for which he paid $500, and Ross conveyed to him by deed with a covenant of warranty of quiet enjoyment. In 1885, one

Davis and others recovered said land of the plaintiff Wyche upon a title paramount to that of the grantor, Charles Ross; but by a compromise the land was sold by a commissioner under order of court,
(175) and was bought by the plaintiff Marsh at the price of $576, and this sale was reported to the Court and confirmed. By the terms of the compromise the plaintiff Wyche was to get one-fourth of the price the land brought at said sale. After this judgment and sale the plaintiff commenced this action against Amanda Ross, the administratrix *c. t. a.* of Charles Ross, the grantor, he having died before the commencement of this action. At the return term of this action the defendant entered no appearance, and judgment was taken against her by plaintiff, and a writ of inquiry as to the amount of damages ordered. Between that term of the court and the next, the defendant W. E. Ross procured the removal of the said Amanda, and he was appointed the administrator *d. b. n., c. t. a.,* of the said Charles Ross, and at this term of the Court filed an affidavit asking the Court to allow him to be made a party defendant, to set aside the judgment by default, and allow him to file an answer and defend the action. The Court allowed this motion to the extent of making the defendant Charles a party defendant in the place and stead of the said Amanda, who had been removed, and allowed him to file his answer and to make any defense he could as to the measure of damages, but refused to set aside the judgment by default theretofore rendered. To this ruling, refusing to set aside the judgment taken by default, the defendant complains and excepts; and this was the principal question discussed before this Court.

We are unable to see that we can correct the mistake of the Court in refusing this motion, if any has been made, and we do not say that there has been. This motion involved a discretionary power of the Court below, which this Court will not review unless it clearly appears that there has been an abuse of discretion in the matter appealed
(176) from. Freeman on Judgments, section 541, (3d Ed.); *Bank v. Foote,* 77 N. C., 131.

With the view of ascertaining this fact, whether there has been such abuse of discretion, in the Court's refusing the defendant's motion to set aside the judgment, we have carefully examined the whole case, and fail to find that there has been.

The two administrations of Amanda and of the defendant, W. E. Ross, are in law one administration. And we find that Amanda was legally served with process, and failed to appear and defend the action. And though it is alleged in defendant's affidavit that Amanda is not friendly towards defendant, and is friendly with plaintiff, and failed to defend on that account, the Court fails to find this to be the fact, there being no other evidence to sustain this charge. We find that the defendant and

the other heirs at law of Charles Ross, the grantor, were notified of the action of Davis and others against the plaintiff for possession, and asked to come in and assist in defending that action, which they declined to do. We find from the facts stated, and not denied, that Charles Ross, the ancestor of the defendant, and his testator only had an estate in the land *per auter vie,* for the life of Mrs. Eliza Quarles, which had terminated before the Davis suit was commenced; that one of the defenses set up by the defendant in his answer (which the judge did not allow to be filed) was the Statute of Limitations. But this plea is not generally considered a meritous defense, or one that is calculated to move the Court to act in a matter of discretion. But as we consider this warranty to be one of quiet enjoyment, in our opinion it could not have availed the defendant if it had been pleaded in apt time, and when the defendant, as a matter of right, could have pleaded it. (177)

Another ground of defense set up in this answer is that there had been no actual ouster of the plaintiff at the time this action was commenced. The plaintiff says there was what is equivalent to an actual ouster; that there had been a recovery of the land, a sale ordered by the Court, and a sale made under said order, and cites *Mizzell v. Ruffin,* 118 N. C., 69, and other cases in support of this contention. But whether, if this had been pleaded as a defense when the defendant had the legal right to plead it, we do not feel called upon to decide. For if we were to admit that it would defeat the plaintiff's action, it would only be for technical reasons not in the least affecting the merits of the case, and like the Statute of Limitations not likely to induce the Court, as a matter of discretion, to set aside a judgment regularly granted in order that it might be pleaded. If parties wish to avail themselves of such defenses, they must put them in when they have the right to do so. Having fully considered the whole case upon the motion to set aside the judgment, we see no error in the action of the Court below, certainly nothing we can review and correct if there has been a mistake.

Having disposed of the motion to set aside the judgment, we are called upon to consider another matter of which the defendant complains, and to which he excepted. On the trial the defendant was allowed the benefit of one-fourth of the price for which the land sold, under the order of the Court, which the plaintiff was to have under the terms of the order of sale, amounting to $135.70. But as the plaintiff claimed no interest on the money paid, the Court did not allow the defendant to claim rents for the two or two and a half years that plaintiff had been in possession, since the death of the life tenant, whose interest the de- (178) fendant's ancestor had conveyed to the plaintiff. If the defendant had been allowed to do this, according to the evidence the rent would have only amounted to a few dollars more than the interest. But it seems

to us that the action of the Court in this respect is sustained by *Locke v. Alexander,* 8 N. C., 417; *Williams v. Beaman,* 13 N. C., 483, and other cases that might be cited. And upon a review of the whole case it seems to us that the defendant has had the opportunity to present whatever defense he had, upon the merits of the case, and that substantial justice has been done according to law, and that the judgment must be

AFFIRMED.

Cited: Riley v. Hall, post, 409; *Cowles v. Cowles,* 121 N. C., 275; *Ross v. Davis,* 122 N. C., 266; *Marsh v. Griffin,* 123 N. C., 667, 670; *Pass v. Brooks,* 125 N. C., 132; *Norton v. McLaurin, ib.,* 188; *Morris v. Ins. Co.,* 131 N. C., 213; *Lumber Co. v. Cottingham,* 173 N. C., 327.

W. A. FOUSHEE ET AL. v. D. G. BECKWITH ET AL.

Practice—Referee's Report—Failure to Find Facts.

1. This Court can not make a finding of facts, and when a referee's report, containing a large volume of evidential facts but without a single finding of fact either by him as referee or by the judge below, comes to this Court it will be remanded in order that the facts may be found.
2. It was the duty of the judge below when the report of the referee came before him in such shape to remand the case to the referee for the findings of fact.

SPECIAL PROCEEDING, pending before the Clerk of the Superior Court of CHATHAM, and heard before *Graham, J.,* at chambers in Oxford, on 23 June, 1896, on exceptions to the report of the Clerk as referee. From a judgment overruling the exceptions the plaintiffs appealed.

(179) *Womack & Hayes for plaintiffs.*
H. A. London for defendants.

FURCHES, J. This case comes to us "in such questionable shape" that we have to return it without deciding any of the questions intended to be presented.

A very large volume of evidence is sent to us, accompanied by a report of the clerk, acting as referee, in which he finds several evidential facts, but without finding a single fact as a conclusion arising from the evidence.

Neither did his Honor below find any facts; nor do we say that it was his duty to do so, as they had not been found by the referee. Had this been done it would have been his duty to review the findings of the referee upon such matters as were pointed out to him by proper exceptions, and to make such findings as he deemed proper; and if the facts had been first found by the referee, and the judge had made no findings, the law would have presumed that he had adopted the findings of the referee. *McEwen v. Locheim,* 115 N. C., 348; *Hunter v. Kelly,* 92 N. C., 285; *Barbee v. Green,* 92 N. C., 471.

If the facts had been found by the judge, or found by the referee and the judge had adopted such finding in express terms, by presumption of the law, this Court would have been bound by such findings. This Court can not find the facts (*Hunter v. Kelly, supra*), and it was a useless expense to send this mass of testimony to us. All that was necessary to send to this Court was what was sufficient to present the exceptions taken to the evidence; and these questions, like the others intended to be presented, should have been passed upon by the referee and then by the judge before they came to this Court.

The judge below should have remanded the case to the referee, that he might review and find the facts. And as he failed to do this we must do so. *Lanning v. Commissioners,* 106 N. C., 505. There is error in the Court's not remanding the case to the referee to find (180) the facts, and it is now so ordered by this Court.

ERROR. REMANDED.

Cited: Alexander v. Harkins, 120 N. C., 454.

O. S. CAUSEY v. EMPIRE PLAID MILLS.

Fixtures—Evidence.

1. The question as to when personal property becomes a fixture by reason of being attached to realty depends, as a general rule, upon the relations, agreement, or intention of the parties interested at the time of the transaction, and sometimes upon the rights of others who become interested therein; hence,

2. In the trial of an action to recover a machine claimed by the plaintiff and attached to a mill which defendant had bought, it was competent for plaintiff to prove that the machine was placed in the mill for temporary use, to be sold or removed by plaintiff as it proved to be satisfactory or not.

CAUSEY *v.* PLAID MILLS.

ACTION, tried before *Boykin, J.,* and a jury, at July Special Term, 1896, of GUILFORD. The action was for the recovery of an "inspecting machine" and damages for its detention by the defendant corporation, the successor of a corporation of the same name, with which plaintiff claimed to have left the machine with a view to selling it. The defendant claimed that the machine was a fixture and passed with the property bought by defendant at a sale of the former corporation's effects. Plaintiff alleged that the defendant had notice of his claim that it was personal property and belonged to him. On the trial the plaintiff offered to prove that the machine was put in the mills for temporary
(181) use, with a view to sell it to the company, if satisfactory, and if not to remove it at his pleasure. The evidence was excluded on defendant's objection, and plaintiff appealed.

L. M. Scott and Shaw & Scales for plaintiff (appellant).
Winston & Fuller for defendant.

FAIRCLOTH, C. J. We were favored with an argument, whether the "inspecting machine" became a fixture to the Plaid Mills building. The question, when personal property becomes a fixture by reason of its connection or attachment to realty arises under varying circumstances, and as a general rule depends upon the relation and agreement or intention of the parties at the time of the transaction, and sometimes the rights of others becoming interested affect the solution of the question. Some of these relations were pointed out in *Overman v. Sasser,* 107 N. C., 432. But we are met with a question of evidence, and the ruling of the Court entitles the plaintiff to a *new trial.*

The plaintiff offered to prove "that the machine was put in the mill for temporary use, with a view to sell the same to the company if they should be pleased with it, and if not to be removed at his pleasure." This offer was excluded by the Court, and plaintiff excepted.

This proposition embraced the agreement, if there was any, and the intention of the parties, and is a material fact in the transaction. Such evidence has been held competent. *Foote v. Gooch,* 96 N. C., 265; *Freeman v. Leonard,* 99 N. C., 274. We think it better to let this case go back and be further investigated, when all competent evidence will be admitted, when the true relations of the parties and circum-
(182) stances may be made to appear, than to mark out any principle governing the case in its present aspects.

ERROR.

V. BALLARD, TRUSTEE, v. TRAVELERS' INSURANCE COMPANY.

Contract, Construction of.

L., a former agent of defendant, who had quit its employment with his accounts unadjusted, went to Hartford, Conn., defendant's place of business, in consequence of a telegram requesting him to come to adjust accounts, and offering to pay his expenses. On arrival, L. demanded that a proposition of settlement should be sent to his hotel; this the defendant declined, as all the books, correspondence, etc., relating to L's accounts were at its office, to which he was requested to come, and in default of L's compliance with the request, defendant refused to pay his expenses. L. thereupon returned home: *Held*, in an action by the assignee of L., that defendant was not liable for the expenses of L's trip, the reasonable construction of the telegram being that the expenses of the trip would be paid by defendant if L. on his arrival should, in a business-like manner, meet the defendant at its office in Hartford and in a business-like way discuss the matters between them.

ACTION, heard on appeal from a judgment of a Justice of the Peace, before *Coble, J.*, at March Term, 1896, of DURHAM. After all the evidence was in, it was agreed that a jury trial should be waived, and that the Court might find the issues of fact and conclusions of law.

The Court found the following facts:

"1. That one of the plaintiffs, J. R. Lindsay, had been in the (183) employ of the defendant company. That the said Lindsay went out of the employ of the defendant company some time in June or May, 1895.

"2. That the said J. R. Lindsay received the following telegram:

"HARTFORD, CONN., 26 August, 1895.

"To J. R. Lindsay:

"Better come here any day this week.

"RODNEY DENNIS, *Sec.*"

"3. That the said Lindsay replied in the following telegram:

"YORKVILLE, S. C., 8, 26, 1895.

"To Rodney Dennis, Sec., Hartford, Conn.:

"I do not feel justified in coming to Hartford at my own expense. The whole subject could be so much better discussed here, and I request that you send a representative here. Please arrange an interview without delay. Answer.

"J. R. LINDSAY."

"4. That the said Lindsay received the following telegram dated at Hartford, 27 Aug., 1895:

"You may come to Hartford at company's expense.

"RODNEY DENNIS, *Sec.*"

"5. That the said Lindsay, in consequence of receiving the last telegram, went to Hartford, Conn.

"6. That Rodney Dennis was Secretary of the defendant company.

"7. That his expenses were $91.40, which has not been repaid (184) to him. That he demanded $91.40 from the company. That while in Hartford, Conn., the said Lindsay received the following letter": (Letter is set out in the opinion.)

"11. That the assignment to Ballard was made for the purpose of bringing suit in this State. It was made in good faith."

The Court's conclusion of law and judgment was as follows:

"That the defendant, The Traveler's Insurance Company, is indebted to the plaintiff in the sum of $91.40."

"To this conclusion of law the defendant excepted, and appealed therefrom to the Supreme Court, gave due notice, etc., and assigned as error:

"(*a.*) That the Court's finding of fact shows the object of the plaintiff Lindsay's trip to Hartford, Conn., was to adjust matters of controversy between him and the defendant company, and that such purpose was the consideration of the promise to pay expenses in the telegram marked exhibit 'A,' and when J. R. Lindsay refused to confer with the officers of the defendant, as defendant contends, shown in the letter of 4 September, 1895, he lost his right to demand payment of his expenses.

"(*b.*) That upon all the facts found by the Court, the conclusion of law is erroneous, because the most favorable view to the plaintiff Lindsay does not entitle him to recover against the defendant."

Winston & Fuller for plaintiff.

Boone & Bryant for defendant.

MONTGOMERY, J. The plaintiff owned the claim upon which the action was brought, as assignee of J. R. Lindsay, who had been an agent of the defendant company. The assignor claimed that he (185) went to Hartford, Conn., after he had ceased to be agent, at the request of the defendant, and that it agreed and promised to pay him the expenses of his trip, $90. Lindsay left the employment of the defendant in May or June, 1885, with matters connected with the agency unsettled. In August, the defendant from Hartford telegraphed to Lindsay in Yorkville, S. C., that he might come on to Hartford, where

the defendant did its insurance business, at its expense, Lindsay, upon receiving the telegram, and in consequence of it, went to Hartford, and after his arrival received from defendant company a letter as follows:

"HARTFORD, CONN., 4 September, 1895.

"J. R. Lindsay, Esq., the Heublein, Hartford, Conn.

"DEAR SIR:—You were invited by letter 27 August to come to this office for the purpose of adjusting your account. Having before us all the records, correspondence and papers affecting the same, we can not do this business at your hotel. The first thing to do is to adjust the account. When that is done, the bill for your expenses here will be paid, or credited to your account, as the case may be. Your proposition for a lump settlement regardless of the accounts, was declined. You then asked for a counter proposition, which I said I would make to-day, after going over the accounts, and ascertaining the facts. I have been at work all the morning to that end. Now you ask that a proposition be sent to your rooms at your hotel. This I decline to do, and further decline to pay your expenses in coming here, unless the purpose of your visit can be accomplished. You brought with you no statement of your account showing the disbursements made by you of moneys advanced, and no statement of your business showing any balance due you by this company, as you claim. Your (186) various reports have to be examined and agreed upon before any final settlement can be agreed upon. This is the first thing in order.

"Yours truly,

J. G. BATTERSON, *President.*"

After the plaintiff's assignor, Lindsay, received the letter he made no answer, and nothing further was done. His Honor, by consent of parties, found the facts, and upon them held that the defendant was liable and gave judgment for the plaintiff assignee. In this we think there was error.

We are of the opinion that the reasonable construction of the meaning of the telegram is that the expenses of Lindsay's trip to Hartford would be paid if upon his arrival he should, at a proper place in the city and at a proper time and in the usual business way, discuss the subject-matter of business interests to both. The unanswered lettter of the defendant shows what the nature of the business was, and the law implied an agreement on the part of Lindsay that he would, upon his arrival at Hartford, in a businesslike manner, meet the defendant at its place of business and discuss the matters between them. The telegram could not be construed, when taken in connection with the unanswered letter, to mean

that Lindsay should come to Hartford, leave without a reasonable effort to adjust the matters between them, and then make the defendant company pay the expenses of his trip.

We think, upon the facts found by his Honor, that the plaintiff was not entitled to recover.

REVERSED.

(187)

V. BALLARD, ASSIGNEE OF J. R. LINDSAY, AND J. R. LINDSAY v. THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONN.

Contract Insurance Agent—Power Coupled with Interest—Revocation—Commissions on Renewal Premiums.

1. Where a contract between an insurance company and an agent provided that the latter should retain for his services 45 per cent on first annual premiums on policies sold by him, and 6 per cent on renewals, and that the contract might be terminated at the option of either party on thirty days notice, and the company accompanied the contract with a letter which was to be taken as a part of the agreement, in which it agreed to advance to the agent $600 monthly with which to establish agencies and introduce the business, such advances to be repaid out of the proceeds of the agency as fast as possible, and in the meanwhile to be secured or evidenced by the agent's demand notes, upon which the agent's payments should be endorsed when made, and the interest to be adjusted at the end of the year or upon the earlier discontinuance of the contract: *Held*, that the contract, as affected by the letter accompanying it, did not confer upon the agent a power coupled with an interest so as to prevent the company from terminating the contract on the required notice. The agent had it in his power to protect himself against assignment of the notes by making it appear on their face that they were payable out of the profits of the agency.
2. Where an agent of an insurance company is allowed by the contract, as part of his compensation, a certain percentage of renewal premiums, his right to collect and retain the same ceases with the termination of the contract.
3. A provision in a contract between an insurance company and its agent to the effect that, if the agent shall fail to do certain things required of him under the contract, he shall forfeit his rights and not then be entitled to commissions on renewals maturing after the agency has ceased, will not, in the absence of a positive provision that he shall be entitled to them if he carries out the stipulations, be allowed to affect the general rule of law that such an agent, when his agency has been revoked under a power given to the principal, will not be allowed commissions on renewals maturing after the agency had ceased.

(188) ACTION, tried before *Coble, J.*, at March Term, 1896, of DURHAM.

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

gave judgment for the plaintiff, and the defendant appealed. The essential facts are stated in the opinion of Associate Justice MONTGOMERY.

Winston & Fuller for plaintiff.
Boone & Bryant for defendant.

MONTGOMERY, J. The contract between the plaintiff's assignor, J. R. Lindsay, and the defendant company, which was in all respects complied with by Lindsay, contained a provision to the effect that it might be terminated at the option of either party by written notice to the other party of not less than thirty days. Notice under that provision was given by the defendant to Lindsay, and in May or June, 1895, he ceased to be agent of the defendant. Certain renewal premiums upon policies which were issued while the plaintiff's assignor was the agent of the defendant, falling due after his agency had ceased, and having been paid by the policy-holders to the defendant, the plaintiff assignee brought this action to recover the amount. He claims that his assignor has a right to the same under that part of the contract which provides for his retaining for his services "on all other life and endowment policies 45 per cent of first annual premiums, 6 per cent on renewals." The defendants resist the recovery on the ground that the contract was terminated in May or June, 1895, and that with the termination of the agency Lindsay's right to receive the 6 per cent on the renewals which fell due and were paid after the agency had been terminated ceased. His Honor found the facts and gave judgment for the plaintiff.

We are of the opinion that the plaintiff is not entitled to re- (189) cover. It was admitted by the counsel of the plaintiff, in his argument here, that if the contract had been the usual and ordinary one between insurance companies and their agents, it might be revoked at the option of the company, but he insisted that a certain letter written by the defendants to Lindsay, and treated as a part of the contract, conferred a power coupled with an interest, and therefore was irrevocable. The letter is as follows:

"HARTFORD, CONN., 6 October, 1892.

"*J. R. Lindsay, Greensboro, N. C.*

"DEAR SIR:—Enclosed find contract, which we believe to be in accordance with the terms agreed upon when you were here. It is understood that we are to advance to you, at the beginning of each month, $600, the same to be repaid to the company out of the profits of the agency as rapidly as possible. Rather than incorporate this part of our agreement in the contract, our attorney advises that we take your 'demand' note for each advance, and then endorse upon the notes your payments,

adjusting the interest in accordance with an understanding, at the end of the year, or before if contract is discontinued, you to pay interest at the rate of 6 per cent. This letter is to satisfy you that we intend to advance, as agreed upon when you were here. It is also understood that we are to take notes for a reasonable portion of life premiums, and that they are to be discounted at the rate of 6 per cent, and that for insurance paid for in notes, which are not paid, you are to pay for expired time, and term insurance medical examiner's fees. All such notes are to be endorsed or guaranteed by you. No notes to be taken, or at any
(190) rate submitted to the company, which fall due on and after 1 December in any year.

"Yours truly,

"RODNEY DENNIS, *Secretary.*"

We fail to see how this letter can have the effect to deprive the defendants of the right to terminate this agency at their option upon giving the proper notice to the plaintiff's assignor. The language of the contract is: "This contract may be terminated at the option of either party by written notice to the other party of not less than thirty days."

The letter being considered a part of the contract, and construed in its most natural way, simply requires the defendants, as long as the contract should continue, to furnish a certain amount of money every month to the plaintiff that he might introduce and extend the business of the company for the benefit of both. It is true that the company required Lindsay to give his personal note for the amounts advanced to him by the company, but the *notes were to be paid out of the profits of the agency.* As long as these notes remain in the hands of the company their collection can not be enforced against Lindsay personally—the agency having been terminated by the principal. And if the company has assigned or transferred them, Lindsay has no one to blame but himself. He had it in his power in the beginning to see to it that the money advanced to him by the defendants should appear in the face of the notes as payable in a restricted way.

The question, "a power coupled with an interest," is discussed by Chief Justice SMITH, who delivered the opinion of the Court in the case of *Insurance Co. v. Williams,* 91 N. C., 69. In that opinion it is said, "What such an agency is, is thus explained by Chief
(191) Justice *Marshall* in the opinion in *Hunt v. Rousmanier,* 8 Wheat., 174: 'We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the

interest are united in the same person. But if we are to understand by the word *interest* an interest in that which is to be produced by the exercise of the power, then they are never united.'" We can see no interest which Lindsay ever had under his contract with the defendants except an interest in the *profits of the agency which were to be produced* by the exercise of the powers given the agent under the contract. These profits were to be produced by his work and skill and industry, aided by the money advanced to him from time to time by the company to enable him to build up and extend his business. The case of *Insurance Co. v. Williams, supra,* is direct authority, too, for the proposition that in cases where the principal has a right to revoke the agency, and does so, a stipulation in the contract that the agent should receive as compensation twenty-five per cent commissions on first-year's payments and five per cent on renewals does not confer a permanent right upon the agent to collect renewals and retain the five per cent commissions. It is said in that case that "such a contention involves the assumption that the contract confers an absolute and permanent right to proceed with renewals when the original insurance was affected through the efforts of the defendant when he can no longer act as agent in making the renewals. Such is not the fair interpretation of the terms of the contract, which allows the specified commissions as compensation for services to the company in the renewals, and necessarily ceases (192) when the services cease." We have not been inadvertent to the 7th article of the contract, which is in these words: "7. That if he neglects to make report or remittance, as provided in clause two, for fifteen days after the close of any month, or after any request as contemplated therein, or to comply with any of the stipulations herein, he shall thereby forfeit all rights under this contract, and all commissions on premiums payable thereafter and on renewal of all policies written hereunder."

This provision of the contract simply declaring that if the agent (Lindsay) should fail to do certain things required of him under the contract he should forfeit his rights and not then be entitled to commissions and renewals maturing after agency has ceased, in the absence of a positive provision to the effect that he should be entitled to them if he carried out the stipulations, will not be allowed to affect the general rule of law that such an agent when his agency has been revoked under a power given to the principal, will not be allowed commissions of renewals maturing after the agency had ceased.

The defendant's exceptions to the jurisdiction of the Superior Court were abandoned here. There was error.

NEW TRIAL.

Cited: Wilmington v. Bryan, 141 N. C., 671.

(193)

HENRY BRYAN v. JOHN BULLOCK.

Partnership—Evidence, Sufficiency of to be Submitted to Jury.

1. To entitle evidence to be submitted to a jury, it must be such as would justify the finding of a verdict in favor of the party introducing it.
2. Where, in the trial of an action to hold defendant liable as a partner of S., it appeared that S. was engaged in buying timber trees from divers persons and converting them into crossties and selling the same to defendant, as he had done to others, that defendant agreed to pay and did pay the vendors of the trees, instead of paying directly to S. by accepting the latter's drafts on him, the sellers being protected by retaining title until the crossties were paid for or satisfactory assurances of payment were received: *Held*, that the evidence of partnership between defendant and S. was too slight to be submitted to the jury.

ACTION, begun in a court of a Justice of the Peace, and tried, on appeal, before *McIver, J.*, and a jury, at July Term, 1896, of GRANVILLE. After the evidence was in, his Honor intimated his opinion that there was not sufficient evidence of the alleged partnership between R. T. Smith and the defendant (whom the plaintiff sought to hold liable) to be submitted to the jury, and that he would therefore instruct the jury to return a verdict for the defendant. In deference to such an opinion the plaintiff submitted to a nonsuit and appealed.

Edwards & Royster and Graham & Graham for plaintiff (appellant). Winston, Fuller & Biggs, and T. T. and A. A. Hicks for defendant.

FAIRCLOTH, C. J. We think his Honor properly declined to submit the evidence to the jury on the allegation of a partnership
(194) between R. T. Smith and the defendant, which is the principal question.

In the absence of a special contract, the usual test of one's being a partner is his participation in the profits of the business *as such*, involving a common liability for losses. *Mauney v. Coit*, 86 N. C., 463. A perusal of the whole evidence fails to disclose any of the usual tests of partnership, there being no such special agreement, and does not support the plaintiff's contention, to be inferred from the acts of the defendant, who never held himself out as a partner of Smith, but expressly denies such relationship. The evidence shows that Smith was engaged in the business of buying timber trees from divers persons, and working out crossties and selling the same to the defendant, as he had done to Cooper and other persons, and marking the crossties accordingly, when delivered to the railroad companies. The defendant agreed to pay and did pay the vendors of the trees, instead of paying directly

to Smith, by accepting Smith's drafts on him in favor of the bank and others. The sellers protected themselves by retaining title until the crossties were paid for, or until they received satisfactory drafts or promises for the same.

Whilst there are some items of the evidence that would not be inconsistent with a partnership relation, yet they are too slight to be sent to the jury on the main question, as pointed out in *Young v. R. R.*, 116 N. C., 932.

AFFIRMED.

(195)

JACKSON, OGLESBY & CO. v. J. R. BURNETT.

Attachment—Dissolution of Attachment—Restitution of Attached Property.

1. Code, section 373, providing for the restitution of property upon an order dissolving the attachment, does not apply to cases where there has been a sale or transfer of the property by the defendant to the plaintiff after the levy of the attachment.

2. Notwithstanding the dissolution of an attachment, the plaintiff who claims that the property has been transferred to him by the defendant after the levy of the warrant, is entitled to have submitted to the jury an issue as to the ownership of the property.

ACTION, tried before *Coble, J.*, at Spring Term, 1896, of GRANVILLE, on appeal from the refusal of a justice of the peace, upon the dissolution by him of the warrant of attachment, to order the attached property to be restored to the defendant. The plaintiffs claimed before the justice of the peace that the defendant, after the levy of the attachment, had transferred the property to them, and in the Superior Court the defendant renewed his motion for restitution of the property attached. Plaintiffs resisted this motion, on the ground that the title to the property attached had been transferred to them by defendant, and that defendant was not the owner or entitled to the restitution or possession of said property, and demanded that a jury be empaneled to try the issue as to the title and ownership of said property. At the same time plaintiffs tendered the following issues for the jury to pass upon:

"1. Is the defendant the present owner and entitled to the return of the property attached?

"2. Are the plaintiffs the owners and entitled to the possession (196) of the property attached?"

At the same time plaintiffs offered witnesses and documentary evidence in support of their claim and contention.

His Honor refused to empanel a jury and submit to them the issues tendered, or any other issues, or to allow them to hear the evidence offered by the plaintiffs. To which ruling and refusal plaintiffs excepted.

His Honor thereupon, without hearing any evidence, but upon inspection of the record in the case and after argument of counsel, allowed the motion of defendant and signed judgment directing the return of the property to him. Plaintiffs appealed.

A. J. Feild for plaintiffs.
John W. Hays for defendant.

MONTGOMERY, J. The plaintiffs recovered judgment for their debt against the defendant in a justice's court without objection. The defendant's attorney in that court entered a special appearance for the purpose of moving to vacate the warrant of attachment for the reason that the affidavit made by the plaintiffs was insufficient in law, which was allowed, and the motion was made. An order vacating the attachment was granted, but the justice refused to adjudge, upon the motion of defendant's counsel, that the attached property should be restored to the defendant. From this refusal the defendant appealed to the Superior Court. In that court the motion made by defendant's counsel in the justice's court was renewed. It was resisted by the plaintiffs on the ground that the defendant was not the owner of and entitled to the possession of the property, and that he had transferred the same to
(197) the plaintiffs after the attachment had been levied. The plaintiffs offered to show the transfer of the property to them by witnesses, and by documentary evidence also, and asked for a jury to determine by a proper issue the title to the property. His Honor refused to hear the evidence himself and find the facts, or to submit issues to the jury, but upon the record allowed the motion of defendant and gave judgment that the property be restored to the defendant.

Questions of fact, arising in proceedings that are ancillary to the main action, are heard and found by the judge, and his findings are conclusive where there is any evidence to support them. Issues of fact, raised by the pleadings, are to be tried by the jury. There was before his Honor no question of fact arising upon the attachment proceedings, nor was there any issue of fact raised by the pleadings in the main action. The attachment had been vacated by the justice without objection of the plaintiffs, and the plaintiffs had procured judgment on their debt without appeal by the defendant. There was before the Superior Court only the question of the restitution of the attached property. We think his Honor erred in not submitting to the jury upon proper issues the question of the ownership of the property. Ordinarily, the order for a writ

of restitution is a part of the judgment in cases where a party is put out of the possession of his property and the proceedings are adjudged void. And section 373 of The Code provides that in cases where an order has been made for the discharge of the attachment, the attached property shall be delivered to the defendant. But we think that the statute was not intended to apply to cases where there had been a sale or transfer of the defendant's interest in the property since the levying of the attachment. There was nothing to prohibit the defendant from selling or transferring his interest in the attached property after the attachment was levied. The plaintiffs claimed title to the property by transfer from the defendant, and offered to show the same by wit- (198) nesses, and also by documentary evidence. If the defendant had sold his interest in the property to the plaintiffs, it would be a wrong to allow him to get possession of it through an order of the Court. The property ought to have been delivered to its true owner. "When an attachment has been dissolved by reason of a judgment in favor of the defendant, or otherwise, the special property of the officer in the attached effects is at an end, and he is bound to restore them, to the defendant if he is still the owner of them, or, if not, to the owner." Drake on Attachment, sec. 426. To the same effect is the decision in *Gates v. Fitzpatrick,* 64 Mo., 185. The plaintiffs and the defendant were before the Court, and the plaintiffs claimed title to the attached property by virtue of a purchase or transfer from the defendant, made after the attachment was levied, and we think that an issue to try the title should have been submitted to the jury. A stranger to the proceedings could have intervened and set up title to the property, and it would seem that the plaintiffs, on the question of restitution, would be entitled to at least an equal right.

ERROR.

Cited: *Mahoney v. Tyler,* 136 N. C., 45.

(199)

W. L. FERRELL ET AL. V. J. J. HALES.

Practice—Entry of Verdict by Clerk—Entry of Judgment—Judgment Nunc Pro Tunc.

1. A clerk of the court may by consent receive a verdict, even if the judge is not in the court-room, provided it is done before the expiration of the term, and he may thereupon enter a valid judgment under Code, section 412 (1), or make a memorandum thereof and afterwards write it out in full.

2. But where the clerk, having by consent received a verdict at 11:40 o'clock Saturday night of the last week of the term, failed, in the absence of the judge and for lack of other direction by him, to enter judgment or memorandum thereof in accordance with the verdict that night, but entered judgment on the following Monday morning, and after the expiration of the term: *Held*, that the judgment so attempted to be entered was a nullity.

3. In such case, the judgment being a nullity, an appeal therefrom could not operate as a vehicle to remove the record so as to subtract it from the operation of legal orders of the trial judge at the next term.

4. Where a verdict was, by consent of the parties, but in the absence of the judge from the court-room, received by the clerk on the last day of court, but no judgment was entered, it was proper for the judge at the next term, finding the record complete up to and including the verdict, to render judgment *nunc pro tunc*, and it was not necessary to the validity of the judgment that notice of its entry should be given, since the cause was pending on the docket.

5. A judgment rendered *nunc pro tunc*, at a term of court succeeding that at which the record was complete up to and including verdict, is as operative as between the parties as if it had been rendered at the previous term, but as to other parties, it is effective, as a lien, only from the first day of the term at which it was actually entered.

6. Where the defects in tobacco, sold with representations as to its grade and quality, are latent and peculiarly within the knowledge of the seller, the fact that the buyer has an opportunity to inspect it, and does not do so fully, is no waiver of the warranty.

(200) ACTION, tried at January Term, 1896, of DURHAM, being for damages for breach of warranty in the sale of a lot of tobacco by the defendant to the plaintiffs.

At the close of his Honor's charge at 6:30 p. m. Saturday (the last day of the term), it was agreed by counsel for both parties that (209) the Clerk might take the verdict of the jury. His Honor thereupon adjourned court until 8 p. m., when he returned to the bench and transacted business until 10:30 p. m., when he left the bench and announced that the term would not be formally adjourned, but he would let it expire by limitation of law at 12 o'clock p. m. His Honor did not return to the bench again that night, or make any other announcement, nor continue the term.

At 11:40 p. m., the jury announced their verdict, which was taken by the clerk, there being no other order by the Judge to the contrary. The Judge not having left town did not himself in person make any judgment. The clerk made no entry or memorandum of judgment on Saturday night, but entries of the verdict and judgment were made early Monday morning, and on the same morning defendant's counsel entered a protest to the entry of judgment by the clerk, and in due time entered an appeal.

At March Term, 1896, of the court, his Honor, *Judge Coble,* on (210) motion of plaintiffs, caused the following judgment to be entered:

"In this cause, it appearing unto the Court that at January Term, 1896, of Durham Superior Court, the jury having returned a verdict for the plaintiffs and assessing the damages at $1,900; and it further appearing to the Court that no judgment was presented to the judge because of the late hour when the verdict was returned, said verdict being returned at 11:40 o'clock on Saturday night of the last week of said term, and by consent the Clerk received the verdict in the absence of his Honor, *A. L. Coble, Judge,* and counsel on both sides; it is now, on motion of counsel for plaintiffs, ordered and adjudged that the plaintiffs recover of the defendant the sum of $1,900, with interest at 6 per cent per annum from 13 January, 1896, and the cost of this action, to be taxed by the clerk; and this judgment is signed and will take effect as of the January Term, 1896, of Durham Superior Court; but this judgment is not intended to be and is not cumulative with the judgment entered in this case or attempted to be entered by W. J. Christian, clerk, under section.....of The Code. The said clerk will make a minute of this judgment upon the said former judgment or attempted judgment of said clerk.

"ALBERT L. COBLE,
"Judge Presiding."

To this judgment the defendant excepted and appealed. (211)

Winston & Fuller and Boone & Bryant for plaintiff.

Manning & Foushee, H. G. Connor and Shepherd & Busbee for defendant (appellant).

CLARK, J. There are two appeals in this case, one from the judgment entered by the Clerk upon the verdict, and the other from the judgment rendered by the judge at the next term, *nunc pro tunc,* but for convenience both can be disposed of together.

The verdict was rendered at 11:40 p. m., Saturday of the second week. This case differs from *Delafield v. Construction Co.,* 115 N. C., 21, in that the judge had not left the court, and though he was not in the court room in person when the verdict was rendered, it was received by the clerk, by consent of parties, and was therefore a valid judgment in all respects. The term was not extended by the judge, as authorized by chapter 226, Laws 1893, but the verdict was within the limits of the term if the judge were present, and he was present through the clerk, who could, by consent of parties, represent him for the purpose of receiving the verdict. *S. v. Austin,* 108 N. C., 780. If the clerk thereupon had entered up the judgment, it would unquestionably have (212)

been valid, for The Code, sec. 412 (1) provides that, upon receiving the verdict, "if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." Even if the clerk had merely entered a memorandum, as "judgt.", it would have been sufficient, according to the authorities, and the judgment in full could have been drawn out thereafter. *Davis v. Shaver,* 61 N. C., 18; *Jacobs v. Burgwyn,* 63 N. C., 193. But neither judgment nor memorandum of judgment was entered, there being no action whatever taken beyond receiving the verdict. It was, therefore, clearly incompetent for the clerk to attempt to enter judgment on the Monday following. It must be declared a nullity, and in the appeal from the same the appellee will pay the costs in this Court.

At the next term the record presented the case of a valid verdict, but with no judgment entered thereon. The judge could not set aside the verdict rendered at the previous term; and if he could not enter judgment upon the facts found by the jury by their recorded verdict, the matter would have been forever suspended, like Mahomet's coffin.

"In Aladdin's tower
Some unfinished window unfinished must remain."

Not so in legal proceedings which deal with matters of fact, not fancy. The judge, at the next term, seeing the record complete up to and including the verdict, properly rendered judgment *nunc pro tunc.* This was practical common sense and is justified by precedent. *Bright v. Sugg,* 15 N. C., 492; *Long v. Long,* 85 N. C., 415; *Smith v. State,* 1 Tex. App., 408. As to difficulties suggested, it may be observed that, while the judgment as between the parties is entered as of the former term, *nunc pro tunc,* as to third parties it can only be a lien from the docketing, which by The Code, sec. 433, has effect from the first day of
(213) the term at which it was actually entered. In the present case the judge at the second term who rendered the judgment was the same who had presided at the trial term; but had there been different judges at the two terms it is the latter who in case of disagreement should settle the case. The matters excepted to, up to and including the verdict, should be settled by the first judge, and his statement sent up in the case made by the last judge, as is the case with exceptions as to matters not immediately appealable for lack of final judgment; as in *Jones v. Call,* 89 N. C., 188; *S. c.,* 96 N. C., 337; *Blackwell v. McCaine,* 105 N. C., 460. It is also excepted to this last judgment that the case was in the Supreme Court by appeal from the alleged judgment by the clerk; but, as we have seen, that attempted judgment was a nullity, and of no more effect than would have been the same entry on the record by

a stranger. The judge properly treated it as a nullity, and the appeal from such unauthorized entry on the record could not have the effect to take the case into this Court so as to subtract it from legal orders of the judge presiding in the court below. No notice of motion was necessary at term time in a cause pending on the docket. *Coor v. Smith,* 107 N. C., 430; *Sparrow v. Davidson,* 77 N. C., 35; *University v. Lassiter,* 83 N. C., 38, and other cases cited in Clark's Code (2 Ed.), p. 652.

A careful examination of the exceptions to instructions given, and for refusal to give instructions prayed, shows no error. Without taking them up in detail, the court below is sustained by the principles laid down in *Lewis v. Rountree,* 78 N. C., 323; *Love v. Miller,* 104 N. C., 582; *Blacknall v. Rowland,* 108 N. C., 554; *S. c.,* 116 N. C., 389. The tobacco was sold by sample and examination of outside bulks, (214) and upon representations made by the defendant. The defects were latent and as to matters peculiarly within the knowledge of the defendant.

NO ERROR.

Cited: Taylor v. Ervin, post, 277, 278; *Knowles v. Savage,* 140 N. C., 374; *Barger v. Alley,* 167 N. C., 363; *Brown v. Harding,* 170 N. C., 261; *S. c.,* 171 N. C., 687; *Pfeifer v. Drug Co., ib.,* 216; *Hardware Co. v. Holt,* 173 N. C., 311.

UNION BANK OF RICHMOND, VA. v. COMMISSIONERS OF OXFORD.

Invalid Statute—Constitutionality of Statute Authorizing Levying of Taxes—Mandatory Requirements of Constitution as to Passage of Statutes—Consent Judgment Against Municipality—Ultra Vires.

1. Section 14, Art. 2 of the Constitution, providing that "no law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and *unless the yeas and nays* on the second and third reading of the bill shall have been *entered on the Journal,*" is mandatory and not recommendatory merely.

2. Where the Journal of the General Assembly shows affirmatively that an act authorizing the creation of an indebtedness, or the imposition of a tax by the State, or any county, city, or town, was not passed with the

formalities required by section 14, Article 2 of the Constitution, such Journal is conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act, and is invalid so far as it attempts to confer the power of creating a debt or levying a tax. (*Carr v. Coke*, 116 N. C., 223, distinguished.)

3. A consent judgment rendered against a municipality for a subscription to a railroad company is *ultra vires* and void when the act of the General Assembly authorizing the subscription was not passed as required by section 14, Article 2 of the Constitution.

4. It is incumbent upon purchasers of bonds of the State, and of counties, cities, or towns, to ascertain whether the power to issue them has been granted according to the requirements of the Constitution.

FAIRCLOTH, C. J., dissents.

ACTION, tried at November Term, 1895, of GRANVILLE, before *Starbuck, J.*, and a jury. (The nature of the action and pleadings may be ascertained by reference to the report of the case between the same parties as contained in 116 N. C., 339.)

The following issues were made up under the direction of the court and submitted to the jury, to wit:

"1. Is the plaintiff a corporation duly organized and existing under the laws of Virginia, having power to engage in a general banking business, and to purchase bonds and other instruments?

"2. Did the Board of Commissioners of Oxford have lawful authority to issue the bonds and coupons sued on in the complaint?

"3. Did the plaintiff, before bringing this action, make presentation of the interest coupons sued upon, and demand payment thereof from the Treasurer of the town of Oxford, at his office in Oxford, and was payment refused?

"4. Is plaintiff the owner of the bonds and coupons sued on, and did it purchase the bonds for a valuable consideration and in good faith, without notice?

"5. Did the Oxford and Coast Line Railroad Company tender to the defendant the release provided for and directed by the judgment rendered at July Term, 1892, and if so, when?

"6. Was any demand ever made by defendant upon said rail-
(216) road company to execute said release?"

Upon the trial the defendant consented that the jury should answer the first and third issues submitted to them "Yes," the fifth issue submitted to them "Yes, on 3 December, 1894"; and on the sixth issue submitted to them, "No."

"EXCEPTION 2.—As to the other issues submitted to the jury, the plaintiff offered in evidence chapter 315, Laws 1891 (being the charter

of the Oxford and Coast Line R. R. Company); this evidence was objected to by the defendant as incompetent, irrelevant and immaterial, in so far as it was offered to prove that the Board of Commissioners of Oxford had power to hold the election mentioned in the pleadings, and to issue the bonds and coupons sued on.

The objection was overruled by the court, and the evidence admitted, and the defendant excepted.

"EXCEPTION 3.—The plaintiff also offered in evidence chapter 21, Pr. Laws 1885 (being the charter of the town of Oxford). This evidence was also objected to by the defendant as incompetent, irrelevant and immaterial, in so far as it was offered to prove that the Board of Commissioners of Oxford had power to order or hold said election, or to issue said bonds and coupons."

The objection was overruled by the court and the evidence admitted, and defendants excepted.

"EXCEPTION 4.—The plaintiff also offered in evidence the following proceedings of the Board of Commissioners, as appearing in the minutes: Proceedings 9 March, 1891 (petition to provide for an election); proceedings 14 March, 1891 (ordering an election to be held 25 May, 1891); proceedings 24 March, 1891 (changing the time for holding said election to 27 April, 1891); notice of election on question of issuing bonds to amount of $40,000 to subscribe to capital stock of (217) Oxford and Coast Line R. R. Company, proceedings 19 April, 1892 (being resolution reciting election held, and ordering issuing of $40,000 of bonds). Proceedings 30 August, 1892 (being order spreading on record receipt from Oxford and Coast Line R. R. Company for $20,000 of bonds, issued pursuant to judgment, July Term, 1892; and resolution of the Board of Commissioners), proceedings 16 March, 1893 (being order directed to be issued on Treasurer to pay $600 on coupons). All said evidence was objected to by defendant as incompetent, irrelevant and immaterial, in so far as it offered to prove that said Board of Commissioners had any power to order or hold said election or to issue said bonds and coupons."

The objection was overruled, and the evidence admitted, and defendants excepted.

The plaintiff also offered in evidence the record of the judgment and other proceedings in the cases (consolidated) of the Oxford and Coast Line R. R. Company and J. T. Pruden against the Board of Commissioners of Oxford and A. A. Hicks, Mayor, mentioned and referred to in the pleadings, and the agreement in said judgment referred to.

The plaintiff introduced A. L. Boulware as a witness on behalf of plaintiff, who testified that he resided in Richmond, Va.; was president of the Union Bank of Richmond; that said bank has owned the bonds

described in the complaint, and shown to him, since September, 1892; that the said bank paid 97½ cents on the dollar for them; that first coupons of February, 1893, were paid, but no others.

The witness Boulware was recalled and testified that plaintiff had no notice of anything except the matters recited in the bonds.

The defendant offered in evidence the printed Journal of the House of Representatives of the General Assembly of the State of North Carolina, at its session of 1891, especially pages 324, 641, 709, 924,
(218) and 926, and also the printed Journal of the Senate of the General Assembly of the State of North Carolina, at its session of 1891, especially pages 647, 742, 745, 759, and 798.

This evidence was offered for the purpose of showing that chapter 315, Laws 1891, (entitled "An act to incorporate the Oxford and Coast Line R. R. Company,") if construed and used as conferring upon the Board of Commissioners of Oxford, or any other municipality, authority to issue bonds to aid in building the Oxford and Coast Line R. R., or to issue bonds for any other purpose, then it was not passed in conformity with the requirements of Article II, section 14, of the Constitution of North Carolina, and in so far as it does give such authority it is unconstitutional and void, though in other respects good, inasmuch as said act in the said House of Representatives did not pass three several readings on three different days, but the second and third readings on the same day, nor were the yeas and nays, if any, on the second and third readings, or any other reading, in said House of Representatives entered on the Journal.

The plaintiff objected to the evidence, not on the ground of incompetency as to the mode of proof in the use of the printed instead of the certified copies thereof, but on the ground of incompetency and irrelevancy and immateriality of the proof itself, and that the ratification of the act is conclusive, and the legal effect of the act is not dependent upon the manner of its passage, and that plaintiff can not be compelled to look behind the act as published; and also upon the ground that the Supreme Court of North Carolina has held that the town of Oxford was authorized by said chapter 315, Laws 1891, to issue bonds; and
(219) on the ground that the Journal was offered to attack the ratification, though defendant disclaimed such purpose.

The objection was overruled and the evidence admitted, and plaintiff excepted.

It appeared by said House Journal that said act, chapter 315, Laws 1891, passed its second and third readings in the House of Representatives on one and the same day, and that the yeas and nays, if any, were

not entered on the Journal. Defendant's counsel stated that they had certified copies from the Secretary of State of the pertinent parts of the Journals, but their production was waived.

His Honor charged the jury that if they believed the evidence they should answer the sixth issue "No" and all the other issues "Yes," and fix the date of the tender of the release as 3 December, 1894. Defendant excepted. The jury found all the issues in favor of the plaintiff, fixing the date of the tender of said release as 3 December, 1894.

The court thereupon rendered judgment in favor of the plaintiff, and the defendant excepted and appealed.

M. V. Lanier, R. O. Burton, W. A. Guthrie and Edwards & Royster for appellant.

Shepherd, Manning & Foushee and J. Crawford Biggs for appellee.

CLARK, J. When this case was here before (116 N. C., 339), the court set aside the nonsuit taken below and held that the plaintiff could maintain an action as the case was then presented. The court did so upon the ground that there being apparently a valid liability of $40,000 against the town of Oxford, the compromise thereof for the sum of $20,000 was not necessarily void, and that the court below erred in nonsuiting the plaintiff. The case had been tried upon the view that the charter of the town of Oxford authorized the election under (220) which the $40,000 indebtedness was contracted. The judge below held that this was not so, and hence that the compromise was not binding. This Court sustained the view taken below, that the town charter did not authorize the contraction of the indebtedness, but held that, on its face, the act chartering the railroad (Laws 1891, chap. 315, sec. 10), authorized the election. The question as to the efficacy of that act had not been questioned below, as the plaintiff had rested its claim upon the authority of the town charter to sustain the election.

The questions decided before need not be called in controversy. We must take it that our former opinion settles that the town had authority to compromise a valid liability for a smaller sum, and that chapter 315, Laws 1891, *on its face,* authorized the election. When the second trial was had below the point was taken for the first time that, conceding, as this Court had held, that Laws 1891, chap. 315, by its terms authorized the election, that act was invalid because not passed as required for all acts empowering counties, cities and towns to issue bonds. The Constitution, Art. II, sec. 14. This section of the Constitution is imperative and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in the organic law would be converted into a nullity by judicial construction. It was intended as a

safeguard, and has been held mandatory in all other courts in which that question has been presented, as will be seen below. This point was not raised below in the former trial, nor in this Court, as the plaintiff was then relying upon the charter of the town, which we held invalid for that purpose. On this second trial, when the plaintiff offered for the first time Laws 1891, chap. 315, as authority to show a valid
(221) election authorizing the indebtedness of $40,000 as a basis to authorize the compromise (for, except as a compromise, the judgment would be void on its face, being *ultra vires*), the defendant contended that Laws 1891, chap. 315, while valid as a railroad charter, was unconstitutional and void so far as authorizing the creation of an indebtedness by the town, because not enacted in the manner required by the Constitution, Art. II, sec. 14. The Journals were put in evidence and showed affirmatively that the act was not read three several days in each House, and that the ayes and noes were not entered on the readings in the House, as required by the Constitution for acts authorizing the creation of public indebtedness. The point, therefore, thus arises for the first time in this case, and was not presented and could not be presented in the former appeal for the reasons above given. The point is one of transcending inmportance, and is simply whether the people, in their organic law, can safeguard the taxpayers against the creation of State, county and town indebtedness by formalities not required for ordinary legislation, and must the courts and the Legislature respect those provisions? This safeguard is section 14 of Article II of the Constitution. It provides "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each house respectively, and *unless the yeas and nays, on the second and third readings of the bill, shall have been entered on the Journal.*" The
(222) Journals offered in evidence showed affirmatively that "the yeas and nays on the second and third readings of the bill" were not "entered on the Journal." And the Constitution, the supreme law, says that, unless so entered, no law authorizing State, counties, cities, or towns to pledge the faith of the State or to impose any tax upon the people, etc., shall be valid.

This case has no analogy to *Carr v. Coke,* 116 N. C., 223. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. Const., Art II, sec. 23. And so it is

here; the certificate of the speakers is conclusive that this act passed three several readings in each house and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirmatively the contrary. The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each house. It is provided that such laws are "no laws," *i. e., are void unless* the bill for the purpose shall have been read three several times, in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal.* This is a clear declaration of the nullity of such legislation unless this (223) is done, and every holder of a State or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 Dill. Mun. Corp., 545, and cases cited. It is certainly in the power of the sovereign people in framing their Constitution to require as a prerequisite for the validity of this class of legislation these precautions and the additional evidence in the Journals that they have been complied with, over and above the mere certificate of the speakers, which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the Journals is plain beyond power of controversy. Accordingly, the law is well settled by nearly one hundred adjudicated cases in the courts of last resort in thirty States, and also by the Supreme Court of the United States, that where a State Constitution prescribes such formalities in the enactment of laws as require a record of the yeas and nays on the legislative Journals, these Journals are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act.

The following is a list of the authorities, in number 93, sustaining this view either directly or by very close analogy. It is believed that no Federal or State authority can be found in conflict with them. Decisions can be found, as for instance *Carr v. Coke, supra,* to the effect

that where the Constitution contains no provision requiring entries on the Journal of particular matters, such, for example, as calls of the yeas and nays on a measure in question, the enrolled act can not (224) in such case he impeached by the Journals. That, however, is a very different proposition from the one involved here, and the distinction is adverted to in *Field v. Clark,* 143 U. S., 671. The authorities are as follows:

Alabama—48 Ala., 115; 54 Id., 599; 58 Id., 546; 60 Id., 361; 77 Id., 597; 82 Id., 562.

Arkansas—19 Ark., 250; 27 Id., 366; 32 Id., 496; 33 Id., 17; 40 Id., 200; 51 Id., 559.

California—8 Sawyer, 238; 54 Cal., 111; 69 Id., 479.

Colorado—5 Col., 525; 11 Id., 489; 20 Id., 279.

Florida—31 Fla., 291.

Georgia—23 Ga., 566.

Illinois—14 Ill., 297; 17 Id., 151; 25 Id., 181; 35 Id., 121; 38 Id., 174; 43 Id., 77; 62 Id., 253; 68 Id., 160; 120 Id., 322.

Indiana—7 Ind., 683; 11 Id., 43.

Iowa—60 Iowa, 543.

Kansas—15 Kans., 194; 17 Id., 62; 26 Id., 724.

Kentucky—93 Ky., 537.

Louisiana—44 La., Ann., 223.

Maryland—41 Md., 446; 42 Id., 203.

Michigan—2 Gibbs, 287; 1 Doug., 351; 2 Mich., 191; 13 Id., 481; 22 Id., 104; 55 Id., 94; 59 Id., 610; 64 Id., 385; 72 Id., 446; 79 Id., 59; 80 Id., 593; 97 Id., 589.

Minnesota—2 Minn., 330; 24 Id., 78; 38 Id., 143; 45 Id., 451.

Missouri—4 Mo., 303; 71 Id., 266.

Nebraska—4 Neb., 503; 18 Id., 236; 20 Id., 96.

Nevada—19 Nev., 391.

New Hampshire—35 N. H., 579; 52 Id., 622.

New York—8 N. Y., 317; 42 Id., 379; 54 Id., 276; 130 Id., 88; (225) 2 Hill, 31; 4 Hill, 384; 1 Denio, 9; 2 Denio, 97; 23 Wend., 134.

Ohio—20 Ohio St., 1.

Oregon—21 Ore., 566.

Pennsylvania—26 Pa. St., 446.

South Carolina—12 S. C., 300; 13 Id., 46.

Tennessee—6 Lea, 549; 86 Tenn., 732; 87 Id., 163; 91 Id., 596.

Texas—81 Tex., 230; 22 Tex. Ap., 396.

Virginia—79 Va., 269.

West Virginia—5 W. Va., 85.

Wisconsin—45 Wis., 543; 64; Id., 323; 80 Id., 407.

Wyoming—1 Wy., 85; Id., 96.

United States—6 Wall., 499; 94 U. S., 260; 105 Id., 667.

Of these cases, especially pertinent are 94 U. S., 260; 105 Id., 267; 42 N. Y., 379; 45 La., Ann., 223; 71 Mo., 266, and 22 Texas App., 396.

To same purport are Black's Constitutional Law, Secs. 31, 102; Cooley Constitutional Lim. (6 Ed.), 156, 163, 168; Smith's Const. Lim., 833; Story Const., 590; Sedgwick Stat., 539, 551; Cush. Leg. Assemb., sec. 2211; 1 Whart. (3 Ed.), 260; 1 Greenleaf Ev., 491.

Constitutional requirements as to the style of acts or the manner of their passage are mandatory not directory. *S. v. Patterson,* 98 N. C., 660, 663, 665. The thirty days notice required before the passage of a private act is not required by the Constitution to be entered on the Journals, as is required as to the readings on several days, and the ayes and noes on each reading, with bills authorizing the contraction of public indebtedness, and hence it may be that the giving of such 30 days notice is conclusively presumed as to such private acts (*Harrison v. Gordy,* 57 Ala., 49; *Walker v. Griffith,* 60 Ala., 361) though the (226) contrary was intimated in *Gatlin v. Tarboro,* 78 N. C., 119.

The history of the country at large, and of this State as well, has shown the necessity of this safeguard as to acts authorizing the creation of public indebtedness, which has been incorporated also into several other State constitutions. We have no power nor wish to nullify so plain and mandatory a provision, so carefully and explicitly worded, and which has been held binding by all other courts wherever the question has been presented.

The judgment on its face is by consent and for railroad subscription. It is therefore on its face to be treated as void, being *ultra vires,* unless a special authority is shown authorizing the indebtedness for which it was a compromise (*Kelly v. Milan,* 127 U. S., 150); for, *ex virtute officii,* town commissioners have no authority whatever to bind the town by submitting to a consent judgment for $20,000 for a matter appearing on the face of the judgment to be not for town purposes. If the Commissioners of the town were vested with no authority to create the debt they certainly could not acquire such power by entering into a consent judgment.

The consent judgment entered into by the town authorities could not bind the town to a subscription to a railroad unless the power to subscribe or donate had been legally granted by the Legislature.

Consent judgments are in effect merely contracts of parties, acknowledged in open court and ordered to be recorded. As such they bind the parties themselves thereto as fully as other judgments, but when parties act in a representative capacity such judgments do not bind the *cestuis que trustent* unless the trustees had authority to act, and when (as in

(227) the present case) the parties to the action, the town authorities, had, as appears above, no authority to issue the bonds, their honest belief, however great, that they had such power would not authorize them to acquire such power and bind the town by consenting to a judgment. It is not a question of a fraudulent judgment but a void judgment from want of authority to consent to a decree to bind principals—the taxpayers—for whom they had no authority to create an indebtedness by consenting to a judgment, any more than they would have had by issuing bonds. If authorized to create the indebtedness, either the bonds or the consent judgment would be equally an estoppel, but as they had no such authority neither bond nor judgment is binding on the taxpayers. It is not their bond nor judgment. In *Kelly v. Milan, supra, Blatchford, J.,* says: "The declaration of the validity of the bonds contained in the decree was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor and the officers of the railroad company. The act of the mayor in signing that agreement could give no validity to the bonds, if they had none at the time the agreement was made. . . . The adjudication in the decree, under the circumstances, can not be set up as a judicial determination of the validity of the bonds. This was not the case of a submission to the Court of a question for its decision on the merits, but was a consent in advance to a particular decision by a person who had no right to bind the town by such consent, because it gave life to invalid bonds, and the authorities of the town had no more power to do so than they had to issue the bonds originally."

In *R. R. v. R. R.,* 137 U. S., 48, 56, *Fuller, C. J.,* says: "The decrees were entered by consent and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties," and hence holds that the Federal Courts, in disregarding such decrees, were not violating the rule
(228) that effect must be given to the determination of the matter by a State court having jurisdiction.

In *Mfg. Co. v. Jamesville,* 138 U. S., 552, *Fuller, C. J.,* again says: "The prior decree was the consequence of the consent (of parties) and not the judgment of the Court; and, this being so, the Court had the right to decline to treat it as *res judicata,*" citing many cases, among them our own case of *Lamb v. Gatlin,* 22 N. C., 37, *infra,* and refused to execute a former decree, saying: "As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the Circuit Court being correct upon the merits, it is also correct in that the Court refused to be constrained by the previous erroneous *consent decree* to decree contrary to the right of the cause." In *Gay v. Paspart,* 106 U. S., 679, *Miller, J.,* says (p. 698): "Such decree as was had, being

dependent upon consent, did not operate as a judicial decision by the Court." This treatment of consent decrees prevails thus in law as well as equity, *Kelly v. Milan, supra,* being an action at law to recover judgment on bonds issued in aid of a railroad, and the other cases above cited in equity. In *Brownsville Taxing District v. Loge,* 129 U. S., 493, 505, which is substantially like the present, being an application for a *mandamus* to compel the levying of a tax to pay a judgment rendered on interest coupons of bonds, *Fuller, C. J.,* says: "The Court can not decline to take cognizance of the fact that the bonds are utterly void, and no such remedy exists. *Res judicata* may render straight that which is crooked, and black that which is white—*facit ex curvo rectum, ex albo nigrum*—but where application is made to collect judgments by process not contained in themselves and requiring to be sustained, reference to the alleged cause of action upon which they are founded, (229) the aid of the Court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgment, but that they rest upon no cause of action whatever." So, in the present case, even if the former judgment had not been by consent, it appears that there was no authority to issue the bonds, and the courts will not issue *mandamus* to levy a tax to pay such judgment.

In *Lamb v. Gatlin,* 22 N. C., 37 (cited and approved by the Supreme Court of the United States *ut supra*), GASTON, J., says, as to the effect of a consent judgment by an executor, that it did not bind the beneficiaries of the estate, as here the taxpayers are not bound by the consent judgment entered into by the town authorities, because "it is not in truth a decree *in invitum,* and by a judgment of the Court to which the defendant was compelled to submit, and which, therefore, would not only bind him, but those also for whose benefit he held the estate, unless it can be impeached for fraud; but it is a voluntary settlement between the defendant and the persons then claiming, which the parties to that settlement have chosen to invest with the forms of a judicial determination. The decree . . . was avowedly adopted because *it was made by the parties.* A decree thus rendered as against the present plaintiffs (who were the principals whom the defendant in the consent judgment represented) has no force except so far as it is seen to be just." There are other authorities to the like effect and purport, but the above will suffice. A recital of facts which the corporate officers had no authority to determine, or a recital of matters of law, do not estop the corporation. *Dixon Co. v. Field,* 111 U. S., 83; *Bank v. Porter Township,* 110 U. S., 608.

The certificate of the speakers is not good for more than it certified, *i. e.* that the bill has been read three times in each House and ratified. And ordinarily that makes the bill a law. But for this (230)

class of legislation the Constitution provides that the facts thus certified by the speakers will make no law unless it further appears that the yeas and nays have been recorded on the Journals on the second and third readings in each House. The Constitution makes the entry on the Journals essential to the validity of the act. If it be conceded that presumption of regularity arises from the publication of the act in this case, it was rebutted, for the Journals were offered by the defendant, and showed that no constitutional authority had been conferred to issue the bonds or contract the indebtedness. It is incumbent upon the purchaser of municipal bonds to examine whether the power to issue has been duly granted. *Lake v. Graham,* 130 U. S., 674; *East Oakland v. Skinner,* 94 U. S., 255; 1 Dillon Mun. Corp., 245. The bonds, having been issued without authority, were absolutely void. *Marsh v. Fulton Co.,* 10 Wall., 676; *Clark v. Hancock Co.,* 27 Ill., 305. The payment of interest is no ratification, for there can be no ratification when there is want of power. *Doon v. Cummins,* 142 U. S., 376; *Daviess Co. v. Dickinson,* 117 U. S., 657, 665; *Norton v. Shelby Co.,* 118 U. S., 425, 451; *Lewis v. Shreveport,* 108 U. S., 282, 287.

In instructing the jury upon the evidence to find the issues in favor of the plaintiff there was

ERROR.

FAIRCLOTH, C. J., dissents.

Cited: Russell v. Ayer, 120 N. C., 211; *Comrs. v. Snuggs,* 121 N. C., 398, 399, 400, 404, 407, 410; *Mayo v. Comrs.,* 122 N. C., 12; *Rodman v. Washington, ib.,* 41; *McLeod v. Williams, ib.,* 454; *Charlotte v. Shepard, ib.,* 605, 607; *Comrs. v. Call,* 123 N. C., 310, 334; *Comrs. v. Payne, ib.,* 462, 487, 493; *Slocomb v. Fayetteville,* 125 N. C., 365; *Smathers v. Comrs., ib.,* 486; *Glenn v. Wray,* 126 N. C., 732; *Comrs. v. DeRosset,* 129 N. C., 279; *Cotton Mills v. Waxhaw,* 130 N. C., 294; *Debnam v. Chitty,* 131 N. C., 677, 686; *Wilson v. Markley,* 133 N. C., 621; *Brown v. Stewart,* 134 N. C., 362; *Graves v. Comrs.,* 135 N. C., 52; *Comrs. v. Packing Co., ib.,* 67; *Overman v. Lanier,* 156 N. C., 540; *Simmons v. McCullin,* 163 N. C., 414.

(231)

W. C. POWELL & CO. v. J. M. SIKES ET AL.

Action to Recover Land—Sale of Land for Taxes—Tax Deed—Mortgagee Not Entitled to Notice of Sale of Land for Taxes.

1. Under the Revenue Act of 1891 (ch. 323) a sheriff's deed for land sold for taxes is good as against a mortgage recorded before the sale, but after the levy of the taxes.

2. It is the duty of a mortgagee to pay the taxes on the mortgaged land if the mortgagor fails to do so, and in case of a sale of the land for the taxes, he is barred, notwithstanding he has no notice of the intended sale by the sheriff.

ACTION to recover land, tried at April Term, 1896, of GRANVILLE, before *Coble, J.*, and a jury. The facts appear in the motion of Associate Justice MONTGOMERY.

The jury, under instruction of his Honor, rendered a verdict for the defendant, and from the judgment thereon plaintiff appealed.

Edwards & Royster for plaintiffs.
T. T. & A. A. Hicks for defendants.

MONTGOMERY, J. This action was brought for the possession of a tract of land described in the complaint. The defendant Sikes bought the premises on 6 June, 1892, at the sheriff's sale for taxes due for 1891. The sheriff executed a deed to Sikes on 28 December, 1893. On 2 February, 1892, the defendant Emery, who was the owner of the land, and who listed it for taxation in 1891, executed to the plaintiffs a mortgage to secure a debt therein mentioned, which debt was unpaid at the time of the sheriff's sale. The plaintiff had no notice of the sale. The plaintiffs insist that the defendant Sikes bought only the defendant Emery's right in property, *i. e.* the right to redeem the (232) land upon the payment of the mortgage debt, and that the plaintiffs were the legal owners of the land at the time of the sheriff's sale, and that they are entitled as mortgagees to the possession of the land. In support of this position we are cited by counsel for plaintiffs to the case of *Hill v. Nicholson,* 92 N. C., 24, and the cases there cited. It was decided in these cases that the mortgagee, being the legal owner of the land, was entitled to notice from the sheriff of intended sales of the land for taxes. The case of *Woody v. Jones,* 113 N. C., 253, is to the same effect. But this Court in more recent decisions, in construing the Revenue Act of 1891, has held that a mortgagee's lien is subject to the lien for taxes, and that he must pay them if the mortgagor does not, and that he is barred by a sale of the land for taxes without notice from the sheriff. In *Exum v. Baker,* 115 N. C., 242, the Court held that "a

mortgagee was required to see to the discharge of the tax liens as they fell due, if the mortgagor should make default in the payment, or submit to the consequences of his neglect to do so." In *Stanley v. Baird,* 118 N. C., 75, the facts were like these in the case before the Court, except that the owner of the land conveyed it in fee simple instead of by way of mortgage, to the plaintiff in that suit, before the land was sold for taxes, and after they were due. Section 73 of the Act of 1891 provides that "no sale of real property for taxes shall be considered valid [invalid] 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." There is no error in the judgment of the Court below.

AFFIRMED.

Cited: Edwards v. Lyman, 122 N. C., 746; *Lyn v. Hunter,* 123 N. C., 511; *Collins v. Pettitt,* 124 N. C., 729; *Ins. Co. v. Day,* 127 N. C., 137; *King v. Cooper,* 128 N. C., 348; *Stewart v. Pergusson,* 133 N. C., 285; *Matthews v. Fry,* 141 N. C., 586.

(233)

A. W. TILLEY ET AL., EXECUTORS OF WILLIAM ELLIS, v. PEGGY ELLIS ET AL.

Will, Construction of—Devise—Latent Ambiguity—Intention of Testator.

1. A testator devised property to the use of "The Methodist Episcopal Church," and to a proceeding instituted by the executors to obtain the advice of the Court as to the application of the devise, the heirs of the testator and two religious organizations, the "Methodist Episcopal Church" and the "Methodist Episcopal Church, South," were made parties and answered, the heirs claiming the devise to be void for uncertainty, and each of the religious organizations claiming to be the intended devisee, it was error to reject testimony offered and tending to show (1) that the legal name of neither organization came within the very words of the will, one being "Trustees of the Methodist Episcopal Church" and the other the "Methodist Episcopal Church, South," and (2) that both organizations were commonly known as "The Methodist Episcopal Church."

2. In such case an issue should have been submitted as to which church the testator intended to devise the property by the use of words applying strictly to neither, but in common parlance to both, on which issue admissions or evidence that one church had numerous members and church buildings in the testator's county and the other none, would have been competent to show the testator's intention.

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

TILLEY *v.* ELLIS.

ACTION, tried at March Term, 1896, of DURHAM, before *Coble, J.*, and a jury. The purpose of the action was to obtain instructions of the Court as to the application of the devise made in item 2 of the last will and testament of plaintiff's testator. The sixth paragraph of the petition was as follows:

"6. That the second item of their testator's will is as follows: 'I give and devise to my beloved wife, Viney Ellis, all of my property, both personal and real, of every description, to have and to hold (234) the same during her natural life, at her death to the use of the Methodist Episcopal Church; if not built before my death to be built out of my estate, one-fourth of a mile east of my homestead, at some convenient place'; that Viney Ellis, wife of said testator, is dead, and no Methodist Episcopal Church was built, either by the testator or any other person or persons, near the testator's homestead during his lifetime, nor is there any congregation of any such Methodist Episcopal Church organized or formed, nor are there any trustees capable of holding property of any such Methodist Episcopal Church, and plaintiffs are not advised upon whom to make service of process in order to have before the Court such Methodist Episcopal Church, that the construction and validity of such devise may be determined; that there is and has been for many years, long prior to the date, 20 June, 1887, (on which said testator made his will as aforesaid), a Methodist Episcopal Church, duly organized, with a congregation and regular services, in about three miles of testator's homestead, which church was well known to the testator at the time he executed the will aforesaid, and plaintiffs are unable to determine from the will of their testator whether this be the church to which he referred or not, or whether the devise is valid and plaintiffs, as executors, are empowered to build a church as directed in the will."

After the jury were sworn and empaneled and the pleadings (239) read the Methodist Episcopal Church, South, tendered issues, and offered to introduce evidence tending to sustain the same.

(1) Is the name "Methodist Episcopal Church" a common or short name for "Methodist Episcopal Church, South," and by such name known?

(2) Did the testator, by the words in his will, "Methodist Episcopal Church," intend the "Methodist Episcopal Church, South?"

(3) Is the corporate name of the "Methodist Episcopal Church" the "Trustees of the Methodist Episcopal Church"?

The Court declined to submit any of the issues tendered, and the Methodist Episcopal Church, South, excepted.

At the hearing it was admitted that one organization in this State was the Methodist Episcopal Church, and the other in this State the Methodist Episcopal Church, South. But it was not admitted that the Methodist Episcopal Church was the corporate name. It was further admitted that there was no organized congregation of the Methodist Episcopal Church in this, Durham County, but it was admitted that there were organized congregations of Christians in North Carolina known as the Methodist Episcopal Church.

The Court construed the will and rendered judgment as follows:

"It is considered, adjudged and decreed by the Court as
(240) follows:

"(1) That the said will of the said William Ellis, deceased, appearing from the pleadings to be his last will and testament, it is adjudged by the Court that the same is valid, and every part thereof is valid as hereinafter construed.

"(2) That the devise in the second item thereof is a good and valid devise to the 'Methodist Episcopal Church,' and the proper legal construction of said devise is to the 'Methodist Episcopal Church,' sometimes called 'The Northern Methodist Church,' subject, as therein expressed, to the life estate in Viney Ellis, the testator's wife, in the testator's property therein devised and bequeathed.

"(3) That the true intent of the testator was, as therein expressed, that unless such 'Methodist Episcopal Church should be built before his death, the same should be built out of his estate, one-fourth of a mile east of his homestead, at some convenient place.'

"(4) It being admitted that Viney Ellis, the life tenant, is dead, and it further being admitted that no such church as the testator contemplated has been built, and that in order to carry out this provision of the testator's will a sale of the testator's property, consisting of landed estate, is necessary in order to convert the same into money for the purpose of the erection of said church.

(241) "It is therefore considered and adjudged by the Court, and ordered and directed, that the executors select, reserve and set apart on the lands of the testator a suitable church site whereon to erect such church building, as near as may be 'one-fourth of a mile east of the testator's homestead,' (not less than half an acre,) and thereafter sell the balance of the estate, real and personal, belonging to the testator, and after the payment out of the proceeds of such sale of all the cost and expenses of such sale, and all unpaid debts of the testator, and the cost of this action, and the costs and expenses of their administration as provided by law, they shall apply and appropriate balance or surplus of the testator's estate to the use and benefit of the

aforesaid 'Methodist Episcopal Church' for the purpose aforesaid of building the church aforesaid. If the trustees or other duly constituted church authorities of said 'Methodist Episcopal Church' shall desire to have the aforesaid surplus moneys turned over to them for the purpose aforesaid, then, upon their entering into bond with good and sufficient surety to be approved by the clerk of this court, conditioned for the faithful application of said funds, then and thereupon the said executors of William Ellis are hereby authorized and directed to turn over to said trustees or other constituted church authorities of said 'Methodist Episcopal Church,' the aforesaid surplus moneys, taking their receipt therefor, and the same shall be a full and final discharge to said executors from all further liability or responsibility thereby."

All the parties except the Methodist Episcopal Church appealed.

Jas. S. Manning for appellants.
Guthrie & Guthrie for appellee.

CLARK, J. The devise was to the use of the "Methodist Episcopal Church." The administrator filed his petition asking to what Methodist Episcopal Church the devise should be applied, and (242) both organizations by which those words were used in their title were made parties and answered, and the heirs at law answered, claiming the devise to be void.

On the trial one of the defendant church organizations admitted that its strictly legal name was "Methodist Episcopal Church, South," the suffix "South" being added to the descriptive words in the will, but offered to prove that the legal name of the other organization was "Trustees of The Methodist Episcopal Church," with the prefix "Trustees of" added to the descriptive words in the will, and tendered an issue to that effect. The Court accepted the admission as to itself by the Southern Methodist Church, but refused to allow it to prove that the Northern Methodist Church was also differentiated from the words of the will by a prefix. This was error.

Again the M. E. Church, South, admitted that the Northern competitor was commonly known as "The Methodist Episcopal Church," without the prefix, but it offered to prove, and tendered an issue, that itself was also commonly known as "The Methodist Episcopal Church," without the suffix. Again the judge accepted the admission of the Southern Church against itself, but refused to permit it to prove that it was commonly known as "The Methodist Episcopal Church" as well as the Northern Church. This surely was error. It is true the admission, cut in two, was that the competitor was the "Methodist Episcopal Church," but that said admission fairly meant only that it was commonly

known as such, and not that such was its legal name, is shown by the statement in the same breath that such was not its corporate name, and the offer to prove, and tender of an issue, that the legal name had a prefix. Besides, even if the name of the Northern church had
(243) come technically within the very words of the devise, if the other church, not technically but in common speech, was known by the very same words and abounded in that section, whereas the Northern church was entirely unknown there, this would leave the intention of the testator to a jury, since the real object is to ascertain his intention.

When evidence is improperly rejected it must be taken for the purpose of the argument that if admitted it would have proved what the party offering claimed it would prove. Therefore, we must take it that, if admitted, it would have proved:

(1st) That the legal name of neither organization came within the very words of the will, one being "Trustees of the Methodist Episcopal Church," and the other "Methodist Episcopal Church, South."

(2d) That both organizations were commonly known as "The Methodist Episcopal Church."

Upon the pleadings the defendant, the Southern church and the heirs at law, had the right to prove that state of facts if they could. Then the other issue offered would also have been competent as to which church the testator intended to devise by the use of words applying, in strict letter, to neither church, but in common parlance to both. On this issue the admission that one church had numerous members and church buildings in the testator's county, and that the other had no members in that county, and similar evidence for and against, would have been competent to show the testator's intention, and if this were not shown to the satisfaction of the jury the devise would lapse for the benefit of the heirs at law. In refusing to submit the issues and evidence offered there was

ERROR.

FAIRCLOTH, C. J., dissenting. I can not concur with the majority of the Court. On 20 June, 1887, William Ellis executed his last
(244) will and testament, and the second item reads as follows: "I give and devise to my beloved wife, Viney Ellis, all of my property, both personal and real, of every description, to have and to hold the same during her natural life; at her death, to the use of the Methodist Episcopal Church; if not built before my death, to be built out of my estate, one-fourth of a mile east of my homestead, at some convenient place." The testator died in 1894.

This action is brought by the executors against the heirs at law of the testator (Viney Ellis being dead), for a construction of said devise, and the "Methodist Episcopal Church," and the "Methodist Episcopal Church, South" are made parties defendant, each party filing an answer, the heirs alleging that the bequest is void for uncertainty. The last named party tendered the following issues at the trial, and offered to introduce evidence tending to sustain the same:

1. Is the name "Methodist Episcopal Church" a common or short name for "Methodist Episcopal Church, South," and by such name known?

2. Did the testator, by the words in his will, "Methodist Episcopal Church," intend the "Methodist Episcopal Church, South?"

3. Is the corporate name of the "Methodist Episcopal Church" the Trustees of the Methodist Episcopal Church?"

The Court declined to submit any of the issues tendered, and the Methodist Episcopal Church, South, excepted.

The statement of the case on appeal by the Court says: "At the hearing it was admitted that one organization in this State was the Methodist Episcopal Church, and the other in this State was the Methodist Episcopal Church, South. But it was not admitted that the (245) Methodist Episcopal Church was the corporate name. It was further admitted that there was no organized congregation of the Methodist Episcopal Church in this (Durham) County, but it was admitted that there were organized congregations of Christians in North Carolina known as the "Methodist Episcopal Church."

The Court rendered judgment in favor of the Methodist Episcopal Church, and ordered the executor to apply the surplus for its benefit according to the will, and the other defendants appealed.

The Code, section 3667, provides that the Synod, Conference, Convention, Religious Societies and Congregations within the State may at any time appoint trustees for such church, denomination, religious society or congregation, to receive and hold property, real and personal, for their use; and section 3665 declares that all lands and tenements that have been or may be given to such religious bodies within the State for their use shall remain to their use, and the estate shall vest in their trustees respectively; "and in case there shall be no trustees, then in the said churches, denominations, societies and congregations respectively, according to such intent."

We see nothing to support the contention of the heirs. The rule undoubtedly is, in regard to testamentary dispositions of property, that uncertainty as to the subject or object of a devise will be fatal to its validity. A case in the early decisions was a gift to the Bishop "to be

disposed of to such objects of benevolence and liberality as he shall most approve of," and was held void because of uncertainty, whereby its execution could not be enforced. A more recent case (1886) was that of the will of the late Samuel J. Tilden of New York. He gave his
(246) residuary estate to his executors, as trustees, and their successors, to hold and apply it "to such charitable educational purposes" as in their judgment would render it "most widely and substantially beneficial to mankind"; held void for uncertainty, and because the will of the trustees was substituted for that of the testator. *Tilden v. Green,* 130 N. Y., 29. See like cases, *Bridges v. Pleasants,* 39 N. C., 26; *Johnson v. Johnson,* 36 Am. St., 104.

The reason why these testamentary dispositions are held void is, that there can be no one who can demand the benefit of the trust on the ground that he is one of a class for whose benefit it was intended by the *testator,* and because there is no one upon whom the Court can lay its hand and compel performance.

The heirs in this case can not claim the property because the subject (the property) is certain on the face of the will and the object (the legatee) is either certain or can be made so under the maxim, *"ut res magis valeat quam pereat."* The suggestion that the bequest to the Methodist Episcopal Church is not made in its corporate name can not prevail. Under The Code, *supra,* the church or sect, etc., now has capacity in religious congregations of particular denominations in the aggregate to take property for the religious uses of the congregation or church, known as a denomination, thus enabling each church to fulfill its functions of benevolence and instruction of its members and others. *Bridges v. Pleasants, supra.*

The position of the appellant, the Methodist Episcopal Church, South, assumes that there is ambiguity on the face of the will. We can not concur in that construction. There is no serious contention that there is a patent ambiguity in this case, as we have already said. A patent ambiguity is one of construction upon the face of the instrument
(247) alone, without any help from outside evidence, and arises from such defect on its face, using language so vague that no subject is indicated, and the Court can not give a meaning without making a will, "which it has no right to do."

A latent ambiguity arises where there is no defect in the description of the person or thing on the face of the instrument, but it becomes necessary to *identify* the person or thing and fit it (the person or thing) to the description in the instrument, and in all such cases evidence *dehors*

becomes admissible and necessary, for the reason that the will or other instrument may describe but it can not *identify*. Suppose a devise to John Smith; there is no ambiguity in that—no room for construction; but where one appears claiming to be John Smith, he must be identified by evidence *dehors* either by admission or the testimony of witnesses. *McDaniel v. King,* 90 N. C., 597; *Taylor v. Maris, ibid.,* 619. All respectable authorities agree that evidence can not be heard to explain, add to, take from, modify or contradict a will, when its terms plainly indicate the persons or things mentioned in it. Although it is admitted, by all the defendants, that there is an organization in this State known as the Methodist Episcopal Church, and another known as the Methodist Episcopal Church, South, the latter, answering by that name, avers that it is sometimes called the Methodist Episcopal Church, and offers to fit itself to the description in the will by showing its averments by outside evidence. The answer to that proposition is that there is no uncertain language on the face of the will, either as to the subject or object of the bequest, and the other church organization, admitted to exist in North Carolina, in terms, fits the language of the will without any extrinsic evidence. To admit such evidence would open the way to the danger of allowing such proofs to establish a will, in the face of the unambiguous language of the will itself, as was attempted to be done in *Tilden v. Green, supra.* This subject is fully discussed and the whole (248) ground covered in the able opinion of the Court, in *Deaf and Dumb Inst. v. Norwood,* 45 N. C., 65. Extrinsic evidence is admitted, not for the purpose of importing into the instrument an intention not expressed in it, but simply for the purpose of elucidating the meaning of the words employed; and the line which separates what is in the instrument from direct evidence of intention, independent of the instrument, must be kept steadily in view. The Court must declare what is the meaning of that which is written, not of what was intended to be written, and thereby avoid letting the case fall on the wrong side of the line, as was done in *Taylor v. Bible Society,* 42 N. C., 201. The question therefore is one of *construction* and not of identification. I think the judgment should be affirmed.

FURCHES, J. I concur in the dissenting opinion.

Cited: Keith v. Scales, 124 N. C., 508, 9; *McLeod v. Jones,* 159 N. C., 76; *Gold v. Cozart,* 173 N. C., 614.

(249)

R. T. SMITH AND WIFE v. OLD DOMINION BUILDING AND LOAN ASSOCIATION.

[DEFENDANT'S APPEAL.]

Action to Recover for Usurious Interest Paid—Pleading—Usurious Interest—Counterclaim in Excess of Debt Sued for—Costs.

1. In an action under section 3836 of The Code to recover twice the amount of interest paid, the complaint alleged that defendant, in the inception of the contract, "received, reserved, and charged the plaintiff $300 as usury," and that "in addition to said charges of usury the defendant likewise charged, reserved, and received other usurious amounts over and above the legal rate of interest, to wit" (specifying the amounts, dates, etc.), and that said sums were charged against plaintiff and knowingly taken, received, and collected by defendant in violation of The Code, section 3836: *Held*, that the complaint contained a sufficient allegation of *payment* of the sums by plaintiff to defendant, and upon a finding of such allegations to be true the court below rightly gave judgment for double the amount of interest paid within two years prior to beginning of the action.

2. Where usurious interest is charged all interest is forfeited, and, the legal effect of the contract being simply a loan without interest, all payments, however made, must be credited on the principal, and in addition the borrower is entitled to recover, or have credited on the debt, double the amount of payments made as interest within two years prior to action brought.

3. Where, in an action under section 3836 to recover double the amount of interest paid, judgment is rendered for the defendant on the debt due to him set up as a counterclaim and in excess of the plaintiff's claim, such judgment carries the costs against the plaintiff, but where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion allowed by section 527 (2) of The Code, the costs of this Court will be divided, so that each party shall pay his own costs.

ACTION, begun 21 June, 1895, and tried before *Starbuck, J.*, at November Term, 1895, of GRANVILLE. The purpose of the action (250) was to recover from the defendanlt twice the amount of interest paid, as provided in section 3836 of The Code, the plaintiff alleging usury. The defendant denied each material allegation of the complaint, and also set up the bar of the Statute of Limitations to plaintiffs' action as contained in said section of The Code. The defendant also asserted a counterclaim against plaintiffs, alleging that the latter were indebted to it in the sum of $1,798.88 on account of money theretofore loaned by it to plaintiffs. To this the plaintiffs replied that said counterclaim was founded on an usurious agreement, whereby plaintiffs agreed to pay to defendant interest upon its said loan in excess of the legal rate.

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

"That plaintiff applied to defendant for loan of $2,500 23 June, 1892, and to secure said loan, agreed to be advanced him (the plaintiff), on 2 July, 1892, executed his bond to defendant in the sum of $5,000 secured by deed of trust of same date, executed by himself and wife to defendant. That of the money, $2,500, which defendant agreed to advance plaintiff, only the sum of $2,305 was actually received by plaintiff on 20 July, 1892. The balance of $2,500 was reserved by company and applied as follows: $50 for membership fee for 50 shares of stock which plaintiff was required to subscribe for as condition upon which to obtain his loan; $127.50 in payment of three monthly installments in advance (mentioned in bond, marked Exhibit X), $2.50 exchange on check, and $15 for other charges and expenses. That plaintiff, beginning with November, 1892, made regular payments of $42.50 to the defendant each month till some time during 1893, when he (251) fell behind two months in his payments, and continued paying on the regular payments, remaining two months behind, until 3 August, 1894, when he made his last payment, having made in all 20 payments of $42.50 each. That of these payments 13 were made within two years prior to the beginning of this action—action having begun 21 June, 1895. That within said two years the plaintiffs also paid to defendant the sum of $20, charged against him as fines on delinquent payments, and $5 of fines previous to 21 June, 1893. That of each monthly payment $12.50 was applied by defendant as interest, and this was done to the knowledge of the plaintiff. That on 5 May, 1894, the defendant had so applied payments made by plaintiff as to show that plaintiff was indebted to defendant in the sum of $1,798.85, as of that date according to and in consequence of such application of payments. That the total amount of interest paid within two years prior to the beginning of the action was $162.50. That said interest was infected with usury. That the total of all sums paid by the plaintiff was $875, including fines. That the plaintiff and his wife, Mollie T. Smith, executed the said bond, and to secure the same executed the said deed of trust on land which was the separate estate of Mrs. Smith. That the money borrowed, for which said bond was given and to secure which said mortgage was executed, was borrowed and used by the plaintiff, R. T. Smith, and not for the benefit of Mollie T. Smith or her estate.

"That in May, 1895, R. T. Smith went to the office of B. S. Royster, who was the local secretary and treasurer of the defendant, and who was one of the trustees in the said deed of trust, and there offered to pay the said Royster the sum of $1,600, which the said Smith claimed was all that was due, Smith stating to Royster that the money was in the bank and he was ready to pay it. Royster declined (252)

to receive it, stating that he had no authority. That Smith did not have the money on his person at the time, but had it at his command in the bank, which was in the same building. That at that time there was due the sum of not less than $1,700."

Upon the foregoing facts and exhibits, his Honor concluded:

"I. That the transaction of May, 1895, between the plaintiff Smith and B. S. Royster, did not amount to a tender.

"II. That the plaintiffs are entitled to recover of the defendant the sum of $325, being double the amount of interest paid within the two years prior to the beginning of the action.

"III. That the defendant has forfeited all interest upon the amount.

"IV. That the defendant is entitled to judgment against the plaintiff, R. T. Smith, for the sum of $1,105, being the amount actually received by the plaintiff, viz, $2,305, after deducting the total of all payments made, viz., $875, and the sum of $325, the last sum being the double of the interest paid within the two years prior to the beginning of the action.

"V. That the defendant is entitled to have foreclosure of the land conveyed by the deed of trust."

His Honor therefore adjudged: "That the defendant, Old Dominion Building and Loan Association, recover of the plaintiff, R. T. Smith, the sum of $1,105 and interest at the rate of six per cent per annum from this term.

"That the plaintiffs recover the costs of the action up to and including this term. It is decreed that A. J. Feild be and he is hereby appointed commissioner to sell the land described in the deed of
(253) trust, which is made a part of the findings of fact in this cause.

That the plaintiffs are allowed until 20 May, 1896, to satisfy the defendant's judgment. That if the judgment is not satisfied within that time the said commissioner shall advertise the said land according to law for 30 days, and sell the same at public auction at the courthouse door in Oxford to the highest bidder for cash, and shall make report to the ensuing term of this Court."

From the above judgment both the plaintiff and defendant appealed.

The defendant's exceptions to his Honor's conclusions of law and to the judgment thereon were as follows:

"1st. That his Honor's conclusion that plaintiffs are entitled to recover of defendant $325, being double the amount of interest paid within the two years prior to the beginning of the action is erroneous in law.

"2d. That his Honor's conclusion that the defendant has forfeited all interest upon the debt is error in law.

"3d. That the defendant is entitled to judgment against the plaintiff, R. T. Smith, for the sum of $1,105, being the amount actually received

by the plaintiffs (viz., $2,305), after deducting the total of all payments made (viz., $875), and the sum of $325—the last sum being the double of the interest paid within the two years prior to the beginning of this action—is error in law.

"4th. That the defendant is entitled to judgment against the plaintiff, R. T. Smith, for the sum of $1,105 only is error in law.

"5th. That the plaintiffs recover the costs of the action is error in law.

"6th. That the order or judgment appointing A. J. Feild, Esq., a commissioner to sell the land conveyed in a deed in trust, there being trustees named in said deed for that purpose, is error in law."

Winston, Fuller & Biggs for plaintiffs.
Edwards & Royster for defendant. (254)

CLARK, J. The Code, sec. 3836, provides: "The taking, receiving, reserving or charging a greater rate of interest than is allowed by the preceding section (3835) when knowingly done shall be deemed a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action of debt, twice the amount of interest paid: Provided such action shall be commenced within two years from the time the usurious transaction occurred."

The second paragraph of the complaint charges that the defendant Association, in the inception of the contract, received, reserved and charged the plaintiff three hundred dollars as usury, and the third paragraph alleges "that in addition to said charges of usury defendant Association likewise charged, reserved and received other usurious amounts over and above the legal rate of interest, to wit: (specifying the amounts, dates, etc.). The defendant's contention that this is not a sufficient allegation of the payment of any sum to the defendant by the plaintiffs is a refinement which certainly receives no countenance from the present system of pleading. The Code, sec. 260. Besides, par. 4 of the complaint expressly alleges that said sums were charged against plaintiff, and knowingly taken, received and collected by defendant in violation of The Code, section 3836. The defendant well understood and intelligently contested the issues really presented by the pleadings. The court correctly held that the plaintiff could recover back double the amount of the interest which the proof showed had (255) been paid within two years prior to the beginning of the action.

The second exception is also without merit. The court properly held, in the very words of the statute, that the defendant had forfeited all

interest upon the debt. In legal effect "the contract is simply a loan of money bearing no interest," and all payments are to be credited on the principal (*Moore v. Beaman,* 112 N. C., 558; *Ward v. Sugg,* 113 N. C., 489; *Fowler v. Trust Co.,* 141 U. S., 384, 406), and in addition if the lender accepted such payments of usurious interest the borrower is given a right of action to recover back double the amounts thus extorted within the two years before action brought. *Roberts v. Insurance Co.,* 118 N. C., 429. The statute makes the charging or contracting for usury a forfeiture of all interest, and in addition its actual acceptance is visited with the penalty of recovering back twice the amount paid. The words of The Code, section 3836, are recited and thus construed in the Usury Act of 1895, ch. 69. If the penalties thus inflicted seem severe it is because the law-making power deemed it necessary to repress the devices of the avaricious by making it altogether unprofitable to evade the law fixing limitations for the usance of money. *Meroney v. B. and L. Asso.,* 116 N. C., 882, 922. Our penalties for usury are identical with those prescribed in the National Bank Act, U. S. Rev. St., sec. 5198. It may well be doubted if anything less severe would be effective. At common law the taking of any interest was an indictable offense (11 A. & E. Enc., 379); hence, interest is now purely statutory, being chargeable in such cases and to such extent only as is expressly allowed by statute. The penalties for usury were formerly much severer in this State, and are still so in some other jurisdictions, notably in New York, where in certain cases the charging
(256) of interest above six per cent has been recently made indictable.

The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will. The 3d and 4th exceptions do not show error as against the defendant, and the same exceptions being made by the plaintiffs are treated in their appeal.

The 5th exception is well taken. The defendant's counterclaim, being in excess of plaintiff's claim, the former recovered judgment, and this carries the costs. *Garrett v. Love,* 89 N. C., 205; *Hurst v. Everett,* 91 N. C., 399. If the plaintiff had wished to avoid liability for costs he should have tendered the amount legally due the defendant. The Code, 573; *Pollock v. Warwick,* 104 N. C., 638; *Murray v. Windley,* 29 N. C., 201. Under the present Usury Act (1895) the usurious lender, whether plaintiff or defendant, recovers no costs; but in its terms that act does not apply to loans made prior to its passage. The 6th exception was abandoned.

The costs of this court on the defendant's appeal will be divided, each party paying his own costs. The Code, 527 (2).

JUDGMENT MODIFIED.

Cited: Churchhill v. Turnage, 122 N. C., 433; *Faison v. Grandy,* 126 N. C., 830; *Cheek v. B. and L. Asso., ib.,* 245; *S. c.,* 127 N. C., 123; *Blalock v. Clark,* 137 N. C., 144; *Coward v. Comrs., ib.,* 301; *Taylor v. Parker, ib.,* 419; *Ervin v. Bank,* 161 N. C., 49; *Owens v. Wright, ib.,* 133, 142; *Corey v. Hooker,* 171 N. C., 233.

(257)

R. T. SMITH AND WIFE v. OLD DOMINION BUILDING AND LOAN ASSOCIATION.

[PLAINTIFFS' APPEAL.]

Action to Recover for Usurious Interest Paid—Usurious Interest—Fines —Penalties — Feme Covert — Principal and Surety — Wife's Land Mortgaged for Husband's Debt Treated as Surety—Tender—Refusal —Refusal of Principal's Tender of Debt Releases Surety—Counterclaim—Pleading—Statute of Limitations—Reformation of Judgment.

1. A penalty or fine for nonpayment of interest is usurious interest.
2. Where a wife mortgages her property to secure her husband's debt, the relation she sustains to the transaction, in reference to such property, is that of surety, and hence, as to any act of the creditor, as by extension of time, etc., her property will be released like any other surety.
3. Where a debtor said to the agent of his creditor that he had money in bank, in the same building where they met, sufficient to pay the debt (and such statement was true), and that he was ready and willing to pay the debt, but did not actually produce and offer the money, because the agent refused to receive it, on the ground that he had no authority to accept the sum tendered, claiming it to be less than the creditor's debt: *Held,* that such offer was a tender, and the actual production of the money was rendered unnecessary by the agent's positive and unconditional refusal to accept it.
4. Where a principal debtor, after the debt is due, tenders the amount due to the creditor, who refuses to accept it, the surety is discharged, and such tender need not be kept open or paid into court. (*Parker v. Beasley,* 116 N. C., 1, distinguished). Hence,
5. Where a debtor, whose debt was secured by a mortgage upon his wife's land, tendered the amount due to the agent of the creditor, who refused to accept it on the ground that he had no authority to accept the amount tendered, it being less than the creditor claimed to be due: *Held,* that the wife's land was thereby released from liability under the mortgage.
6. In an action, under section 3836 of The Code, to recover double the amount of interest paid, the defendant may set up a counterclaim for the debt on which the usury was paid, since it arises "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or is connected with the subject of the action."

7. In an action governed by section 3836 of The Code, to recover twice the amount of interest paid, the plaintiff is debarred from basing his claim on payments made more than two years before suit brought; otherwise, in an action governed by chapter 69, Acts of 1895, in which the plaintiff is not barred until two years after payment in full of the indebtedness.

8. The findings of fact by the trial judge by consent being equivalent to a special verdict, this Court will correct an error in the judgment thereon by directing it to be reformed.

(258) ACTION, tried before *Starbuck, J.*, at November Term, 1895, of GRANVILLE. The purpose of the action, the facts found by his Honor (by consent a jury trial being waived), conclusions of law thereon and the judgment fully appear in the report of the defendant's appeal in the same case (*ante*).

The plaintiff excepted to his Honor's conclusions of law upon the facts found by him, and to his judgment thereon, as follows, to wit:

"1. For that he finds as a fact that plaintiff paid defendant $20 by way of fines within two years, but does not allow a double recovery therefor.

"2. For that the conclusion of law that plaintiff is indebted to defendant in the sum of $1,105 is erroneous.

"3. For that his Honor found that there was no tender whereas the facts found by his Honor show the contrary."

The plaintiff also contended: (1) That the defendant is not entitled to set up by way of counterclaim the matters set forth in his answer as such; (2) That in an action to recover a penalty given by the statute no counterclaim is allowable, as such action is given by law to correct or punish the party who violates the Statutes of Usury; (3) (259) That the cause of action upon which this suit is brought is not barred by the two years Statute of Limitations, nor will it be until two years after the payment in full of the indebtedness set out in the answer and counterclaims of the defendant.

Winston, Fuller & Biggs for plaintiffs (appellants).
Edwards & Royster for defendant.

CLARK, J. The first and second exceptions of the plaintiff are sustained. The ruling complained of was doubtless a mere inadvertence of the court. The $20 collected as "fines" was simply usurious interest. "A penalty or fine for nonpayment of money is interest." *Meroney v. B. and L. Assn.*, 116 N. C., 882 (on page 922); *Mills v. B. and L. Assn.*, 75 N. C., 292; *Rowland v. B. and L. Assn.*, 116 N. C., 877.

THIRD EXCEPTION: When the wife mortgages her separate property to secure a debt of the husband, the relation she sustains to the transaction, in reference to said property, is that of surety. *Hinton v. Green-*

leaf, 113 N. C., 6; *Purvis v. Carstarphen,* 73 N. C., 575; *Walker v. Mebane,* 90 N. C., 259; *Gore v. Townsend,* 105 N. C., 228. In *Hedrick v. Byerly, post,* 420, it is pointed out that in such case as to the Statute of Limitations, that being by operation of law, the mortgage would only become barred by the same lapse of time as any other, though as between her and her husband, and in reference to claims against her husband's estate, she was a surety, and hence as to any act of the creditor, as by extension of time, etc., she would be released like any other surety. Here (upon the facts found by the court by consent of parties) there was a tender by the obligor of more than the sum due. The finding that, at the time the $1,600 was tendered, there was a balance of $1,700 due, upon all the facts found, is an erroneous conclu- (260) sion of law from such facts; for by those findings the plaintiff had received $2,305 from defendant and had made payments aggregating $875, leaving a balance due on the bond, at that time, of $1,430. The tender was therefore sufficient in amount, and being made to the local secretary and treasurer of the defendant was made to the proper person. 17 A. & E. Enc., 132. It is found as a fact that the plaintiff stated to said officer that he then had the money in the bank in the same building, and that this was true, and that the plaintiff was ready to pay the sum tendered ($1,600) but said treasurer declined to receive it. The production of the money was thereby rendered unnecessary. 25 A. & E. Enc., 904; *Holmes v. Holmes,* 12 Barb., 137; *U. S. Bank v. Ga.,* 10 Wheat., 347; *Bradford v. Foster,* 87 Tenn., 11; *Koon v. Snodgrass,* 18 W. Va., 320; *Harding v. Davies,* 2 Car. & P., 77. Evidence of the waiver of a tender is competent and sufficient to support an allegation of tender. *Holmes v. Holmes,* 5 Selden, 525; 2 Greenleaf Ev., (14 Ed.), secs. 601, 603. This was not a bare offer to pay, which amounts to nothing, but it was a tender by a man ready and able to perform, who did not produce the money when it was at hand because of the creditor's positive and unconditional refusal. When the principal, after the debt is due, tenders the amount due to the creditor, who refuses to receive it, the surety is discharged. 2 Brandt Surety, par. 339, and numerous cases there cited; and such tender need not be kept open nor the money paid into court. *White v. Life Assn.,* 83 Ala., 419, and cases cited therein; *Mitchell v. Roberts,* 17 Fed., 776; citing a number of authorities. This case differs from *Parker v. Beasley, 116* N. C., 1. There the point was as to the effect of a tender upon a mortgage of the principal debtor; and the rights of a surety, upon the refusal by (261) the creditor of a tender by the principal debtor of the sum due, did not arise. In such cases the surety is held discharged, because that single act is an extension of time to the principal, and it is not necessary to pay the money into court, which would stop the running of

interest as to the principal. Here the tender had no effect whatever as to the principal debtor, for the debt being usurious bore no interest; but its refusal, according to the authorities, discharged the liability of the wife's property conveyed as security for the husband's debt. When the creditor had the sum due tendered him and declined it, he could no longer look to the surety.

The plaintiff's contention that the defendant can not to his action set up a counterclaim for the debt on which the usury was paid is unfounded. The plaintiff's own claim is "in the nature of an action of debt" (Code, sec. 3836), and hence any cause of action "arising on contract and existing at the commencement of the action" was competent as a counterclaim. Code, sec. 244 (2). But whether the plaintiff's action was in *tort* or contract, the counterclaim is allowable, because it arises "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action." Code, sec. 244 (1); *Branch v. Chappel, ante,* 81.

Also unfounded is the plaintiff's contention that the plaintiff is not barred till two years after payment in full of the indebtedness on which the usury was paid. This is true under the present Usury Act, (chap. 69, Laws 1895), but that statute does not apply to this case, which is governed by The Code, sec. 3836. *Roberts v. Ins. Co.,* 118 N. C., 429.

(262) The judgment must be reformed in the court below by deducting from the amount of defendant's recovery $40 (being double the usurious interest paid as "fines") and by striking out the decree for foreclosure of the wife's land. The findings of fact by the judge by consent are equivalent to a special verdict, and upon those facts, it appearing that there had been a legal tender refused by the creditor, the effect of which was to discharge the surety, the court will direct the judgment below to be reformed. *Alston v. Davis,* 118 N. C., 202. The costs of the plaintiff's appeal will be taxed against the defendant. Code, sec. 527 (2).

JUDGMENT MODIFIED.

Cited: Sherrod v. Dixon, 120 N. C., 67; *Churchill v. Turnage,* 122 N. C., 433; *Bank v. Ireland, ib.,* 576; *Meares v. Butler,* 123 N. C., 208; *Fleming v. Barden,* 127 N. C., 215; *Williams v. B. and L. Assn.,* 131 N. C., 269; *Smith v. Parker, ib.,* 471; *Harrington v. Rawls, ib.,* 40; *Blalock v. Clark,* 133 N. C., 308; *S. c.,* 137 N. C., 144; *Wilson v. Telephone Co.,* 139 N. C., 396; *Lee v. Manly,* 154 N. C., 248; *Medicine Co. v. Davenport,* 163 N. C., 299; *McAuley v. Sloan,* 173 N. C., 82.

J. S. DURHAM v. JONES & POWELL.

Action for Damages—Malicious Prosecution—Instructions—Embezzlement—Probable Cause.

1. Under Code, section 1014, the scope of the law relating to embezzlement was extended by bringing within its terms an agent, servant, or employee of any corporation, person, or partnership who should embezzle or fraudulently convert to his own use any money, goods, or other chattels which should come into his possession or under his care, and by providing that the offender shall be deemed guilty of a felony and punished as in cases or larceny.

2. It is not necessary that a warrant issued by a justice of the peace should describe the criminal offense with the legal accuracy required in an indictment.

3. Where, in the trial of an action against partners for malicious prosecution, it appeared that plaintiff had been arrested on the complaint of one of the partners, but discharged on preliminary examination, and that such complaint, which was made a part of the warrant, charged that the plaintiff did unlawfully, etc., and by false representations obtain ice from the firm with intent to defraud; and, further, contained allegations of facts which, if true, constituted embezzlement: *Held*, that it was error in the trial court to restrict the defendants to showing that plaintiff was guilty of cheating by false pretenses, and to refuse to charge that, if the jury believed the facts to be as charged in the complaint on which the warrant was issued, and that either of the defendants had knowledge of them when the complaint was made, then the defendants had probable cause for instituting the prosecution.

ACTION, tried before *Coble, J.*, and a jury, at March Term, (263) 1896, of DURHAM. The purpose of the action was to recover damages for malicious prosecution. The defendants, merchants in Raleigh, N. C., had procured the arrest of the plaintiff in Raleigh, on 25 October, 1895, on the affidavit of J. A. Jones, one of the defendants, which was as follows:

"J. A. Jones, being duly sworn, complains and says that at and in said county, and in Raleigh Township, on or about 6 July, 1895, J. S. Durham did unlawfully and willfully, knowingly and designedly, by means of false representations, obtain ice from J. A. Jones and A. M. Powell, trading as Jones & Powell, with intent to cheat and defraud Jones & Powell of the said ice, saying that he would retain a certain part of the proceeds of the sale of said ice, after said Jones & Powell had been paid in full; whereas, he intended to convert the whole of the proceeds of sale of said ice to his own use, or to appropriate the ice itself, having beforehand made an arrangement with one W. T. Saunders to ship said ice to his ice house, and to pay him out of the proceeds of sale of

(264) said ice, or with the ice itself, an account said Durham owed said Saunders; that the ice was to be sold from the ice house of said Saunders, and the said Durham was to purchase from him so much as not to include the money owed said Saunders, and the said arrangement was carried into effect contrary to the form of the statute and against the peace and dignity of the State."

The warrant was issued by and returnable before J. C. Marcom, J. P., at Raleigh, who, after the examination of witnesses, discharged the defendant in said warrant, who thereupon brought this action for damages.

The following issues were submitted:

"1. Did the defendants, or either of them, maliciously and without probable cause prosecute a criminal action against the plaintiff as alleged in the complaint?

"2. What damages is the plaintiff entitled to recover?"

There was testimony on the part of the defendants tending to establish the truth of the averments in the affidavit on which the warrant was issued. At the close of the testimony the defendants (among other requests) asked for the special instruction referred to in the opinion of *Associate Justice Avery,* the refusal to give which was assigned as error, as well as the instruction given in lieu thereof.

The charge of his Honor was as follows:

"This is an action brought by the plaintiff against the defendants for the recovery of damages on account of an alleged malicious prosecution of the plaintiff by the defendants.

"The jury are instructed that in order for the plaintiff to maintain this action, the following facts must be shown by the plaintiff, by a preponderance or a greater weight of the evidence:

"1. That the prosecution complained of was terminated before (265) this action was commenced.

"2. That the said prosecution was instituted without reason or probable cause, and

"3. That it was instituted maliciously.

"The plaintiff contends that the defendants in this action instituted on 19 October, 1895, a prosecution against him on the charge of false pretense; that he was arrested on said warrant on 25 October, 1895, and carried before J. C. Marcom, J. P., in the city of Raleigh, where upon a hearing before said justice he was adjudged to be not guilty as charged; that he was discharged by said justice; that his trial was had on said 25 October, 1895; that he was held under arrest for several hours; that the said prosecution was dismissed and terminated; that no further prosecution was instituted on said charge against him; and he further contends that there was no reason or probable cause for said prosecution, and that said prosecution was done through malice on the

part of defendants in this case. And that the charge brought against him in that prosecution of having committed the crime of false pretense was false; and the plaintiff contends that on account of the alleged malicious prosecution he is entitled to recover from the defendants damages to the amount of $10,000.

"The defendants contend that there was probable cause or reasonable ground for the prosecution complained of, and they further contend that the prosecution was not done maliciously or through malice on their part against the plaintiff in this cause.

"The court instructs the jury that the burden is on the plaintiff to show that the defendants or one of them instituted a criminal charge as herein alleged; that he was arrested and prosecuted on said criminal charge, and that said prosecution was terminated by his acquittal or discharge; and the Court instructs the jury that if they believe the evidence in this case bearing on these facts the plaintiff has (266) established the said facts.

"The plaintiff alleges that he was prosecuted on a charge of false pretense, and the court deems it important that the jury should know what constitutes the crime of false pretense, in determining whether or not the said alleged prosecution was instituted without probable cause and maliciously.

"To constitute the crime of false pretense there must be a false representation of a subsisting fact or of a past event, or a fact having a present existence, and not of something to happen in the future, made for the purpose of obtaining goods or property from some one, and such false representation must be made with intent to deceive, must be calculated to deceive, and must deceive, and the goods and property must be obtained by means of such false representations to constitute the crime of false pretense.

"Keeping the definition of false pretense in mind, the jury will proceed to determine from the evidence in the case, under the court's instructions, whether or not the alleged prosecution was preferred against the plaintiff in this case without probable cause and maliciously.

"The court instructs the jury that if they find from the evidence in the case that the plaintiff was prosecuted as alleged, arrested and tried before a justice of the peace, and discharged by the said justice for the want of sufficient proof—and in this case the defendants admit that the plaintiff was discharged by the said justice—then the burden for showing probable cause for his arrest is cast upon the defendant (267) who instigated said prosecution, or upon both of the defendants, if the jury shall find that the defendant Powell in any way assisted or took part in the said prosecution.

"And the jury are further instructed that to constitute probable cause for a criminal prosecution there must be such reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious and prudent man in the belief that the person arrested is guilty of the offense charged.

"The court further instructs the jury that the facts and circumstances testified to by the defendant Jones, to have been within his knowledge, at the time he procured the warrant against the plaintiff, and connected with the transaction out of which the prosecution grew, were not such as would warrant a cautious and prudent man in believing that the plaintiff was guilty of the charge made against him, and did not constitute probable cause for the prosecution for the crime of false pretense. So the jury will proceed to inquire whether or not the prosecution was instituted through malice, for unless the jury find that the said prosecution was preferred both without probable cause and with malice they will answer the first issue 'No.' Whether or not there was malice the jury must determine from the facts and circumstances attending the prosecution, and the burden is upon the plaintiff to show by a preponderance of evidence want of probable cause and malice, unless the jury find that the discharge by the justice was on account of want of proof; as before instructed, if the said discharge was for the want of proof, then the burden is shifted to the defendants.

"The jury are instructed that the prosecution of a person criminally, from any other motive than that of bringing the guilty person to justice, is a malicious prosecution; and if in the prosecution of the plaintiff the prosecutor acted from any other motive than that of bring-
(268) ing one whom he believed to be guilty to justice, he acted with malice in the eyes of the law.

"But the jury are instructed that if they believe that R. C. Strong was a practicing attorney in good standing—and this is not disputed—and if they further believe that the defendant Jones made a full, fair and true statement to said attorney, before the warrant was sworn out, of all the facts and circumstances bearing upon the accused, and if the said attorney advised him that within the spirit of the law the said facts in his opinion were sufficient to constitute the crime of false pretense, then the jury will consider such advice as evidence to rebut any implication of malice.

"And if the jury, after considering all the facts and circumstances, together with the advice of said attorney, believe that the said prosecution against the plaintiff was not instituted with malice, then they will answer the first issue 'No.'

"If, on the other hand, they find from the evidence that the alleged criminal prosecution against the plaintiff was preferred without prob-

able cause and maliciously by both the defendants, then the jury will answer the first issue 'Yes, as to both the defendants.'

"If the jury find that the alleged prosecution was instituted without probable cause and maliciously by one of the defendants, then the jury will answer the first issue 'Yes, as to such defendant.'

"If the jury should find from the evidence, under the court's instructions, that the defendant Jones instituted the said prosecution without probable cause and maliciously, and if the defendant Powell consented, advised or coöperated in the said prosecution, then the defendant Powell would be liable to an action for malicious prosecution. (269)

"But if the defendant Powell did not coöperate or consent to the said prosecution, then he could not be liable for malicious prosecution.

"If the jury answer the first issue 'No,' they need not consider the second issue.

"If the jury answer the first issue 'Yes, as to both the defendants,' or as to either of the defendants, then they will proceed to determine what damages, if any, the plaintiff is entitled to recover. In doing this the jury will consider all the facts and circumstances proved, the suffering of the plaintiff, both mentally and pecuniarily, if the jury believe that he endured any such suffering, the circumstances under which the defendant or defendants acted, whether with express malice or not, whether they acted *bona fide* under the advice of counsel, and all the facts and circumstances connected with the matter, and assess the damages at what the jury think proper."

The jury, for their verdict, responded to the first issue, "Yes, as to both," and to the second, "$1,500."

Boone, Merritt & Bryant and Fred A. Green for plaintiff.

J. S. Maninng, Guthrie & Guthrie and F. H. Busbee for defendants (appellants).

AVERY, J. Embezzlement has been called a statutory larceny because of the fact that the earlier English statutes were thought to be but declaratory of the common law, that certain acts therein mentioned were punishable as larceny. 2 Bishop Cr. Law, secs. 319, 320, 327, 1. The last act passed in this State (Code, sec. 1014, Laws 1871-'76, chap. 145, sec. 2), extends the scope of the law so as to bring within (270) its terms an agent, servant or employee "of any corporation, person or partnership" who should "embezzle or fraudulently convert to his own use . . . any money, goods or other chattels . . . which shall come into his possession or under his care," and by providing that "he shall be deemed guilty of a felony and punished as in cases of lar-

ceny." 2 Wharton's Cr. Law, sec. 1917 (d). The use of the word embezzlement in this statute is but another mode of describing the fraudulent misappropriation of the goods of the employer to the employee's or agent's own use. 2 Bishop, *supra,* sec. 325, 1 and 2. The warrant upon which the plaintiff was arrested referred to the affidavit or complaint of J. A. Jones, one of the defendant firm, and thereby made it a part of the process. The complaint sets forth, amongst other things, that J. S. Durham did unlawfully and willfully, knowingly and designedly, by means of false representations, obtain ice from J. A. Jones and A. M. Powell, trading as Jones & Powell, *with intent to cheat and defraud* Jones & Powell of said ice, *saying he would retain a certain part of the proceeds* of the sale of *said ice,* after said Jones & Powell had been paid *in full,* whereas he intended to convert the whole of the proceeds of the sale of said ice to his own use or to appropriate the ice itself, having beforehand made an arrangement with one W. T. Saunders to ship said ice to his ice house and pay *him* out of *the proceeds of said ice or with the ice itself* an account said Durham owed said Saunders; that the ice was to be sold from the ice house of said Saunders, and that said Durham was to purchase from him so much as not to include the money owed said Saunders, and the said arrangement was carried into effect contrary," etc. It is proper to premise that the law does not intend or require that a justice of the peace shall describe a criminal (271) offense in a warrant, issued for the purpose of preliminary examination, with the same legal accuracy as is necessary in an indictment. But the complaint does aver: (1) That there was such an agreement as constituted the plaintiff the agent of Jones & Powell to sell ice for them, paying them a certain proportion of the proceeds of sale, and taking the residue as his compensation for selling. (2) That he then entertained the fraudulent purpose of converting the whole of the ice or the poceeds of its sale to his own use, by applying it in discharge of his own debt. (3) That he carried the said arrangement, to so misappropriate the proceeds of sale, into effect. In words that could not have been misunderstood, the warrant put the defendant on notice that he was charged with agreeing to constitute and constituting himself an agent for Jones & Powell, and with fraudulently misappropriating the goods and money of these defendants that came into his hands in that capacity. There was also testimony that tended to prove the agency as well as the wrongful misappropriation.

In view of the nature of the charge in the warrant and the evidence offered in support of it, the court erred in restricting the defendants to showing probable cause that the plaintiff was guilty of cheating by false pretenses, and in refusing to charge as requested in instruction number 7 in the prayer of the defendants, to wit, that "if the jury believe from

the evidence that the plaintiff agreed with the defendant J. A. Jones, as a member of the firm of Jones & Powell, that if the defendant firm would ship him a car-load of ice he would sell the ice by retail for cash, and out of the first moneys received set apart a sufficient amount to pay Jones & Powell for said ice and as their money, and the said Jones & Powell shipped the plaintiff, Durham, a car-load of ice; and if the jury believe from the evidence that the plaintiff, Durham, received the said ice under said agreement, and sold the same and (272) failed to set apart the first moneys received therefor for said Jones & Powell, and to pay them for said ice; and if the jury believe from the evidence that at the time of said contract with Jones & Powell for said ice the plaintiff, Durham, had made an arrangement with one Saunders to put said ice in his ice house, and, being indebted to said Saunders, had agreed with him that he could have a certain amount of said ice to pay his debt, and delivered to said Saunders such amount of said ice, if the jury believe that either Jones or Powell had knowledge of these facts and circumstances at the time said warrant was procured, then the defendants had probable cause to institute said prosecution, and the jury will answer the first issue 'No.'"

It is clear that no question could have been raised about the form of the warrant, if the justice of the peace had required the plaintiff (the defendant in the warrant) to give bond for his appearance at the Superior Court, whether the Solicitor deemed it best to draw an indictment for cheating by false pretenses or embezzlement.

It is not material to pursue the inquiry whether there was testimony sufficient, if true, to show probable ground for believing that the plaintiff was guilty of cheating by false pretenses. The testimony of Powell and Strong was in support of the complaint, and tended to show the agency of the plaintiff and the fraudulent misappropriation of goods and money that passed into his hands in that capacity. If the testimony of Jones, which is embodied in substance in the prayer for instruction, was believed by the jury, then their finding, thrown into the shape of a special verdict, would have been that the plaintiff was the agent of the defendants for the purpose mentioned, and converted to his own use money and chattels that passed into his hands as agent, and the jury might have drawn the inference and found that it was (273) done with a felonious and fraudulent intent.

We have foreborne to discuss the case in the light of the decision in *Oakley v. Tate,* 118 N. C., 361, wherein *Chief Justice Faircloth* for the court announced the general principle that a complainant could not be "held responsible for an error committed by a justice." It is not necessary to determine how far, if at all, that principle applies to the case before us. Conceding that when the fact that the plaintiff was dis-

charged by the justice for want of sufficient proof was shown the burden was cast upon the defendants to rebut a *prima facie* case, it is manifest that it was competent for them to relieve themselves of that burden by showing that there was probable cause as to an offense charged in the warrant.

It was therefore for the jury to determine, under proper instructions, whether there was probable cause for believing that any criminal offense, coming within the terms of the complaint or charge, had been committed by the plaintiff. The court misled the jury in restricting their inquiry to the question whether probable cause had been shown as to the charge of cheating by false pretenses, and erred when, in effect, that inquiry was answered for them in the charge. In refusing to instruct the jury as requested, and substituting the charge given, there was error which entitles the defendants to a

NEW TRIAL.

CLARK, J., did not sit.

(274)

S. B. TAYLOR ET AL. v. E. K. ERVIN.

Term of Court—When it Embraces Sunday—Entry of Verdict on Sunday—Judgment Rendered on Sunday Valid.

1. When a term of court is set by statute to begin on a certain Monday, and to last for "one week" (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day; hence,

2. A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered.

3. In special cases, *ex necessitate*, a court may sit on Sunday.

4. There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute, Code, sec. 412, that it shall be entered up at once on the verdict) is valid.

ACTION, heard on motion in the cause, before *Starbuck, J.*, at Spring Term, 1896, of ONSLOW. His Honor found the following facts:

"That this cause was called for trial on Saturday of the Fall Term of Onslow Superior Court, being the last Saturday of the term.

"That the verdict in this cause entered on the Minutes of the Fall Term, was returned and received between the hours of 2 a. m. and 3 a. m. on Sunday.

"That the judgment, purporting to be a final judgment, rendered in this cause and appearing on the Minutes of said term, was rendered between the hours of 2 a. m. and 3 a. m. on said Sunday.

"That the said verdict and judgment appear on the Minutes of the said term as having been returned and rendered on Saturday.

"That the defendant did not consent to but objected to the (275) reception of the verdict and rendition of judgment, contending that the term had expired."

"After hearing argument of counsel for the plaintiffs and the defendant, the court was of the opinion that the said Fall Term expired on Saturday night at 12 o'clock, prior to the return of the verdict and rendition of the judgment.

"It was therefore ordered 'that the Minutes of the said Fall Term be amended, *nunc pro tunc,* so as to show the facts, viz: That the said verdict was returned and the said judgment rendered on the said Sunday, 10 November, 1895.

"It is considered and adjudged: That the said verdict and judgment are void, and it is ordered that this cause be placed on the Civil Issue Docket for trial."

The facts so found were not controverted, but were admitted by plaintiffs to be correct.

To the order on such facts the plaintiffs duly excepted and appealed.

R. O. Burton for plaintiffs.
No counsel, contra.

CLARK, J. The Code, section 910, and the act substituted for it (Laws 1885, ch. 180) and the several amendatory statutes, provide for courts to begin on a certain Monday named, and to last for one *"week"* (or two or three weeks, as the case may be). Of course in such cases the term, if for one week, beginning on Monday, embraces the following Sunday, unless the court is sooner adjourned; if for two weeks, it embraces two Sundays, unless adjourned earlier, as is usual. In the present case the term prescribed for Onslow Superior Court began on the 9th Monday after the 1st Monday in September, (which was the first Mon- (276) day in November), "to continue in session one week. . . . unless the business shall be sooner disposed of." The term legally expired, therefore, at midnight Sunday, unless in point of fact the court had adjourned earlier, and the reception of the verdict on Sunday was legal, as has been repeatedly held. *S. v. Ricketts,* 74 N. C., 187; *S. v. McGimsey,* 80 N. C., 377; *S. v. Howard,* 82 N. C., 623; *White v. Morris,* 107 N. C., 92; *S. v. Penley,* 107 N. C., 808; *Shearman v. State,* 1 Texas App., 215; *McKinney v. State,* 8 Texas App., 626, 645; *Comrs.*

v. Marrow, 3 Brew., 402; *Reid v. State,* 53 Ala., 402. As stated by ASHE, J., in *S. v. Howard, supra,* "Sunday, according to the usage and practice of our courts, is not a juridical day, but it has been held that in special cases, *ex necessitate,* the court might sit on Sunday. The holding court on the Sabbath is not forbidden by the common law or any statute in this State, but it has been the long-settled and almost universal practice, when a term continues so long that a Sunday intervenes, to adjourn over until Monday, and 'long practice makes the law of a court,' a law which has its origin and observance in a deference to the settled religious habits and sentiments of a large majority of our citizens, a law whose violation is not excused except in case of necessity." To reduce the cases of necessity, the statute law (now The Code, sec. 1229), has for long provided that if a trial for felony is in progress the judge may continue the term, and a more recent statute (Laws 1893, chap. 226), has provided that in certain contingencies the judge may continue the court for the conclusion of the trial of a civil action. The term here did not fall within these statutes, and in fact was not continued by the judge, but Sunday was a part of the week belonging to that term; and, as the court justly points out in *S. v. Ricketts, supra,* the receiving on Sunday of the verdict of a jury which is confined,
(277) or whose fatiguing deliberation, if the verdict is not received before the expiration of the term, might become valueless, "is a work of necessity within the common and legal meaning of the word, and may be justified on religious and moral grounds." It is certainly better that, when the twelve men who are sequestrated from the world in the consideration of a secular issue have come to a conclusion, the simple announcement of that conclusion should be received and the jurors released than that the term should be continued over another day to their discomfort, when the pronouncement by them, of one or two words in criminal cases, or the handing in a paper they have already agreed to and signed in civil cases, would set them free. At any rate, there is no law against extending this humanity to a jury. The verdict being valid, the judge might well have directed thereupon the entry of the word "judgt.", which might afterwards be drawn out in full, as was pointed out in *Davis v. Shaver,* 61 N. C., 18, and *Jacobs v. Burgwyn,* 63 N. C., 193, which were cited and aproved in *Ferrell v. Hales, ante,* 199. But if, in fact, the judge signed the ordinary judgment in ejectment upon the receipt of the verdict, it was not invalid. It has not infrequently happened that the highest judgment known to the law, sentence of death, has been prononuced on Sunday, when the verdict was not rendered till that day. While it seems to be held everywhere that receiving a verdict on Sunday is valid, in some of the States which have changed the common law by Sunday-legislation, it has been held

that a judgment entered on Sunday is void. *Sherman v. State,* and *Reid v. State, supra.* Even in States of that class a judgment on Sunday is held valid when the statute, like our Code, sec. 412, contemplates judgment to be entered up at once on the verdict, unless otherwise directed by the judge. 1 Freeman on Judgments, sec. 138; *Thompson v. Church,* 13 Neb., 287; *Weame v. Smith,* 32 Wis., 412. (278) But even if, under our statutes, a formal judgment, signed on Sunday, had been invalid, the verdict being valid the judge should simply have entered judgment *nunc pro tunc. Ferrell v. Hales, supra.* In holding either verdict or judgment void there was error.

REVERSED.

Cited: Rodman v. Robinson, 134 N. C., 507; *Brown v. Harding,* 171 N. C., 687; *Pfeifer v. Drug Co., ib.,* 216.

C. F. BRESEE & SONS v. H. D. STANLY.

Contract of Infant—Ratification—Promise, to Amount to Ratification, Must be Unconditional and Express.

A conditional promise by one, after having reached his majority, to pay a note given during his infancy, the promise being hedged about with the statement that he would pay when he could do so without inconvenience to himself and with a refusal to fix a time for payment, does not amount to a ratification, since in order to amount to a ratification of a voidable instrument by an infant, the promise must be unconditional, express, voluntary, and with a full knowledge that he is not bound by law to pay the original obligation.

ACTION, to recover $130 and interest, due by note alleged to have been executed by defendant to the plaintiff, tried on appeal from a justice of the peace by *Starbuck, J.,* and a jury, at May Term of LENOIR.

The defendant pleaded infancy in avoidance of the note.

Plaintiff admitted on the trial the infancy of defendant at the time of the execution of the note, but relied upon the affirmance and ratification of the contract by the defendant after arriving at full age.

Verdict for the defendant. Plaintiff moved for a new trial (280) on the ground of error in charging the jury that according to the testimony of the defendant, he had not ratified the contract. Motion denied.

There was judgment for the defendant and plaintiffs appealed.

George Rountree for plaintiffs.
No counsel contra.

AVERY, J. The defendant was sued on a note for $130, and it was admitted that he was not twenty-one years of age when he executed it. The plaintiff contends that the defendant ratified and affirmed the contract after his majority, even if his own testimony as to what he said to the plaintiffs' agents is to be taken as true. He testified as follows: "I said it was a just debt and I would pay it, *if I ever got so that I could without inconvenience to myself.* Mr. Perry, plaintiffs' agent, then asked me if I could not fix some time at which I would pay the note. I replied that I would not promise to pay the note in one year, nor in ten years, nor at any time." This promise, so carefully hedged about with saving conditions, recalled to the minds of some members of the court the story of a settlement of accounts in Iredell County, which it is thought may with propriety be preserved as history in the judicial annals of the State. Mr. James solicited his debtor, Huggins, to close an old open account by note. Huggins agreed to do so, provided
(281) he should be allowed to draft the instrument, and accordingly presented the creditor the following:

"I, John Huggins, agree to pay James James one hundred and fifty dollars *whenever convenient,* but it is understood that Huggins is not to be pushed. Witness my hand and seal, this the...day of.....

"JOHN HUGGINS. [SEAL]"

But viewing his statement in its legal aspect, in order to amount to a ratification of a voidable agreement entered into by an infant, a promise, made after arriving at his majority, must be unconditional, "express, voluntary and with a full knowledge that he is not bound by law to pay the original obligation." *Alexander v. Hutchinson,* 9 N. C., 535; *Dunlap v. Hales,* 47 N. C., 381. A case directly in point is that of *Dunlap v. Hales, supra,* where the infant, on arriving at full age, was sued on a note given for slaves and wrote a letter in which he first proposed to surrender the slaves, and then added, "If they will not accept of the above offer I will have to pay them, I suppose, but I shall do so *at my convenience,* as it will be nothing less than a free gift on my part." A different principle is applicable to executed contracts, as to which ratification may be inferred from circumstances (*Petty v. Rousseau,* 94 N. C., 355), but the promise must always be express and unconditional in order to impart validity to such agreements as that sued on here. There is

NO ERROR.

(282)

W. H. CHADBOURN v. E. M. JOHNSTON ET AL.

Action to Foreclose Mortgage — Parties — Unauthorized Appearance Entered by Solvent Attorneys, Effect of—Setting Aside Judgment.

1. The wife and heirs at law of a mortgagor being necessary parties in an action to foreclose, a widow, who as *feme covert* joined in the mortgage of her husband, and the devisee of the mortgagor and those claiming under him, are likewise necessary parties.

2. Where all the legal parties are made defendants in a summons issued in an action to foreclose, and the summons is returned executed, such return carries with it the presumption of service and gives the court jurisdiction and authority to proceed to judgment. But this presumption may be rebutted and judgment set aside upon evidence showing that in fact the summons had not been served.

3. Where the necessary parties defendant in an action to foreclose are put into court by responsible and solvent practicing attorneys making a general appearance for them, the fact that summons had not been served will not induce this Court to set aside a judgment otherwise regular, rendered in such action.

MOTION heard before *Graham, J.*, at September Term, 1895, of PENDER, to set aside a judgment rendered at the March Term, 1894, the sale made thereunder and decree confirming the sale.

W. R. Allen for plaintiff. (286)
J. L. Stewart for defendants.

FURCHES, J. This is a motion to set aside a judgment of foreclosure, sale and confirmation thereunder, and from the facts found by the court it appears that on 6 December, 1886, John Watkins and his wife, Rebecca A. Watkins, executed a mortgage on the land mentioned in the complaint, to the defendant, E. M. Johnston, to secure a debt due by note of $3,704, payable twelve months from date. That on 26 December, 1886, said Johnston assigned said note to the plaintiff, Chadbourn. That after the execution of this note and mortgage, and before the commencement of this action, the said John Watkins died, leaving a last will and testament, in which he devised this land to his wife (287) for life, and the remainder in fee to the defendant, E. M. Johnston, and that since the death of said Watkins the defendant, E. M. Johnston, has sold and conveyed his estate in said land to W. J. Johnston. That this action was brought against E. M. Johnston, W. J. Johnston, and R. A. Watkins, the widow and devisee for life of said John. That the summons was served on the defendant E. M. Johnston, but there was no service on the other two defendants. That at the return of the summons the defendant, E. M. Johnston, employed John D.

Kerr, Marsden Bellamy and Herbert McClammy, practicing attorneys at that court, who entered a general appearance for the defendants, believing they were employed by all, and filed an answer for the defendant E. M. Johnston, and obtained leave to file for the others, but no other answer was filed. And at March Term, 1894, a judgment was entered against E. M. Johnston, who was one of the executors of the mortgagor, John Watkins, for the amount of the debt secured by the mortgage, a commissioner appointed and a sale of the land ordered. This sale was made and reported to the court by the commissioner and confirmed and judgment of foreclosure entered. And this is the judgment and proceedings thereon that are asked to be set aside under this motion.

The wife of a mortgagor who joins with her husband in making a mortgage is a necessary party in an action of foreclosure. *Nimrock v. Scanlin,* 87 N. C., 119. And if the wife is a necessary party, it would seem that the widow who joined in making the mortgage with her husband would be.

The heirs-at-law of the mortgagor are necessary parties in an action to foreclose. *Fraser v. Bean,* 96 N. C., 327. And it would seem that if heirs are necessary parties, a devisee and those claiming under (288) him would be. We are, therefore, of the opinion that Rebecca A. Watkins, both as a widow and as devisee, was a necessary party, and that W. J. Johnston, assignee of E. M. Johnston, was a proper if not a necessary party.

But it seems that they were both legal parties to this action. They were made defendants in the summons issued in the case, which was returned executed, though in truth and in fact it was not executed on Rebecca A. Watkins and W. J. Johnston.

This, *prima facie,* gave the court jurisdiction and authorized it to proceed to judgment. But this presumption might be rebutted by showing that in fact it had not been served. And, if nothing more had occurred, upon the court's finding this fact it would have been the duty of the Court to set aside the judgment.

But the matter did not end here. Three practicing attorneys made a general appearance for the *defendants,* which put the defendants Rebecca and W. J. Johnston in court, and one of these attorneys (Marsden Bellamy) is found to be "amply solvent." And it has been held by this Court that where this is the case the Court will not set aside the judgment otherwise regular. *University v. Lassiter,* 83 N. C., 38. For this reason the court erred in setting aside the judgment of sale and the order confirming the same and foreclosing the mortgage.

ERROR.

Cited: Ice Co. v. R. R., 125 N. C., 23; *Hatcher v. Faison,* 142 N. C., 367; *Schiele v. Ins. Co.,* 171 N. C., 433; *Comrs. v. Spencer,* 174 N. C., 37.

(289)

JACOB BAKER v. P. D. ROBBINS AND A. F. WILLIAMS, ADMINISTRATOR OF HARPER WILLIAMS, DECEASED.

Mechanic's Lien—Mortgage.

1. Before there can be a lien on property there must be a debt due from the owner of the property, a lien being but an incident to the debt.
2. Unless the statute otherwise provides, a mortgage lien is superior to a subsequent lien created by statute.
3. Where a mechanic filed a lien for repairs made upon a sawmill for the owner, such lien will not hold as against a mortgagee who did not authorize or know of the repairs, and did not subsequently ratify the acts of the owner and mechanic. In such case the lien is effective only against the owner's equity of redemption in the property.

ACTION, tried on appeal from a judgment of a Justice of the Peace, before *Coble, J.*, and a jury, at August Term, 1896, of DUPLIN. The facts appear in the opinion of Associate Justice FURCHES. His Honor, on the verdict in favor of the plaintiffs, rendered judgment directing the lien on the boiler in favor of the plaintiffs to be enforced as a superior lien to that of the mortgagee, and the defendant Williams alone appealed.

Stevens & Beasley for plaintiff.
Simmons & Ward for defendant.

FURCHES, J. This is an action of debt and to enforce a mechanic's lien. The defendant Robbins was the owner of a steam sawmill and boiler, upon which defendant William's intestate held a mortgage. The defendant Robbins, being in possession of the mill without the knowledge or consent of his co-defendant, employed the plaintiff to patch and repair the boiler, which he did, according to the finding of the (290) jury, to the amount of $43.84.

The plaintiff afterwards filed his lien for this work on the mill, engine and boiler, which is admitted to be in apt time and regular in form.

There is no complaint of anything that occurred during the trial, but defendant Williams objects to the judgment of the court, and we are of the opinion that the objection is well taken.

It is not alleged that plaintiff had any contract with defendant Williams or his intestate to do this work, or that they knew he was doing the same. And the jury find that the defendant Robbins is indebted to plaintiff for the work, and that defendant Williams is not.

The defendant Williams has, since this work was done, by action and claim and delivery, recovered possession of this mill, and now has the same in possession, and is proposing to sell the same under his mortgage to satisfy his debt.

There is no question but that plaintiff's lien is good against any interest the defendant Robbins may have in the mill; but it is contended by the plaintiff that it is good against the defendant Williams as well as against Robbins, and Phillips on Mechanic's Liens, 818, and *Watts v. Sweeney,* 127 Indiana, 116, are cited in support of this contention. The citation from Phillips does seem to support this contention, and cites the case of *Watts v. Sweeney, supra,* as authority for the position. We have examined *Watts v. Sweeney,* and whether it is correctly decided or not, it is clearly distinguishable from the case under consideration. *Watts v. Sweeney* is a case where an engine was sent to the defendant's shops for repair, and it is held that defendant had a common-law right to retain possession until the repairs were paid for. And by a
(291) statute of Indian the defendant, after a certain time, had a right to sell the engine to make his debt. The statute created no lien, but only authorized the sale to enforce the lien. This common-law right to retain property is well recognized law, given to common carriers, inn-keepers, shop-keepers, and others. But no common-law rights came to the assistance of the plaintiff in this case. Whatever rights he has are created by the statute. He had no possession, and therefore no right to retain possession. This he does not claim, but insists that by virtue of the statute he has a lien on this mill, superior to that of the mortgage of defendant Williams.

This case falls under the doctrine laid down by the Court in *Hanch v. Ripley,* 127 Ind., 150, where it is held that the lien of a mortgage is superior to a subsequent lien created by statute. And this is so in this State, except where it is provided otherwise by the statute. Statutory liens may and often do take effect from the date of their creation and not from the filing of the lien. But in this case it is not a question of priority of lien, so far as the defendant Williams is concerned, but the question is as to whether there is *any lien* as against him.

There is no debt or liability against him. The plaintiff claims none. He did not even have knowledge of the fact that the plaintiff was doing the work. He has never, by word or act, approved or ratified the acts of the plaintiff and the defendant Robbins. He has not received a dollar on his mortgage since the work was done.

The law seems to be settled in this State that there must be a debt due from the owner of the property before there can be a lien. The debt is the principal, the basis, the foundation upon which the lien depends. The lien is but the incident, and can not exist without the principal. *Bailey v. Rutjes,* 86 N. C., 517; *Boone v. Chatfield,*
(292) 118 N. C., 916. Under our statute giving subcontractors liens the debt may not be due directly from the owner of the property to the subcontractor, but he must be indebted to the original contractor at

the time of filing the lien, or notice thereof, or there can be no lien. *Clark v. Edwards, ante,* 115. The judgment of the court must be reformed so as to declare no debt or lien against the defendant Williams, but to be a lien on the defendant Robbins' equity of redemption in the property covered by the notice of lien filed by the plaintiff. When thus modified, it is affirmed.

MODIFIED AND AFFIRMED.

Cited: Belvin v. Paper Co., 123 N. C., 151; *Weathers v. Borders,* 124 N. C., 613; *Kearney v. Vann,* 154 N. C., 316; *Humphrey v. Lumber Co.,* 174 N. C., 520.

A. R. SHATTUCK v. THOMAS CAULEY ET AL.

Estoppel in Pais—Bona Fides.

The owner of land who aids another to obtain a loan by mortgage thereon as the latter's property, and uses language calculated and intended to induce the lender to believe that he has no title to the property, and that the borrower is the owner, is estopped to deny that the borrower is the true owner, the lender having no notice, actual or constructive, that the title is not in the borrower.

ACTION, tried before *Starbuck, J.,* and a jury, at Spring Term, 1896, of LENOIR. The facts appear in the opinion of Associate Justice MONTGOMERY. The defendant, Franklin Cauley, appealed.

George Rountree for plaintiff. (293)
Allen & Dotch for defendant, F. Cauley.

MONTGOMERY, J. This action was brought to subject the land described in the complaint to sale for the purpose of having the proceeds applied to the payment of a debt due to the plaintiff and secured by a deed of trust executed by Thomas Cauley and his wife, two of the defendants, on 3 May, 1890, and registered duly in the office of the Register of Deeds of Lenoir County. The defendant, Franklin Cauley, brother of the defendant Thomas, upon the trial set up title to the property, and resisted the plaintiff's claim to have the property sold for the payment of the debt of Thomas. The jury found that at the time of the execution of the deed of trust the defendant Franklin was the owner of the land; but in response to the second issue submitted to them, to wit, "Is the defendant, Franklin Cauley, by his conduct prior to the execution of the deed of trust to the plaintiff Shattuck, estopped as to said

plaintiff to deny that Thomas Cauley was the owner of the land at the time the deed of trust was executed? Their answer was "Yes." The defendant requested the Court to instruct the jury that there was no evidence to support a finding in favor of the plaintiff on the second issue, and that they be instructed to answer that issue "No." Upon his Honor's refusal to so charge the defendants noted an exception. It was alleged in the complaint and admitted on the trial that the defendant, Franklin, had conveyed the land to Thomas by deed in 1872, and that the deed was registered in that year and *was on record* in Lenoir County when this action was tried. Upon the trial there was testimony tending to show that before and at the time the plaintiff loaned the money to Thomas, and took the security therefor by way of the deed of trust,

(294) the plaintiff had examined the records of Lenoir County thoroughly to see the nature of the title of Thomas to the land; that he found no deed from any one to Franklin, and no deed indicating that the land belonged to any one but Thomas. In addition, Thomas Cauley, a witness for plaintiff, testified as follows: "I am a defendant in this action. I was in possession of the land 21 or 22 years. I rented it out one year before I moved on it. I was holding the land under a deed from Franklin Cauley. I sold it as administrator of my brother, who was killed in the war, to make assets to pay his debts, and got Franklin Cauley to buy it in for me, and I made a deed for it to him as administrator, and he deeded it back to me in 1872, and I was holding under this deed. (This deed was put in evidence.) I gave in the land for taxation as mine, and paid the taxes on it. Franklin Cauley never gave it in nor paid taxes on it. I was turned out of possession by the court under the judgment in the action brought by Franklin Cauley against me. Franklin Cauley was never in possession of the lands until said judgment. Franklin Cauley went with me to Mr. A. J. Loftin's office when I went to borrow money from the plaintiff Mortgage Company. I told Mr. Loftin how much money I wanted. He (Loftin) demanded to know how much the land was worth. He said he would let me have one-third of the value of the land. Franklin Cauley knew what I was doing and helped me, in the presence of Mr. Loftin and in his office, to value the land. He (Franklin Cauley) said the land was worth $1,200; that he would be willing to give that much for it if he had the money. I never paid any rent for the lands to Franklin Cauley, and he never exercised any ownership over the land."

We are of the opinion that his Honor committed no error in refusing to give the instruction asked by the defendants as to the second

(295) issue. The defendant Franklin was estopped by his conduct just prior to and at the time of the loan of money on the land by the plaintiff to Thomas. He claimed, on the trial, title to the land by a

deed from Thomas to himself, dated and registered in 1875, and that the book in which the deed was registered was burned in 1879, and the jury found that he was the owner of the land under that deed. But, according to the testimony of Thomas, he not only allowed, in his presence, Thomas to borrow the money of the plaintiff and to execute to the plaintiff the deed of trust upon the land to secure the loan, but he actually aided him in procuring the loan; he valued the property, and said to the plaintff that he would be willing to give $1,200 for the land, if he had the money. By this conduct the defendant Franklin not only aided and assisted Thomas to make the loan, but he deliberately and willfully used language that was calculated and must have been intended to make the plaintiff believe that he had no title to the property, and that his brother Thomas was the owner of it. The plaintiff had no notice of the deed from Thomas to Franklin, either actual or constructive. Franklin and the justice of the peace who wrote the deed were probably the only persons who knew of its execution, and so far as the testimony shows they were the only persons who knew of it. It is true that Franklin testified that the agent of the plaintiffs knew of the destroyed deed, but the agent denied it. The principles of law applicable here were announced by this Court in the cases of *Mason v. Williams,* 66 N. C., 564, and *Morris v. Herndon,* 113 N. C., 236.

The other defendants, Rouse and Mitchell, moved for judgment upon the verdict, upon the ground that they (mortgage creditors of Franklin, by deed of subsequent date to the deed of trust from (296) Thomas to the plaintiff) were not bound by the estoppel against Franklin; but the exception to his Honor's ruling was abandoned in this Court.

NO ERROR.

Cited: Bank v. Bank, 138 N. C., 472.

J. R. CARTER AND WIFE v. G. W. ELMORE.

Judgment, Insensible and Void—Appeal.

A pretended judgment which adjudges nothing against the defendant, and on which an execution cannot issue, is insensible and no appeal lies therefrom.

ACTION, tried before *Graham, J.,* and a jury, at October Term, 1895, of SAMPSON, on appeal from a judgment of a justice of the peace. The judgment rendered in the Superior Court was as follows:

"The jury having found the issue as follows: Is the defendant indebted to plaintiff, and if so, in what amount? Answer: 'Yes, $40.'

"This cause, coming on to be heard, and the issue of no debt having been submitted to the jury, and they having found that the defendant, G. W. Elmore, is indebted to the plaintiff, John Carter, in the sum of $40, and all costs of this action, to be taxed by the clerk.

GRAHAM, J."

Defendant appealed.

(297) *F. P. Jones for defendant.*
No counsel contra.

CLARK, J. The judgment sent up in the record is insensible, and does not adjudge anything against the defendant. No execution can issue upon it, and the defendant has nothing from which to appeal. *Bostic v. Taylor,* 93 N. C., 415; *Baum v. Shooting Club,* 94 N. C., 217; *S. v. Lockyear,* 95 N. C., 633; *Rosenthal v. Roberson,* 114 N. C., 594. Deeming there might possibly be an inadvertence in entering the judgment or in copying it for the transcript on appeal, the Court at last term continued the cause, and the defect was called to the attention of counsel to the end that if they thought proper the judgment might be amended below, or that the transcript might be corrected if the error was in copying. No correction has been made, and the Court will not, after such notice, remand *ex mero motu,* and no motion being made by either party to remand, we will now direct the entry.

APPEAL DISMISSED.

Cited: Rogerson v. Lumber Co., 136 N. C., 270.

---

(298)

B. W. NASH, TRUSTEE, v. S. I. SUTTON ET AL.

Judgment—Verdict—Agreement.

Where, on the trial of an action by a trustee to recover church property, the parties agreed that the answer as to the single issue submitted, as to whether the trustee was the owner and entitled to the possession, should settle the whole controversy and all the issues raised by the pleadings, and that the answer should be "Yes" if certain facts were true; otherwise it should be "No," and the jury answered "No": *Held,* that the verdict, being in accordance with the stipulation, justified a judgment for the defendant.

NASH *v.* SUTTON.

ACTION, tried at May Term, 1896, of LENOIR, before *Starbuck, J.*, and a jury. The facts appear in the opinion of Associate Justice FURCHES.

Allen & Dortch for plaintiff.
George Rountree for defendant.

FURCHES, J. We find the following agreement entered into by the parties and made a part of the case on appeal: "The following issue, by permission of the court, the request of plaintiff and the express agreement between the parties, was the only issue submitted to the jury, with the distinct understanding on the part of the court and the parties that the response to said issue by the jury should settle the whole controversy and all the issues raised by the pleadings. It is further agreed that, if the jury should find the original conveyance (which had been burned) to the trustee was in trust for the Baptist Church at Hickory Grove and Baptist denomination, they should answer the issue 'Yes'; but if they should find that it was in trust for the Baptist Church at Hickory Grove alone, then they should answer the issue 'No.'" And the issue submitted to the jury under this agreement is as follows: "Is the plaintiff, B. W. Nash, trustee, the owner of and entitled (299) to recover possession of the property in controversy? Answer, 'No.'" Upon the coming in of the verdict the following judgment was rendered: "Upon the finding of the jury, and upon admissions made on the trial, it is adjudged that the plaintiff recover nothing from the defendant; that the plaintiff is not the owner and is not entitled to recover the possession of the land described in the complaint; that defendant go without day, and recover costs, etc., and that no witness fees are to be taxed against plaintiff."

And this judgment is excepted to by the plaintiff upon the ground that it is not justified by the verdict. This is the only exception in the case, and it is without merit and can not be sustained. The verdict, when taken in connection with the agreement of the parties, fully sustains the judgment of the Court, and the same must be

AFFIRMED.

(300)

J. W. JONES, ADMINISTRATOR D. B. N. OF A. W. JONES, v. R. J. W. BEAMAN, ADMINISTRATOR OF R. C. D. BEAMAN.

Estoppel—Res Judicata.

Where R. B., as administrator of J., admitted, by an account placed with but not filed or audited by the clerk of the Superior Court as a final account, that he was indebted to his intestate's estate in a specific sum, and died without finally settling the estate, a judgment in an action by an administrator *d. b. n.* to recover said specific sum is not a bar to the recovery, in an action for the settlement of the whole estate, of an additional sum which the plaintiff, at the time of the first action, did not know to be due.

ACTION, tried on exceptions to report of referee, before *Coble, J.*, at August Term, 1896, of GREENE. Both parties appealed. The facts are stated in the opinion of Chief Justice FAIRCLOTH. (For a former report of case between the same parties, involving substantially the same facts, see 117 N. C., 259).

George M. Lindsay for plaintiff.
Shepherd & Busbee for defendant.

FAIRCLOTH, C. J. At the argument the plaintiff withdrew his appeal, and the defendant waived all his exceptions except the question of estoppel on his appeal. This case was before this Court at September Term, 1895, 117 N. C., 259.

Facts: R. C. D. Beaman, defendant's intestate, was administrator *d. b. n.* of A. W. Jones, and upon the death of said Beaman the plaintiff became administrator *d. b. n.* of said Jones. Said Beaman, before his death, placed in the hands of the clerk an account of his dealings with said estate, but the same was never filed nor audited by the clerk as a final account because the vouchers were incomplete.

This account showed a balance of $500 in administrator's hands.
(301) Plaintiff brought an action for that specific sum without taking an account, and recovered it. The referee finds that plaintiff did not know that anything more was due. Plaintiff brought the present action and demanded an account of the whole administration, and the referee finds that $604.74 is due the plaintiff, in addition to the $500 recovered in the former suit, and judgment was rendered accordingly, and defendant appealed.

The defendant pleaded the former judgment as an estoppel and relied upon it in this action. In the former opinion (117 N. C., 259) we decided, upon the facts then appearing, against the plea. The facts now are not materially different from the former case, certainly no more favorable to the defendant.

We have no reason to change our former conclusion on this question, and we refer to that case for our reasons, without repeating them here.

AFFIRMED.

---

(302)

W. W. COX, TRUSTEE, v. FIRST NATIONAL BANK OF WILSON.

Executors—Trustees—Banks—Transfer of Stock in Bank—Negligence of Bank—Notice of Provisions of Will Bequeathing Stock.

1. Trustees having no right to sell trust property unless authorized by the instrument creating the trust or by an order of court of equity, persons purchasing from them do so at their peril.
2. An executor has the right to sell or pledge securities belonging to the estate only for the purposes of the estate, and, in the absence of collusion, the purchaser need not look to the application of the proceeds.
3. Where stock in a bank was bequeathed to trustees in trust for one for life, with remainder over, and the executors of the estate, by a simple endorsement, without indicating whether the transfer was a sale or payment of the legacy, transferred the certificate to the life beneficiary, who transferred it to the bank, which had notice of the provisions of the will, but did not make inquiry as to the nature of the transfer, and it further appeared that the condition of the estate did not necessitate a sale of the stock by the executors: *Held*, that the bank was negligent in not making the necessary inquiries, and is liable for the loss of the stock to the remainderman.

ACTION, tried before *Starbuck, J.*, at Spring Term, 1896, of GREENE. There was judgment for the plaintiff, and defendant appealed. The facts appear in the opinion of Chief Justice FAIRCLOTH.

G. M. Lindsay and Shepherd & Busbee for plaintiff.
H. G. Connor for defendant.

FAIRCLOTH, C. J. The plaintiff instituted this action against the defendant bank for the value of ten shares of stock issued by the bank. S. P. Cox executed his last will and testament, and died in August, 1882, leaving A. L. Darden, Charles P. Farmer and H. G. Wil- (303) liams, executors thereto, who were qualified and entered upon the discharge of the duties of their office. In the first item of the will (which is all we have in the record) S. P. Cox gave and bequeathed to W. W. Cox, (plaintiff), Charles P. Farmer and O. C. Darden, among other things, ten shares of stock in the defendant bank, in special trust for his wife for life, and after her death for the use and enjoyment of

his daughter, Frances E. Williams; and if she died, leaving no living heir of 21 years of age, then the remainder to his living children, and if none be living then to his grand-children. The ten shares of stock remained on the defendant's books at the death of S. P. Cox and in his name.

The widow died in 1892, and Frances E. Williams died in March, 1895, never having had any issue. Frances E. Williams presented to the bank the certificate of ten shares of stock, with the following endorsement thereon: "For value received we hereby sell, assign and transfer to Frances E. Williams ten shares of the capital stock of the First National Bank of Wilson. The 21 February, 1883." (Signed and sealed by A. L. Darden, H. G. Williams, Jr., and Charles P. Farmer, Executors of S. P. Cox.) Endorsed also: "Transferred to Frances E. Williams 15 March, 1884."

On the last day named the bank issued two certificates of stock to said Frances for five shares each, and on the second day thereafter she sold and assigned the certificates to the president of the bank.

At the trial this issue was submitted: "Did the defendant bank, at the time of its taking up the certificate of the shares of stock and the issuing of new certificates of shares of said stock to Frances E. Williams, have actual notice of the provisions of the will of S. P. Cox?" (304) And the jury answered "Yes," and in the case sent to this Court it is admitted that the estate of S. P. Cox was amply solvent, and that the exigencies of administration did not require his executors to sell said shares of stock to make assets.

Each party moved for judgment, and the court rendered judgment in favor of the plaintiff for $1,000, interest and costs. Defendant excepted, and this is the only exception in this case.

Upon these facts, the question seems to be whether the defendant exercised due care in taking up the original stock and issuing new certificates in lieu thereof to one absolutely who, under the provisions of the will, was entitled to only a life estate, or whether it was negligent in not making inquiry, and thereby became liable for the loss of the plaintiff in consequence thereof. We have no direct authority on the question, and it must be settled upon principles of common reasoning.

The rights of stockholders and persons interested in stock are placed by law under the protection of the bank, so far as concerns the transfer on its books. The defendant bank, as a corporation, is made the custodian of the shares of its stockholders, and is clothed with power to protect the rights of every one from unauthorized transfer. It is a trust placed in its hands for the protection of individual interests, as well as its own, and like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any loss sustained by

its negligence or misconduct. A bank is bound by the same obligations, moral and legal, that apply to the case of an individual, unless explicitly exempted by law. *Thurber v. Bank,* 52 Fed., 514.

We need not consider what constitutes constructive notice of (305) the contents of the will, because the jury have found that the defendant had actual notice of the will of S. P. Cox. It may be stated briefly that the assent of an executor to a legacy for life, where there is a remainder, is an assent to the remainderman's legacy, because the two constitute in law one legacy. If there be no remainder over, or if the executor needs the property after the life estate expires, to perform some other duty or trust, then such an assent is limited to the life legacy. *Howell v. Howell,* 38 N. C., 522; *McKoy v. Guirkin,* 102 N. C., 21.

The defendant insists that there was a sale of the original certificate by the executors to the said Frances for value, and that was sufficient to justify it in issuing new certificates for the absolute interest. It will be observed that defendant's answer does not aver that there was a sale, or that anything of value was paid, nor is there any evidence of such facts except the endorsement of transfer on the back of the original certificate of stock.

Trustees have no authority to sell the trust property, unless authorized by the instrument creating the trust or by an order of the Court of Equity, and purchasers buy from them at their peril.

Executors have the right to sell or pledge notes of hand as well as chattels, and the sale is no breach of duty, for the purposes of the estate may require such sales, and the purchaser is held liable for any misapplication of the proceeds unless collusion between the two appears, as if the sale was to pay an individual debt of the purchaser. *Gray v. Armistead,* 41 N. C., 74.

A sale of such notes, etc., however, is not usual and should invite attention to the reasons for so doing.

It is to be regretted that we are not better informed as to the truth of the matter in the present case. It was easy to have shown whether there was an actual sale for value to said Frances, or whether the (306) certificate was transferred as her legacy, or whether it was done in payment of something due her in the general settlement of the estate. On these important question the record and proofs are silent; and the endorsement on the certificate, which may be used either in case of an actual sale or transfer and delivery as a legacy, is alone relied upon as sufficient evidence of an actual *bona fide* sale.

The case then is this: On the one hand, the original stock stood on the books in the name of the testator, with actual knowledge of the contents of the will, wherein this stock was directed to be held by trustees

for successive parties, including the said Frances for life; and about two years after testator's death said life tenant presents said stock to the bank and demands new certificates for the absolute interest in the original stock. On the other hand, the bank officer sees on the back of the certificate what is in form, and purports to be a sale for value, signed by the executors, one of whom is one of the trustees appointed in the will.

We are led to the conclusion that a prudent business man with these facts before him would have made further inquiry, which was easily done by looking at the executor's returns in the clerk's office, or by asking the executors themselves, or by simply asking the life tenant, Frances, when she demanded new stock at the counter of the bank, what was the truth of the matter. But nothing of this kind was done. We think, therefore, that the defendant and its officers were negligent in this respect, and are liable for the loss of the plaintiff in consequence thereof. We do not think that the inference from the endorsement on the original certificate is sufficient to overcome all the facts and circumstances before recited.

AFFIRMED.

Cited: *Wooten v. R. R.*, 128 N. C., 121; *Odell v. House,* 144 N. C., 649; *Baker v. R. R.*, 173 N. C., 367.

---

(307)

NATIONAL CITIZENS BANK OF NEW YORK v. CITIZENS NATIONAL BANK OF RALEIGH.

Banks—Collections—Restricted Endorsement—Insolvency of Corresponding Bank.

1. Whenever it appears on the face of a paper that it is in the hands of a bank for collection, the proceeds of the collection are the property of the owner, and the actual collecting bank is liable to the owner in case of the insolvency of an intermediary bank from which the paper has been received for collection, and to whose credit the proceeds have been placed, notwithstanding the fact that the state of accounts between such intermediary bank and the collecting bank shows a balance (after crediting the collection) in favor of the latter.

2. A restrictive endorsement, such as "For collection for account of," etc., prevents the transfer of title to a bank to which it is sent for collection; and where, in an action to recover the proceeds of the collection of such paper from one who received it for collection from an intermediary, the complaint alleged that the plaintiff had been in possession and was the owner of the paper, and such allegations and the presumption arising therefrom not having been denied or rebutted, it was not error in the court below to adjudge that the plaintiff was the owner.

BANK *v.* BANK.

ACTION, tried before *Starbuck, J.*, at January Term, 1896, of NEW HANOVER. By consent a jury trial was waived, and his Honor found the facts, which are substantially set out in the opinion of *Associate Justice Montgomery*. There was judgment for the plaintiff and the defendant appealed.

Battle & Mordecai for defendant (appellant).
Iredell Meares for plaintiff.

MONTGOMERY, J. The drawer of the check lived in Raleigh, N. C., and the payees lived in New York City. The check was deposited by the payees in the plaintiff bank in New York, and by the plaintiffs sent on to the Bank of New Hanover at Wilmington, N. C., with (308) endorsement, "For collection for account of National Citizens' Bank of New York" (the plaintiff). The check was sent by the Bank of New Hanover to the defendant bank at Raleigh, with the additional endorsement, "For collection account of Bank of New Hanover, Wilmington, N. C." The defendant bank entered a credit on its books to the Bank of New Hanover for the amount of the check fifteen minutes before the registration of the deed of assignment made by the Bank of New Hanover on account of insolvency. The money was collected on the same day the credit was given. The balance on the reciprocal accounts between the New Hanover Bank and the defendant bank, after the credit of the amount of the check, was in favor of defendants. The plaintiff bank and the Bank of New Hanover kept no reciprocal accounts. On the contrary, the plaintiff would send to the Bank of New Hanover matters for collection, and when collected the New Hanover Bank would remit the proceeds to the plaintiff. The New Hanover Bank did not have on its ledger any account with the plaintiff bank. It kept only the record of its transactions with the plaintiff on its collection register. Upon the facts (which his Honor found by agreement) judgment was entered for the plaintiff, and the defendants appealed from the judgment. There was no error in the rendering of the judgment. The defendants saw, from the endorsements on the check, that it was the property of the plaintiff and that the New Hanover Bank was merely an agent to collect it for the plaintiff. *Boykin v. Bank*, 118 N. C., 566. If there ever had been any conflict in the decisions of this Court on the subject-matter embraced in this opinion, before the case of *Boykin v. Bank, supra*, was decided, that opinion would seem to have resolved the doubt. It was held in that case, in substance, that (309) wherever it appeared on the face of a paper that it was in the possession of a bank for collection the proceeds of the collection were the property of the owner, and that the actual collecting bank is liable

to the owner in case of the insolvency of any intermediary bank which has received it for collection, unless the actual collector had remitted the proceeds or its equivalent to the bank from whom he received it before he had knowledge of that bank's insolvency. Simply entering credits on mutual accounts between the actual collecting banks and their intermediaries will not protect the actual collector of such drafts and checks from the demands of the owner under the circumstances of this case. For their own convenience it may be well for the banks and collecting agencies to observe such rules, but they will not be allowed to work injury and loss to owners of checks and drafts who send them out to be collected and the proceeds returned to them. Of course a bank which had received a check or draft from an agent bank of the principal would be protected if it had sent to the agent, before the agent's known insolvency or the principal's demand, the funds, or their equivalent, collected on the paper. We are aware that this is not the rule in all the States of the Union. The counsel of the defendant read to us the opinion of the Supreme Court of Tennessee in the case of *Howard v. Walker,* 92 Tenn., 452, in which the opposite view of this subject is taken; but we will abide by our own decisions.

The contention of the defendants that the check was not the property of the plaintiff can not be sustained. The complaint alleged that it was the property of the plaintiffs and it was not denied in the answer except by legal inference. The defendants averred that the title to the check,

(310) as a matter of law, passed out of the plaintiff to the Bank of New Hanover when the former sent it to the latter for collection. This is not a sound proposition of law; for, as we have seen, the endorsement was restricted. The plaintiffs having been in possession of the check, and having alleged in their complaint that they were the owners of it, the presumption is that it was their property; and this presumption not having been rebutted, the finding of his Honor was correct.

AFFIRMED.

Cited: Next case; and Bank v. Wilson, 124 N. C., 568.

PEOPLES BANK OF NEW YORK v. CITIZENS NATIONAL BANK OF RALEIGH ET AL.

Banks—Collections—Restricted Endorsements.

[For Syllabus, see *Bank v. Bank, ante,* 307.]

CIVIL ACTION, tried before *Starbuck, J.,* at January Term, 1896, of NEW HANOVER. The facts appear in the opinion. From a judgment for the plaintiff the defendants appealed.

Iredell Meares for plaintiff.
Battle & Mordecai for defendants.

MONTGOMERY, J. Upon examination of the record in this case we find that the only difference between it and that of *Bank v. Bank, ante,* 307, is that in the latter the check for the proceeds of which the action was brought was drawn on a bank in Raleigh other than the defendant bank, while in this action the check was drawn on the defendant bank itself. For the reasons stated in *Bank v. Bank, supra,* we are of the opinion that in the rendering of the judgment by his Honor in favor of the plaintiff in this action, there is

NO ERROR.

(311)

D. F. SMITH ET AL. v. M. C. SMITH ET AL.

Practice—Appeal—Case on Appeal—Agreement of Counsel—Service of Case on Appeal.

1. The legal mode of service of a case on appeal is not waived by an agreement of counsel for the appellee that the appellant is "to serve the case on" appellee by a certain time.

2. Where one of several attorneys for the appellee, on being asked to accept service of the case on appeal, said that he had no authority to do so, and advised that the case be sent to the other counsel: *Held,* that such direction was not a waiver of the legal mode of service so as to authorize a service by mail.

3. Where service of a case on appeal is made by mail, on the last day for service, instead of by an officer, the failure to promptly return the case does not estop the appellee to deny the legality of the service, since, if the case had been promptly returned, it would have been too late to have it legally served.

4. This Court will not pass on or recognize alleged verbal agreements of counsel when they are denied.

SMITH *v.* SMITH.

MOTION for a writ of *certiorari* as a substitute for lost appeal from the judgment of *Greene, J.*, in an action tried at Fall Term, 1896, of COLUMBUS. The facts and the grounds of the motion are stated in the opinion of *Associate Justice Clark.*

John D. Bellamy and Shepherd & Busbee for the motion.
J. B. Schulken and MacRae & Day contra.

CLARK, J. This case differs widely from *Willis v. R. R., post,* 718. There the agreement, which was admitted, was that the papers "should be *sent*" to the appellee's counsel. They were accordingly sent to him by express, and there was ample time, if he had promptly notified the appellant's counsel that he had not intended to waive service, for (312) the case to have been served by an officer. This Court held that, upon the admitted agreement, the appellant's counsel had reasonable ground to understand that service had been waived; and, besides, the appellee's counsel, under such circumstances, by delaying several days after he received notice that the papers were in the express office for him, and till too late for legal service, to notify appellee's counsel of the mistake, was estoppel from insisting that the case could not be legally served after the time limited.

In the present case, the agreement, which is in writing, provides: "Next term of Brunswick Court fixed for settlement of the case on appeal, appellants to serve case on the plaintiff at least a week before said court." This certainly extended the time of service, which is not denied, but so far from waiving service, it contemplates service, which means, of course, legal service. No other agreement is averred, but the appellants rely upon an affidavit that Mr. Cutlar on the last day (Saturday) upon which the case could have been served asked Mr. Rountree in Wilmington to accept service, who replied that he had no authority to do so, and to mail the papers to the other counsel in Whiteville, who three days thereafter notified the appellant's counsel that they would not accept service. As Mr. Rountree had no authority to accept service, he could not reasonably have been understood as waiving service, and Mr. Cutlar should at once have had the case legally served, especially as the agreed time for service was about to expire. Nor is there any estoppel, upon the appellee's counsel by their failure to promptly return the case; for, if returned by the next mail, the time for service would have expired, and their conduct could not have misled the appellant's counsel to their detriment. In these two essential particulars the case (313) differs from *Willis v. R. R., post,* 718. Affidavits are filed by the appellee's counsel, reciting, among other things that the appellant's counsel had given them notice that "no favors would be given or received," that Mr. Cutlar had since stated to them that his real

reason for sending the case by mail was that he did not know that the law required service by an officer, and expressly denying any written or verbal agreement to waive the service, or for service other than by an officer having been made between counsel. Indeed the appellants seem to rely greatly upon "the liberal practice heretofore prevailing among the members of the bar in the southeastern part of the State." *Pearson, C. J.*, in *Wilson v. Hutchison,* 74 N. C., 432, gave notice to the bar that this plea would not avail against the express terms of the law and this has been since cited and approved. This Court could not constitute itself a tribunal to decide the limits (sure to be controverted) of the "liberal practice heretofore obtaining in this district," nor if such custom were admitted could it avail to nullify the statute. All that the Court can do, when the parties have stipulated to disregard the statute, is to construe the meaning of the agreement, if in writing, or even if verbal, provided it is admitted. *Mitchell v. Haggard,* 105 N. C., 173. If an alleged verbal agreement of counsel is denied (as in this case) the court has uniformly refused the invidious task of weighing the affidavits of counsel. *Sondley v. Asheville,* 112 N. C., 694; *LaDuc v. Moore,* 113 N. C., 275; *Graham v. Edwards,* 114 N. C., 228; *Roberts v. Partridge,* 118 N. C., 355. Rule 39 of this Court, which has long been in force, is as follows. "The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing filed in the cause in this Court." Gentlemen of the bar are (314) the sole judges of the courtesies they shall extend to each other, and it is best every way that they should be. Like Gallio, we "will not judge of such matters." The Court will only administer legal rights.

CERTIORARI DENIED.

D. T. SMITH ET AL. v. M. C. SMITH ET AL.

Practice—Appeal—Case on Appeal—Service.

1. Service of all process and papers in a cause (except when service by publication is authorized) must be by an officer or acceptance of service, except only subpœnas which may be made by one not an officer, provided he is not a party to the action.

2. Hence, under section 550 of The Code, which provides that the case on appeal shall be served on the appellee, without specifying the manner of service, the service must be made by an officer.

3. Where there is no case on appeal in this Court, and no error appears on the record proper, the judgment below will be affirmed.

4. In an action to set aside conveyances alleged to have been procured by fraud and undue influence, a cause of action is stated by the complaint which alleges that the defendant, who had been the former mistress of the grantor, and in order to marry whom he had procured a divorce from his wife, had, "by continued persuasion, by alternate flattery and complaining, by excessive importunity, by threats of abandonment, obtained undue influence over the will of the said Smith, deceased, 'the grantor,' and by means of this fraud and undue influence she exerted such a domestic and social force upon the said Smith that he executed the deeds, etc.; and the plaintiffs aver that said deeds were executed by reason of said fraud or undue influence, and not of the free will and consent of said Smith."

ACTION, tried at Fall Term, 1896, of COLUMBUS, before *Greene, J.*, and a jury. There was a judgment for the plaintiffs, and defendants appealed. Upon failure of service of the case on appeal, the defendants moved in this Court for a writ of *certiorari* to have the case on
(315) appeal settled by the judge, which was denied, and thereupon they moved to have their case treated as the proper case on appeal.

The purpose of the action was to set aside conveyances of property alleged to have been procured by undue influence. The eighth allegation of the complaint referred to in the opinion of *Associate Justice Clark* was as follows:

"8. That about the year 1872 or 1873 the said H. C. Smith, deceased, became infatuated with the defendant, M. C. Smith, said defendant being then unmarried, while the said H. C. Smith was a married man; and that the defendant, M. C. Smith, became then and there the mistress or concubine of the said H. C. Smith, he being then about fifty years of age, and she (the defendant) about twenty or twenty-one years of age; that the illicit and adulterous intercourse then begun continued until the defendant M. C. Smith, then bearing the name of Mary Columbia Formyduval, gave birth to an illegitimate child—a son; that thereupon and thereafter the defendant, M. C. Smith, by the influence she had acquired by her wicked acts and pleadings, prevailed upon the said H. C. Smith to procure a divorce from his lawful wedded wife; that the said H. C. Smith, urged on by defendant, M. C. Smith, and blinded by his infatuation for his concubine, the said M. C. Smith, did, by fraud and subornation of witnesses, as plaintiffs are informed and believe, procure a decree of divorce from his said wife, Dorcas Smith; that after said divorce the defendant, M. C. Smith, and H. C. Smith went through a marriage ceremony and lived together as man and wife; that after said marriage, and during said cohabitation, the defendant, M. C. Smith, by continued persuasion, by alternate flattery and complaining, by excessive importunity, by threats of abandonment, obtained undue influence over the will of the said H. C. Smith, deceased, and by means of this fraud

or undue influence she exerted such a domestic and social force (316) upon the said H. C. Smith that he executed the deed and the bills of sale above referred to, and the plaintiffs aver that said deed and bills of sale were executed by reason of said fraud or undue influence, and not of the free will and consent of said H. C. Smith."

J. B. Schulken and MacRae & Day for plaintiffs.
John D. Bellamy, Jr., and Shepherd & Busbee for defendants.

CLARK, J. The application of the appellant, heretofore made for a *certiorari* to have the case settled by the judge, having been denied, they now move to have their case on appeal treated as the proper case on appeal, although service thereof has not been accepted, nor has it been served by an officer, claiming that placing the statement of the case in the mail in time to reach the appellees was due service. They admit that to do so would be to overrule numerous decisions of this Court, which they ask us to review for that purpose.

The original Code of Civil Procedure, section 80, provided for service of papers in a cause, either personally or by filing in the clerk's office, and C. C. P., sec. 301 (the original of the present section 550), provided for service of the case and countercase on appeal, "in the manner provided by section 80," and the same was true of sec. 349 (now 597) as to serving notices. The inconveniences and manifest evils which arose from thus filing papers which opposite counsel might not see, or might overlook till too late, culminated (after some unpleasant incidents) in a repeal of section 80, and the simple provisions in sections 550 and 597 that the statement of the case on appeal, and all notices, (317) "shall be *served*" on respondent, etc. Where no other mode of service is provided for, the court held that service must be made by an officer, unless service is accepted, according to section 228 for service of summons. *Allen v. Strickland,* 100 N. C., 225. That case, it is true, was as to the attempted service of a notice by mail, but the principle applies to all legal papers as to which "service" is prescribed, without indicating any deviation from the ordinary manner of service, and The Code, sec. 597, provides for service of "notices and other papers" in the same manner. *Allen v. Strickland* has since been followed by *Clark v. Manufacturing Company,* 110 N. C., 111, and *S. v. Johnson,* 109 N. C., 852 (as to service of notice of appeal when taken out of court), the court saying: "The requirement of service by an officer is not only statutory but reasonable, as it prevents disputes like this, as to whether there has been service or not"; also in *S. v. Price,* 110 N. C., 599 (as to the service of the case on appeal), which is followed in *Herbin v. Wagoner,* 118 N. C., 656;

Forte v. Boone, 114 N. C., 176; *Cummings v. Hoffman,* 113 N. C., 267; *McNeill v. R. R.,* 117 N. C., 642; *Roberts v. Partridge,* 118 N. C., 355; and there are others. Aside from the construction of the statute being so thoroughly settled, if it were *res integra* it could not be held otherwise. With the policy of the statute in requiring service, if not accepted, to be made by an officer, we have nothing to do; but it admits of more than a doubt if the substitution of service by counsel or parties, and proved by their oaths, would not lead to the greater evil of counter affidavits as to service being made in time, if at all. The former provision, as to service by filing in the clerk's office was so prolific of evil as to cause its repeal.

At present any hardship is averted by acceptance of service, or, if (318) that is refused, service by an officer, which modes avoid the unpleasantness which might otherwise occur more or less frequently to the profession and to the courts of settling such matters upon the controverted affidavits of counsel. Service of all papers, by our statutes (except in cases where service by publication is authorized), must be by an officer, or acceptance of service, except only subpœnas, as to which service may be made by one not an officer, but even then the service must be "by one not a party to the action," and the return sworn to. Code, sec. 597 (4).

The counsel moves, in the absence of a case on appeal, to dismiss the action because the complaint fails to state a cause of action. It is true that this motion can be made in this Court for the first time, Rule 27; but the objection to the complaint is not well taken. Paragraph 8 is sufficient as an allegation of fraud and undue influence.

There being no case on appeal, and no errors appearing upon the face of the record, the judgment is

AFFIRMED.

Cited: Westbrook v. Hicks, 121 N. C., 132; *Lowman v. Ballard,* 168 N. C., 18.

L. HUSSEY AND A. J. STANFORD v. FRIDAY HILL AND WIFE.

Action to Foreclose Mortgage.

Where, in an action of debt on a note and to foreclose a mortgage given to secure the same, the execution of the note and mortgage and the registration of the latter and the nonpayment of the note are admitted, the plaintiff is entitled to judgment on the note and of foreclosure, and any questions raised by the defendant as to his title to the land can only be passed on in an action between the purchaser at the foreclosure sale and the defendant.

HUSSEY *v.* HILL.

ACTION, to foreclose a mortgage, tried before *Starbuck, J.*, at (319) February Term, 1896, of DUPLIN, as upon a case agreed as to the following facts:

"On 21 January, 1884, the defendants executed to plaintiff Stanford a mortgage deed in fee simple with the following *habendum* and warranty, to wit: "To have and to hold said lands to the party of the second part and his heirs, executors and administrators forever, and the said parties of the first part do for themselves, their heirs and assigns, agree and covenant to and with said party of the second part to forever warrant and defend the title of the said lands to the said party of the second part, his heirs and assigns." This mortgage conveyed the real estate in controversy, and was made to secure a note under seal recited therein for $150, to be due 1 January, 1885, and was probated and recorded 27 January, 1885, and on the 26 January, 1885, the said mortgage was transferred by plaintiff Stanford to plaintiff Hussey in the following words endorsed on back of mortgage: "Warsaw, N. C., 26 January, 1885. I hereby transfer all my right and interest in and to the within mortgage to L. Hussey, his heirs and asigns, this day and date. A. J. Stanford." Said note was at the same time assigned and transferred to Hussey, who is now the owner of it. No payment has ever been made on said note and mortgage. The transfer by Stanford to Hussey was not recorded. This suit was brought by plaintiffs Hussey and Stanford to foreclose the said mortgage. On 8 March, 1883, the defendants, Friday Hill and wife, executed to the plaintiff, L. Hussey, upon the same land in controversy a mortgage deed to secure an indebtedness therein expressed of two hundred and twenty-five dollars, divided into two notes, the last of which to be due 1 January, 1885. Said mortgage deed was duly recorded on 10 March, 1883, and contained a power of sale by the said party (320) of second part, his heirs, executors, administrators and assigns.'

"This mortgage was assigned in the following words and endorsed on back of mortgage: 'I hereby transfer the within mortgage and notes to W. L. Hill, 10 January, 1887. L. Hussey.' That at the time of said transfer Hussey did not notify Hill that he was the owner or held the second mortgage. Said transfer or assignment from Hussey to Hill was never registered. W. L. Hill advertised, purporting to follow the conditions of the mortgage assigned to him by Hussey as aforesaid, and sold the lands therein described at the courthouse door in Kenansville on 6 February, 1888, and one J. S. Wilson became the purchaser at this sale. On 20 February, thereafter, Hill executed to Wilson a deed purporting to be in fee for the land, and under the power in the mortgage assigned by Hussey to Hill as aforesaid. Said Wilson purchased for value and without notice other than that given by the registration of said mortgage

deed, of which registration he had no actual notice, and after said sale took possession of the lands and received the rents and profits for one year.

"Afterwards and before the institution of this action the defendant Friday Hill bought the land from Wilson for value, and the said Wilson executed to him a deed with covenants of seizin, freedom from encumbrances and general warranty.

"This deed was recorded 2 December, 1890. This action was begun 19 November, 1894.

"It was agreed that the foregoing were the facts of the case upon which the plaintiffs' rights to foreclose depended, and upon said facts the court should render judgment. The defendant moved for
(321) judgment in his favor upon the facts. Refused by the court. Defendant excepted. Judgment was rendered for the plaintiff, Hussey. Defendants excepted and appealed, assigning the following errors:

"I. For that his Honor erred in holding upon the admitted facts that the plaintiff Hussey was not estopped from denying the foreclosure sale and the regularity thereof by his assignee, W. L. Hill.

"II. For that his Honor erred in holding that the plaintiff Hussey was not estopped to set up his second mortgage against his assignee and those claiming under him when Hussey sold the first mortgage and failed to give his assignee any information at the time he held this second mortgage.

"III. For that his Honor erred in holding that the plaintiff Hussey was entitled to any judgment.

"IV. For that his Honor erred in holding that the plaintiff Hussey, mortgagee, could attack the irregularity of the sale, if the sale was irregular.

"V. For that his Honor erred in holding that the plaintiff Hussey was entitled to any judgment in that defendant Hill held the legal title with covenants of warranty from a *bona fide* purchaser under Hussey's first mortgage, which carried the legal title."

Simmons & Ward for plaintiffs.
Stevens & Beasley for defendants.

FURCHES, J. It seems to us that none of the questions argued in this Court are presented by the record. The exceptions seem to be intended to present a question of estoppel as to the plaintiff Hussey, arising out of his assignment of his note and mortgage, of a prior date to the Stanford note and mortgage, after he had become the assignee and owner of the Stanford note and mortgage; the validity of the Wilson sale, as assignee

of Hussey; and as to whether the defendant Friday Hill is (322) estopped by his subsequently acquired title through and under the Wilson sale.

These are interesting questions, but as they do not arise in this case, we are not called upon to decide them, and any opinion we might express as to them would be but *obiter*.

These questions can only arise, should the title of the land become involved, between the purchaser under the Stanford mortgage and the defendant who now claims to hold under the Hussey mortgage through the Wilson foreclosure sale.

This is simply an action of debt upon a note of hand, and to foreclose a mortgage given to secure the payment of the note. The mortgage is but the incident of the debt. The execution of the note is admitted, and the execution and registration of the mortgage are admitted, and it is also admitted that the note had not been paid. These admissions entitled the plaintiff to judgment, ascertaining his debt, and to a sale and foreclosure of the mortgaged premises.

As to whether the defendant Friday Hill has a good title, or any title, to the mortgaged land, does not come in question in this action. The judgment is

AFFIRMED.

Cited: *S. c.*, 120 N. C., 312.

---

(323)

CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION v. WILLIAM E. BLACK AND WIFE, EMMA C. BLACK.

Action to Foreclose Mortgage—Married Woman—Minor—Executors—Contracts of Married Woman—Estoppel—Subrogation.

1. A married woman is incapable of entering into any contract to affect her real and personal estate, except for her necessary personal expenses, or for the support of her family, or such as were necessary in order to pay her ante-nuptial debts, without the written assent of her husband, unless she is a free trader.

2. In order to charge the wife's separate property, where the husband's assent is given, the intent to so charge it must appear on the face of the instrument creating the liability, though the property to be subjected need not be specified.

3. A wife cannot subject her land, or any separate interest therein, in any possible way except by a regular conveyance, executed according to the requirements of the statute.

4. Where a married woman, who was at the time a minor, applied for a loan and executed a note and a mortgage purporting to convey her separate real estate to secure the note given for the loan: *Held*, that fraudulent representations made by her at the time the mortgage was executed that she was twenty-one years of age will not estop her to insist upon the invalidity of the mortgage, though the representations were material inducements towards the making of the loan.

5. Where a married woman obtains a loan and gives a mortgage to discharge a lien on her separate estate, and such mortgage is void, the lender is not entitled to be subrogated to the lien of the mortgage so discharged.

ACTION, tried before *Starbuck, J.*, at Spring Term, 1896, of MOORE. The action was instituted to foreclose two certain mortgages executed by the defendants to the plaintiff on 5 September, 1891, and 5 September, 1892, respectively, to secure two certain bonds of same date for
(324) loaned money—the first in the sum of $400 and the second in the sum of $150.

The defendants admitted the execution of the bonds and mortgages and the proper registration of the mortgages, but denied the right of the plaintiff to recover against the *feme* defendant, on the ground that the *feme* defendant was, at the time said mortgages were executed, an infant under the age of twenty-one years, and on other grounds set forth in the answer.

It was admitted that the land described in said mortgages was the property of the *feme* defendant, and that both mortgages embraced the same property.

The issues and responses were as follows:

1. Did Emma C. Black execute the bonds and mortgages described in the complaint as surety for her husband to the knowledge of the plaintiff? Answer: "No."

2. Did the plaintiff, by a binding agreement, extend the time of payment of said bonds by William E. Black without the knowledge and consent of Emma C. Black? Answer: "No," by consent.

3. Was Emma C. Black, at the time of the execution of said bonds and mortgages, an infant? Answer: "Yes."

4. If so, has Emma C. Black ratified the execution of said bonds and mortgages after becoming twenty-one years of age? Answer: "No," by consent.

5. Did Emma C. Black sign the applications for the loans secured by the bonds and mortgages which were described in the complaint? Answer: "Yes," by consent.

6. Did said applications contain the statement that Emma C. Black was twenty-one years of age? Answer: "Yes," by consent.

7. Did Emma C. Black sign said applications knowing that they contained this statement? Answer: "Yes."

8. Did said statement constitute a material inducement to the (325) plaintiff to make said loan? Answer: "Yes."

9. Was the money, or any part of it, advanced on these loans applied to the liquidation of the mortgage lien of D. A. McDonald on defendant Emma C. Black's land described in the pleadings? Answer: "Yes, $175."

Issues 7, 8 and 9 submitted on objection of defendants, the court stating it would pass upon their materiality after they were answered by the jury. The plaintiff moved for judgment of foreclosure on both mortgages and for a judgment against the defendants for balance due, etc. Motion denied. Judgment was then rendered declaring the notes and mortgage void as to Emma C. Black, and plaintiff appealed.

Black & Adams for plaintiff (appellant).
Douglass & Spence for defendant.

AVERY, J. This action is brought to recover judgment for the amount of two notes signed by William E. Black and his wife Emma C. Black, and to foreclose two mortgages executed at the respective dates of the two notes, and purporting to convey the separate real estate of the wife to secure them. The answer sets up as a defense that the *feme* defendant was under the age of twenty-one when she signed the notes and mortgage, and was then, and has continued up to the present to be, under the additional disability of coverture. The jury found these averments of the answer to be true. The plaintiff relies by way of replication upon the facts afterwards found by the jury, that the *feme* defendant signed an application for the loan of the money that was the consideration of the note sued on, knowing that it contained a representation that she was twenty-one years old, and that her representation operated as a material inducement to plaintiff to make the loans. The jury further found in response to an issue that $175 of the money loaned on (326) the notes and mortgages was expended in discharging the lien of a mortgage of D. A. McDonald on the land embraced in the description in the mortgages sued upon.

The main contention of the plaintiff is that the *feme* defendant has become liable, and has subjected her property to the lien of the mortgages, not by force of the agreement to pay, but because she is estopped to deny the false and fraudulent representations that were the means of procuring the plaintiff's money. The plaintiff is the actor in this suit and seeks to recover on an alleged contract entered into by one at the time both an infant and a *feme covert*, and to subject her real property, conveyed under a deed executed while both disabilities existed.

1. If the *feme* defendant had been twenty-one years old she would have been incapable of entering into any *"contract"* to affect her real and

personal estate, except for her necessary personal expenses or for the support of her family, or such as were necessary in order to pay her debts existing before marriage without the written consent of her husband," unless she was a free trader under the provisions of the statute. Code, sec. 1826. The consent of the husband is not required at all where the obligation falls within the three foregoing exceptions. *Flaum v. Wallace,* 103 N. C., 296.

2. In order to charge the wife's separate property where the assent of the husband is given, the intent to charge it must appear on the face of the instrument creating the liability, though the property to be subjected need not be specified. The assent of the husband, when given, does not enable the wife to make a contract, but to enter into an agreement in the nature of an executory contract. *Wilcox v. Arnold,* 116 N. C., 78; *Bank v. Howell,* 118 N. C., 271.

(327) 3. The wife can not subject her land or any separate interest therein, in any possible way, but by a regular conveyance executed according to the requirements of the statute. The law will not allow her, even though she be twenty-one years of age, to dispense with these necessary forms, and accomplish indirectly, either by silence or active participation in a fraud, what the Constitution, as construed by the courts, prohibits her from doing directly. *Thurber v. LaRoque,* 105 N. C., 301, 311; *Farthing v. Shields,* 106 N. C., 289; *Hughes v. Hodges,* 102 N. C., 236; *Lambert v. Kinnery,* 74 N. C., 348; *Littlejohn v. Egerton,* 76 N. C., 468.

It follows, from the principles already stated, and which are sustained by abundant authority, that if the *feme* defendant had been of full age her agreements to pay money, embodied in the notes, would have been void, and had she been discovert and under twenty-one, those stipulations would have been, in the view most favorable to their enforcement, voidable. She could not have ratified a void agreement, and if either of them had been voidable only, the jury have found as a fact that there has been no attempt at affirmance since she attained her majority. There was no error, therefore, in refusing to render a personal judgment against her as an obligor to the notes. *In re Freeman,* 116 N. C., 199.

When the wife is of full age she may, by joining her husband in a deed executed as prescribed by law, subject her land to a lien to secure the husband's debt. *Jeffrees v. Green,* 79 N. C., 330; *Newhart v. Peters,* 80 N. C., 166; *In re Freeman, supra.* But where her deed is void for failure to comply with the requirements of the Constitution, she can not, "by the indirect medium of an estoppel," created by her conduct, *in pais,* impart validity to it. *Williams v. Walker,* 111 N. C.,

(328) 604; *Lambert v. Kinnery, Hughes v. Hodges; Thurber v. LaRoque, supra.*

The *feme* defendant is not an actor here. The controversy hinges mainly upon the questions whether she has entered into a contract upon which a personal judgment can be recovered against her, and whether her separate real estate can be subjected under the mortgage deed. The prayer in the answer that the notes and mortgages be ordered to be surrendered and canceled does not give character to the action. That prayer is predicated upon the idea of a previous holding that these instruments are void as contracts or conveyances, and it could be withdrawn if necessary. The contention which confronts us before reaching that question is that the *feme* defendant is estopped by her conduct from setting up her disability in avoidance of her deed. If she had come into a court where both the principles of law and equity are administered, seeking to repudiate her own promise because it was invalid as a contract, and at the same time refusing to surrender what she acquired as a consideration for that promise, the principle enunciated in *Walker v. Brooks,* 99 N. C., 207, and in *Burns v. McGregor,* 90 N. C., 222, would apply, and she would fail to find protection in the perpetration of the fraud by permitting her to retain the fruits of it, while she repudiated the supposed obligation incurred in order to acquire the money. The courts are not at liberty to violate the Constitution, even for the purpose of rectifying what is morally wrong and restoring to the rightful owner property acquired by resorting to unconscionable methods. Where the Constitution has imposed well-defined limits to the capacity of married women to contract, they can not by their own acts enlarge their powers. Bigelow on Estoppel, (3 Ed.), p. 51.

We have discussed the exceptions upon the theory that the plaintiff set up the fraud in pleadings by way of estoppel, though there seems to be some dispute as to whether the amendment to the (329) replication relating to the infancy of the *feme* defendant was ever allowed by the court. The plaintiff contends that, apart from the effect of coverture upon the validity of her promises and deeds, the female defendant was estopped as an infant from avoiding and repudiating the obligation of those instruments because she misled the plaintiff by the representation that she was twenty-one years old. It is a principle as old as the common law that agreements or attempted contracts of infants are voidable at the option of the infant on attaining his majority. It is expressly found here that there was no ratification, if such a thing had been possible where the double disability existed. But it is insisted that because she obtained money by false representations as to her age, she was estopped from denying her obligation to pay. If the courts should sanction this doctrine, the result would be that the ancient rule, established as a safeguard to protect infants from the wiles of designing rascals, would be abrogated, and the way opened up to reckless youths to

evade the law by lying. The courts would thereby put a premium upon falsehood and hold out the temptation to infants and to others, who hope to profit by debauching them, to resort to this disreputable method of enabling the one to squander and the other to extort the patrimony intended to prepare a child for future usefulness.

On the other hand, considering the defendant as a *feme covert* only, the fund expended in payment of a mortgage, of which we have no history, but which is found to have constituted a lien on her land, could not be followed upon the principle of subrogation, or any other principle, so as to subject her land. Where the wife is silent when the
(330) husband expends money on her separate real estate, that fact in no way affects her title. *Thurber v. LaRoque, supra.*

If, however, it were conceded that she could not be protected on account of the disability of coverture against the claim of the plaintiff to be subrogated to the rights of the older mortgagee, her position as an infant who had neither ratified an express or implied promise, if made, to reimburse the plaintiff for any such expenditure, if made, would be impregnable. No person can compel an infant, who has not agreed to do so after attaining full age, to repay money expended for him officiously in the improvement of his land, no matter what the effect may have been.

For the reasons given, the judgment is

AFFIRMED.

Cited: Weathers v. Borders, 121 N. C., 388; *McLeod v. Williams,* 122 N. C., 454; *Weathers v. Borders,* 124 N. C., 614; *Zachary v. Perry,* 130 N. C., 291; *Ball v. Paquin,* 140 N. C., 92.

J. B. McPHAIL v. BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY.

Counties—County Commissioners—Contract for Bridges—Delegation of Authority—Quantum Meruit.

1. Under ch. 370, Acts of 1887, the county commissioners alone have the power to determine upon the necessity for the construction or repair of bridges and to contract for the same, and such power cannot be delegated to the township supervisors or others. After deciding that a bridge shall be built or repaired, they can appoint the township supervisors or other agents to have the work done at a price fixed by the commissioners, or may refer the matter beforehand to such supervisors to ascertain and

report the facts and lowest price at which the work can be done, but the supervisors have no power to accept a bid without the approval of the commissioners.

2. An order passed by a board of county commissioners that "the repairs of Evans Creek bridge are referred to R. J. H. and A. McN." conferred no power upon such persons to make a contract, but only to ascertain and report to the commissioners, for their action, the facts connected with and the cost of the repairs.

3. Where repairs have been made on a bridge, and the work has been accepted by the county, the contractor may recover therefor on a *quantum meruit* for the reasonable and just value of the work and labor done and material furnished, though the action was brought on a special contract for the repairs made with supervisors who had no authority to make the contract.

ACTION, begun in justice's court, and heard on appeal by (331) *Greene, J.*, and a jury, at April Term, 1896, of CUMBERLAND.

The plaintiff declared upon a contract for building a bridge at the price of twenty-three dollars and fifty cents. The defendant, when the case was called, objected to the court's trying the case, for that there was no law authorizing the holding of a court at this time, and that it had no jurisdiction to try the case at this time. Objection overruled and defendant excepted.

Geo. M. Rose for plaintiffs.

N. W. Ray for defendants (appellants).

CLARK, J. As The Code, section 2034, originally stood, when (334) bridges were beyond the reasonable capacity of the road overseer and his hands, the board of township supervisors were empowered to contract for the building, keeping and repairing of the same, with the concurrence of the board of county commissioners. Even under that statute any contract made by the township supervisors would not have been valid till reported to and concurred in by the county commissioners. The township supervisors here pursued no improper plan in advertising for the lowest bid, but they erred in supposing that they were bound to accept it, no matter how unreasonable, or that they could accept it at all without the concurrence of the county commissioners, to whom they should have reported it for approval. But even as thus guarded, the Legislature of 1887 (chapter 370) thought there was room for abuse, and struck out even this qualified authority in the township supervisors, and provided that the contracts in all such cases shall be made by the county commissioners. The determination whether a bridge or its repair is needed, and the sum to be paid, is thus confined to their judgment, and can not be delegated. When they have decided that a bridge should be built or repaired, they can appoint the township supervisors

or others agents to have the work done at a price fixed by themselves—that would be a mere ministerial duty. And to enlighten themselves, they can refer the matter beforehand to the township supervisors (or possibly others) to report the facts and the lowest price at which
(335) the work can be done, subject, of course, to their own approval.

The order passed by the commissioners. "The repairs of Evans Creek bridge are referred to R. J. Harrison and Alexander McNeill," meant no more than that and was valid. If it had meant to confer upon the referees the power to determine either the question whether the repairs should be made or the discretion to fix the amount to be paid, without being subject to approval by the county commissioners, the order would have been invalid; besides, the words of the order can not, without straining, be construed to carry such powers.

As the repairs have been actually made and accepted, the county is bound on a *quantum meruit* for the reasonable and just value of the work and labor done and material furnished, but not for the attempted contract of Harrison and McNeill, which, under the law, they had and could have no authority to make so as to bind the county.

The question raised as to the legality of the term of the court at which the action was tried is settled by the decision in *McNeill v. McDuffie, post,* 336.

ERROR.

---

(336)

McNEILL & HALL v. JOHN R. McDUFFIE.

Courts—Term of Court—Validity of—Statutes—Construction of—Repeal by Implication.

1. Under ch. 86, Laws 1895, providing for the holding of a Superior Court in Cumberland County "on the sixth Monday after the first Monday in March, to continue for two weeks," the judge may appear on any day within the two weeks (if the court has not previously been adjourned) and that part of the term actually held will be as valid as if court had been opened on the day fixed by the statute.

2. Chapter 281, Acts of 1895, provided that a Superior Court should be held in Richmond County "on the sixth Monday after the first Monday in March," while ch. 86, Laws 1895, provided that a Superior Court should be held in Cumberland County, commencing on the same date and "to continue for two weeks": *Held*, that ch. 281 is not so irreconcilably in conflict with ch. 86 as to repeal it, since both counties being in the same judicial district, the judge, after opening court in Richmond County on the day fixed by statute, could lawfully hold court in Cumberland County before the end of the two weeks, the court not having been previously adjourned by the sheriff.

3. In such case it was proper for the judge to direct the clerk of Cumberland Superior Court to follow the customary formula, describing the court as begun and opened on the first day thereof as specified in the statute.

CLAIM and delivery, tried before *Greene, J.*, and a jury, at April Term, 1896, of CUMBERLAND.

The defendant excepted to the jurisdiction of the court upon the ground that the law did not authorize said court to be held at the time. Exception overruled and defendant excepted. Upon the trial there was no exception on the defendant's part as to the rulings of the court upon the exception or rejection of evidence. No special instruction was asked for by the defendant. There was judgment for the plaintiffs and defendant appealed. (337)

Geo. M. Rose for plaintiffs.
N. W. Ray for defendant.

CLARK, J. Chapter 86, Laws 1895, provides for a Superior Court to be held in Cumberland County "on the 6th Monday after the 1st Monday in March, to continue for two weeks." By chapter 281 of the same Acts, but ratified later in the session, it is enacted that a Superior Court be held in Richmond County "on the sixth Monday after the first Monday in March," Cumberland and Richmond counties being in the same judicial district. It is clear that the two courts can not be readily opened on the same day by the same judge. But it does not follow necessarily that one act repeals the other. There is no express repeal, and the courts lean strongly against repeals by implication. There is an apparent conflict, but *non constat* that the judge might not hold both courts, beginning his session (as he did) in Cumberland after dispatching the business before him in Richmond. If he had been detained by illness or any other cause, so that he could not appear till the second Monday at Cumberland, that term being authorized for two weeks and not having been adjourned on the fourth day by the sheriff, the court would have been valid, and by fiction of law all its judgments would have dated as of the "sixth Monday after the first Monday in March," no matter on what day the court actually opened or any particular judgment was entered. *Norwood v. Thorp,* 64 N. C., 682. It can make no difference what was the cause of the judge's absence, whether illness or attending to official duties elsewhere. The material and only essential facts are that the judge designated by law to hold the court appeared within the time prescribed and held it, the court not having been previously adjourned (in consequence doubtless of directions given to the sheriff by the judge). His Honor was authorized by statute to hold the Superior Court of Cumberland for two weeks, be- (338)

ginning on the sixth Monday, and the part of the term he actually held is not invalidated because (from whatever cause is immaterial) he did not open the court upon the first day of the prescribed term. The judge properly directed the clerk to follow the customary formula describing the court as begun and opened on the first day thereof, as specified in the statute. *Norwood v. Thorp,* 64 N. C., 682.

We have the authority of Sir Boyle Roche that "no man can be in two places at the same time, barring he is a bird," and certainly the judge could not open court in two counties at the same hour, but it is not physically impossible that he might do so on the same day if at different hours, adjourning one of the courts to a later day in the term. At any rate, the conflict is not such that the court is compelled to hold one act as being necessarily a repeal of the other; and such being the case we must sustain both statutes. *Wortham v. Basket,* 99 N. C., 70. His Honor below had no difficulty in doing so, for he in fact held both courts, and if he found it possible in fact we ought not to find it impossible in law.

The conflict is more seeming than real, not being irreconcilable, but it is an awkward inconvenience caused by legislative inadvertence, and will doubtless be corrected at the next session of the General Assembly.

NO ERROR.

Cited: McPhail v. Comrs., ante, 335; *Waterworks v. Tillinghast, post,* 348; *Andrews v. Tel. Co., post,* 406; *Davidson v. Land Co.,* 120 N. C., 259.

---

(339)

WILLIAMSON & CO. v. E. NEALY.

Attachment—Property in Hands of Sheriff Under Other Process.

The law will not allow its precepts and process to be interfered with until their execution has been completed; hence, property in the hands of a sheriff, under a mandate in claim and delivery proceedings ordering him to deliver it to the plaintiff, is not subject to attachment, notwithstanding the fact that a mortgage under which the claim and delivery plaintiff proceeds is unregistered.

ACTION, heard before *Starbuck, J.,* at Fall Term, 1896, of COLUMBUS.

A jury trial was waived, and the court found the facts, which were agreed to by the parties:

That on 28 April, 1896, the plaintiffs sold the defendant E. Nealy a buggy, and said defendant executed to plaintiffs the following paper-writing:

"$20.

"Sixty days after date I promise to pay Williamson & Co. twenty dollars for value received on one open Wren buggy. It is to stand good for the above amount if not paid when due.

"Given under my hand and seal, this 28 April, 1896.

"M. Q. Coleman." "E. NEALY [SEAL.]

That the buggy therein described was the one sold by plaintiffs, and is the buggy in controversy in this action.

That on 11 July, 1896, the plaintiff, after default in the payment of the debt described in the paper-writing, began this action before a justice of the peace for the recovery of said buggy, and sued the writ of claim and delivery, and that the sheriff seized the buggy and took the same into his possession under said writ of claim and delivery. (340)

That on the same day and after the seizure of the buggy under said writ the defendants, Hall & Pearsall and Worth & Worth, who have valid debts against defendant Nealy having been contracted prior to 28 April, sued writs of attachment, having proper grounds therefor.

That the sheriff, then already in possession of said buggy under the claim and delivery process, levied on the buggy under the said writs of attachment.

That the said paper-writing was not recorded till after the levying of said attachments.

The defendants, other than Nealy, were allowed to implead in this action before the justice on 13 July, 1896.

Upon the foregoing facts it was adjudged by the court that the plaintiffs are entitled to the possession of the buggy in controversy in this action, described as an open Wren buggy, and in the hands of the sheriff of Columbus County.

It was further adjudged that the plaintiffs recover their costs of the defendants, to be taxed by the clerk, provided that the defendants, B. G. Worth, D. G. Worth, B. F. Hall and Oscar Pearsall, shall not be taxed with any cost that accrued prior to 13 July, 1896.

The defendants, B. G. Worth, D. G. Worth, B. F. Hall and Oscar Pearsall, excepted to the foregoing judgment and appealed.

John D. Bellamy, Jr., for plaintiffs.
J. B. Schulken for appellants.

FURCHES, J. The plaintiffs claim title to the buggy under an unregistered mortgage from the defendant Nealy, and the interpleaders, Worth and others, claim title under attachments against the defendant Nealy. The plaintiffs, under claim and delivery proceedings, had caused the

(341) buggy to be taken by the sheriff, and while the sheriff had the property in his possession under these proceedings, the defendant interpleaders placed in his hands the attachment papers on their claim, and the sheriff levied the same (if he had the right to do so) on the buggy while it was still in his possession under the claim and delivery proceedings. That after this levy, and while the property was still so in the hands of the sheriff, the mortgage under which the plaintiffs claim was registered.

It is admitted that an unregistered mortgage is good against the mortgagor, and it is also admitted that it is not good as against creditors.

It was contended by the defendant interpleaders that their attachments were executed by the sheriff before the mortgage was registered, and this entitles them to the buggy, while the plaintiffs contend that the buggy was in *custodia legis* at the time the attachments were put in the hands of the sheriff, and remained so until after the mortgage was registered. That for this reason the sheriff could not execute the attachments while the buggy was so in his custody, and the levy after the registration of the mortgage did not or would not affect their title. The plaintiffs' counsel cited in support of their position (that the buggy, being in *custodia legis,* could not be levied on), *Alston v. Clay,* 3 N. C., 171; *Overton v. Hill,* 5 N. C., 47, and *Hunt v. Stevens,* 25 N. C., 365. But this doctrine of *custodia legis* preventing a levy is overruled in *S. v. Lea,* 30 N. C., 94, and *Gaither v. Ballew,* 49 N. C., 488. And it is a little singular that the court (*Pearson, J.,* delivering the opinion), in the case of *Gaither v. Ballew,* cites and comments on *Alston v. Clay* and *Overton v. Hill,* without making any mention of *Hunt v. Stevens,* or *Jeffreys v. Lea, supra,* when *Jeffreys v. Lea* enunciated the same (342) doctrine as is enunciated in *Gaither v. Ballew.*

The doctrine enunciated in *Jeffreys v. Lea* and *Gaither v. Ballew* is not put upon the ground of being in *custodia legis,* but upon the ground that the service of the attachment would interfere with the execution of the process of the court in the hands of the sheriff, under which he seized the property. But that for money in the hands of a clerk, where no further order of the court is necessary to be made, and the party to whom it belongs has a right to demand it, an attachment will lie. And the same with a sheriff, where he has money in his hands collected under process but which the owner may demand, and the sheriff would have a right to pay over to him, it is the subject of an attachment against the owner.

And it is only where the service of such attachment would conflict with the discharge of his duties as sheriff in obeying the order or mandate of a court under which he took possession of the property or effects in his hands that an attachment can not be served.

In claim and delivery the mandate is to take the property and deliver it to the plaintiff. Code, sec. 323. So it would seem that while the buggy was in the possession of the sheriff, under this mandate of the court, the law will not allow him to serve any other process that would conflict with his duty in delivering the property he had taken under the claim and delivery proceeding to the plaintiff, or that would injuriously affect the plaintiff's right to the property while it was in his possession under said process.

It seems that the law will not allow the execution of its precepts and process to be interfered with until their execution has been completed.

Under the facts found by the court we find no error of law and the judgment is (343)

AFFIRMED.

Cited: Mitchell v. Sims, 124 N. C., 415; *LeRoy v. Jacobosky,* 136 N. C., 458; *Lemly v. Ellis,* 143 N. C., 211.

FAYETTEVILLE WATERWORKS COMPANY v. S. W. TILLINGHAST.

Action by Landlord to Recover Leased Property—Landlord and Tenant —Estoppel in Pais—Pleading—Issues—Rights of Tenant.

1. One who contracts with a corporation through persons interested in it and professing to represent it, and by virtue of such contract gets possession of the property as lessee, and holds it until the expiration of the time limited by the contract, is estopped to deny that the corporation was properly incorporated and officered and that it is the owner of the leased property.

2. Where, in an action by a waterworks company against a lessee of its property to recover possession of the property after the expiration of the lease, the defendant alleges that plaintiff is not the owner of the property, he cannot be allowed to interpose the additional and inconsistent plea that, being tenant from year to year, he has not had the legal notice of three months to quit.

3. The plea by a tenant in common of the general issue, or its equivalent, the denial of plaintiff's title in an action to recover possession of property, being an admission of ouster, the defendant in an action by a landlord to recover leased property cannot deny plaintiff's title and at the same time plead co-tenancy.

4. In an action to recover leased premises, for an account of the rents and the appointment of a receiver, the defendant denied plaintiff's ownership of the property, and pleaded that he was a co-tenant with other part owners

thereof, and also pleaded that he, being a tenant of the property from year to year, had not received the legal notice to quit: *Held*, that it was not error to submit the issue, "Is the plaintiff entitled to the possession of the property described in the complaint?"

5. Where a contract of lease of waterworks provided that the lessee should keep up the repairs, and might add new extensions to the system, and that the lessor should not have the right, at the expiration of the lease, to take possession of such new extensions without paying for the same, the court will, in an action by the lessor to recover possession and for the appointment of a receiver, see that such extensions are taken into account and paid for out of the rents or otherwise.

(344) ACTION by the plaintiff as lessor against the lessee to recover possession of the property of the Fayetteville Waterworks Company, leased to the defendant, for an account of rents and the appointment of a receiver, heard before *Greene, J.*, and a jury, at Fall Term, 1896, of CUMBERLAND. The facts appear in the opinion of *Associate Justice Furches*. There was judgment for the plaintiff, and defendant appealed.

G. M. Rose for plaintiff.
N. W. Ray for defendant (appellant).

FURCHES, J. Plaintiff alleges that it is a corporation chartered by the Legislature of North Carolina (Laws 1820, p. 44), called and known as the "Fayetteville Waterworks Company." And on 1 July, 1883, the defendant, on the one part, and William Huske and W. N. Tillinghast, acting for and in behalf of said corporation (being interested in this corporate property, and there being no regular officers of the
(345) same) entered into a contract to lease to the defendant this property for the term of one year, with the option of two more years, which contract and lease is as follows:

"Memoranda of agreement and contract of lease, made and entered into by and between S. Willard Tillinghast, of Fayetteville, N. C., and the Fayetteville Waterworks Company, a corporation existing under the laws of North Carolina. Tillinghast takes into his possession and full control all the property of every kind belonging and appertaining to the Fayetteville Waterworks, including their franchise, easements, privileges and rights of every kind, with full power and authority to use the same in such manner as he may deem best, for the aim and purpose for which the said corporation was chartered. He shall do all needed repairing and refitting of the property of every kind, as heretofore in use, and may extend, enlarge and increase the same in such manner and in such ways and places as he may deem expedient. And for the use and occupation

of said property, with the right to collect water rates as allowed by the charter of said company and all its privileges, Tillinghast shall pay fifty dollars ($50) per annum to each of the present owners or shareholders, claiming as heirs or as the assignee or representative of the heirs of the late James Baker, as the said principal shares or interest were on 1 July, 1883, it being understood that this lease is to begin and date as from 1 July, 1883, and to continue for one year at least, and that the said Tillinghast shall have the option to continue it for two years, and for three years, until 1 July, 1886, if he shall desire to do so.

"At the expiration of the lease, or when it shall be terminated by Tillinghast, he shall surrender all the property now included and given into his possession by virtue hereof, with all the repairs that may be put thereon. But all extension of pipe, additional pumps, reservoirs, conduits and additional structures and improvements of every kind that may be made, over and above the general repairs to the prop- (346) erty as now exists, or as the said extension and additions may be at the expiration or termination of this lease, shall be paid for at such price as may be agreed upon by the parties, and until such price is paid the said Waterworks Company shall not have the right to take such extensions and additions into use, possession or control.

"S. W. TILLINGHAST. [SEAL]
"WM. HUSKE. [SEAL]
"W. N. TILLINGHAST, [SEAL]
"Agent for May C. Baker."

The defendant admits making and signing this lease, and that he entered and took possession of the property under the same; that he had been in possession ever since and is still in possession of the same. But he denies that plaintiff is a corporation; admits that an act of incorporation was passed by the Legislature, as alleged by plaintiff, but alleges that it was never organized as a corporation; that it has no officers and never had had, and denies its right to bring and maintain this action.

Defendant further alleges that this property is real estate and belongs to the heirs at law of one Baker and their assigns, who are tenants in common, and that by assignment from some of these heirs he has become the owner and tenant in common of the property, with the other heirs and assignees of Baker. He admits that J. A. Huske, who seems to be the active party in bringing this action, is interested as one of the heirs of Baker; and Huske testifies without objection, and his testimony is not contradicted, that he is the authorized attorney in fact of other heirs, and represented four-sevenths interest in the concern, and was the administrator of his father, William Huske, one of the signers of (347) the lease to defendant. But defendant says there had been no

meeting had of the parties interested in this property, by which this action is authorized to be brought, and that J. A. Huske has no right to bring the same.

He further says that he has never denied the right of the Baker heirs and their assigns, as tenants in common with him, and that he did not have three months notice to quit, as the law provides and requires should be given.

But it seems to us that defendant, by his answer, "cuts himself," as *Judge Pearson* used to say; that he can not deny the plaintiff's title, and, failing in that defense, fall back on the ground that he is a tenant in common and has not refused to let the other tenants in; and, on failing in that defense, fall back upon the defense that he is a tenant of plaintiff and has not had legal notice to surrender, treating him as a tenant from year to year on account of his being allowed to hold over.

We do not feel called upon to inquire into the regularity of the organization of the plaintiff corporation, as to whether it has any officers or not. The fact that the defendant contracted, through those interested in it and professing to represent it, and by virtue of this contract and lease the defendant was enabled to get possession of the property, and did get possession and still holds the same, estops him from now denying that the plaintiff is properly organized and officered and that the plaintiff is the owner. This doctrine is well established by authority as well as the reason of the thing. *Mining Co. v. Goodhue,* 118 N. C., 981, and cases there cited. *Springs v. Schenck,* 99 N. C., 551. Neither can the plea of tenancy avail the defendant. He "can not blow hot and cold at the same breath." He can not in the same answer say to the plaintiff, "You are not the owner of this property and have no right to the posses-
(348) sion," and then say, "I am your tenant and would have vacated if you had given me the notice the law requires." *Vincent v. Corbin,* 85 N. C., 108; *Springs v. Schenck, supra.*

Nor can he relieve himself of the effect of this relation of landlord and tenant without a complete surrender of the possession he acquired under contract of tenancy. The parties must be first put in *statu quo. Springs v. Schenck, supra.*

We are not to be understood by anything we have said in this opinion that a landlord has the right to dispossess his tenant from year to year, without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the want of legal notice.

Nor can the plea of tenancy in common avail the defendant. The plea of the general issue, or what is equivalent to that under the present practice, by a tenant in common is an admission of *ouster. Gilchrist v.*

Middleton, 107 N. C., 663, p. 683. The denial of plaintiff's title was equivalent to a plea of the general issue.

There was objection to the issue submitted, which was as follows: "Is the plaintiff entitled to the possession of the property described in the complaint?" To which the jury responded in the affirmative. We are of the opinion this was a proper issue, and the verdict of the jury was a proper finding.

The question made on the trial, as to the regularity and jurisdiction of the court, was passed upon and the jurisdiction of the court sustained in *McNeill v. McDuffie, ante,* 336.

There seems to have been no exceptions taken to the judgment of the court. But it appears from the contract of lease, under which the defendant went into possession, that defendant was authorized to (349) add *new extension, etc.,* as distinguished from the repairs he might put on the works already in; and that the plaintiff shall not have the right to take the same into possession and use until they are paid for. The case is still retained and in the hands of a receiver, and if the defendant has put in any such improvements the court will see that they are taken into the account which has been ordered, and that they are paid for out of the rents, or otherwise, before the plaintiff is restored to possession. With this modification in the judgment it is affirmed. This judgment of the court rests on the doctrine of tenancy and estoppel, and will not affect any rights the plaintiff or defendant may have in a proper proceeding to assert the same.

MODIFIED AND AFFIRMED.

Cited: Hendon v. R. R., 127 N. C., 113.

(350)

STATE ON THE RELATION OF H. L. COOK, ASSIGNEE OF A. AND A. B. McIVER, v. JAMES B. SMITH, SHERIFF, AND OTHERS.

Action Against Sheriff—Joinder of Causes of Action—Practice—Parties.

1. Under section 267 (1) of The Code all causes of action, of whatever nature, in favor of the plaintiff against the same defendants, can be united in one action when they arise out of the same transaction or transactions connected with the same subject of action.

2. Causes of action against a sheriff and the sureties on his official bond for illegal levy and sale are properly joined with a cause of action against a person who directed or procured such levy and sale to be made, and gave an indemnifying bond therefor.

3. Such action, since it embraced a cause of action against the surety on the sheriff's bond, was properly brought in the name of the State on the relation of the plaintiff.

ACTION, heard on complaint and demurrer, before *Greene, J.*, at April Term, 1896, of CUMBERLAND. The complaint was as follows:

"1st. That on 20 May, 1891, A. McIver and A. B. McIver made, executed and delivered to the plaintiff and John S. McIver a deed of assignment whereby and wherein they conveyed to them in trust and for the purposes therein mentioned all the goods, wares and merchandise, property and effects, as fully described and set out in said deed, which was recorded in said county on 20 May, 1891, in Book R, No. 4, pages 207-210, and which said deed is made a part of this complaint.

"2d. That the defendant, Jas. B. Smith, is now, and was at the times hereinafter mentioned, the Sheriff of Cumberland County, having given bond and qualified as such, with the defendant Walter Watson as
(351) surety, a copy of which said bond is hereto attached and made a part of this complaint.

"3d. That on 23 May, 1891, the defendant, Frank W. Thornton, caused to be issued to the defendant, James B. Smith, Sheriff, as aforesaid, executions against the property of the said A. McIver and A. B. McIver for the sum of $38 and $53, total $91; and notwithstanding the said James B. Smith, Sheriff, had notice that the plaintiff claimed title to said goods, levied the said execution upon the property of the plaintiff, who has since become the sole assignee of A. and A. B. McIver, by order of the court, in violation of the plaintiff's rights unlawfully levied and unlawfully sold the said goods under said executions as the property of said A. and A. B. McIver.

"4th. That the said defendant sheriff in making the levy which the plaintiff alleges was unlawful, seized and took into his possession a large amount of goods of far greater value than the amount called for in the executions, to wit: a large amount of goods such as groceries and other goods, an inventory of which has not been filed by the said sheriff, and a large amount of goods, such as liquors and other property at the Overbaugh house, the goods first mentioned being in the storehouse on Hay Street, in Fayetteville, N. C., lately occupied by A. and A. B. McIver, the said levy being largely in excess of the amount called for by execution, and a great many of the same became injured and a number utterly ruined by being kept without air or ventilation while so in the custody of the defendant sheriff, to the great damage of the plaintiff, and
(352) that the value of the goods so levied upon by the said sheriff was $3,000, and the amount called for in the execution under and by virtue of which the levy was made was $91 and costs, $4.50.

"5th. That the goods and effects so wrongfully levied upon were advertised and sold, the sale being advertised for 6 June, Saturday, when the said sheriff, without sufficient notice and without cause, postponed the sale, notwithstanding the fact that the day advertised for the sale was the time when large numbers of bidders were attending and ready as well as desired to bid at the sale; but the sale was postponed to a time later, and the plaintiff avers that the goods brought less in consequence, and were kept thereby a longer time in the heat of a closed storehouse, thus adding to the plaintiff's loss and injury; that the first sale day as advertised was for Saturday, 6 June, 1891, when there were many people ready to attend the sale, and at the time to which it was postponed there were far less, as it was a less public day, and the plaintiff was greatly injured thereby.

"6th. That, in pursuance of said unlawful levy, the said sheriff wrongfully sold the plaintiff's goods, after keeping them in possession for a long time, to wit: from the 23d of May until 8 June, 1891; and finally, on 8 June, 1891, he sold the same, which were of the actual value of $220, a sum far greater than the amount called for in the said executions, and thereafter returned said executions satisfied.

"7th. That the actual value of said goods so levied upon by the said sheriff was $3,000, and the said F. W. Thornton, defendant herein, directed the said sheriff to sell the same without regard to the deed of assignment and the plaintiff's rights thereunder, and agreed to indemnify the said sheriff against any and all loss that might arise, or any damage that might ensue, from said unlawful levy and sale, and (353) did do so, as the plaintiff has been informed by the said sheriff, and after the said sale the said F. W. Thornton received proceeds thereof to his own use and benefit.

"8th. That before the said sale the plaintiff forbid the said sheriff from selling the goods so levied upon, and notified him of his title thereto, and that since said sale he demanded the proceeds thereof, which the said sheriff disregarded, and has refused to pay over the proceeds thereof to the plaintiff or any part thereof.

"9th. That by reason of the premises the plaintiff has been injured, and sustained loss to the amount of the value of the goods, to wit, $210, and the actual value of the same, which were so levied upon and sold, to wit, and the great damage to the goods which were not sold, but injured and totally ruined by the heat of confinement in the closed places while so in the sheriff's custody.

Therefore the plaintiff demands judgment for the sum of $210, the value of the goods sold, for the sum of five hundred and fifty dollars, the damages resulting from injury and loss of the goods from close confinement and the depreciation in prices resulting from the unnecessary

postponement and lack of bidders which might have been had but for the sheriff's unlawful acts, and for the sum of five thousand dollars, the penalty of said bond, to be discharged upon the payment to the relator of the plaintiff of the sums above set forth, and for the cost of the action, and such other and further relief as the plaintiff's relator may be entitled to receive.

F. W. Thornton demurred to the complaint on the following grounds:

"1st. That the complaint shows upon its face that it does not state facts sufficient to constitute a cause of action in this, that the complaint shows that plaintiff had no contract with this defendant, and is (354) not liable to the relator of the plaintiff on any bond or other paper as mentioned in Article 2 of the complaint.

"That there is a misjoinder of action in this, that there is joined an action of contract on a bond made, as alleged, by J. B. Smith, sheriff, and Walter Watson to the relator of the plaintiff, and an action of tort between H. L. Cook, assignee, and F. W. Thornton, the two causes of action being different rights and different interests."

His Honor sustained the demurrer and dismissed the action as to Thornton, and plaintiff appealed.

W. E. Murchison for plaintiff.
G. M. Rose for defendant Thornton.

CLARK, J. The defendant Thornton having, as the demurrer admits *pro hac vice,* directed, caused and procured the sheriff wrongfully and illegally to seize and sell the goods of the plaintiff, said Thornton giving the sheriff an indemnifying bond to induce him to make the seizure and sale, and having received from the sheriff the proceeds of such illegal sale, is liable to the plaintiff. The sheriff is also liable for the same acts, and is properly joined with Thornton, since the liability "arises out of the same transaction" and is expressly provided for by The Code, sec. 267 (1), and the joinder of the surety on the sheriff's bond is because of his general contract of suretyship for the official acts of the sheriff. The liability to the plaintiff by all the defendants is for the same act, performed by one party (the sheriff), by the procurement and direction of another (Thornton), the surety to the sheriff's bond being joined by virtue of his agreement, and just as he is joined in all actions against the sheriff for misfeasance and neglect in office. The cause of action "affects all parties to the action" (Code, sec. 267), and the joinder was eminently proper. *Benton v. Collins,* 118 N. C., 196; *Pretzfelder* (355) *v. Insurance Co.,* 116 N. C., 491; *Leduc v. Brandt,* 110 N. C., 289; *Heggie v. Hill,* 95 N. C., 303; *King v. Farmer,* 88 N. C., 22. On account of the surety on the bond the action is on relation of the

State but this is merely formal and of no import, the relator being the real party. *Warrenton v. Arrington,* 101 N. C., 109. Always when the sheriff is sued for official liability, he is responsible personally, and his surety should be sued on the relation of the State, but it has never been held a defect to join them.

In the full discussion of this question at last term, in *Benton v. Collins, supra,* the authorities are reviewed, and it is pointed out that when the causes of action arise out of the same transaction they may be joined, though one should be for a *tort* and the other in contract, and such seems the manifest intent of section 267 of The Code. Suppose the demurrer for misjoinder were sustained, the court could merely order the action divided into two (Code, sec. 272; *Pretzfelder v. Insurance Co., supra*), and then on the trial of each of those actions the same witnesses would be introduced, the same transaction proved, and the same questions of liability would arise, thus doubling the time and expense of the litigation without any possible benefit to any one. It is to prevent this very state of facts that The Code, sec. 267, expressly provides that "the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they arise out of (1) the same transaction or transactions connected with the same subject of action."

The principle that a cause of action in *tort* can not be united with one in contract applies only where they arise out of different transactions, and is subordinate to the general provision of The Code that all causes of action of whatever nature in favor of the plaintiff against the same defendants can be united when they arise out of the same transaction. In sustaining the demurrer there was (356)

ERROR.

Cited: Sloan v. R. R., 126 N. C., 490; *R. R. v. Hardware Co.,* 135 N. C., 75, 76; *Reynolds v. R. R.,* 136 N. C., 347; *Fisher v. Trust Co.,* 138 N. C., 242; *Hough v. R. R.,* 144 N. C., 701; *Hawk v. Lumber Co.,* 145 N. C., 50; *Ricks v. Wilson,* 151 N. C., 49; *Quarry Co. v. Construction Co., ib.,* 351; *Ayers v. Bailey,* 162 N. C., 212.

JULIUS SPELLER, EXECUTOR, v. C. B. SPELLER ET AL. AND R. M. SPELLER, EXECUTOR, ET AL.

Practice—Certiorari—Refusal of Appellant to Pay Cost of Transcript—Suits in Forma Pauperis—Fees of Court Officers.

1. An order granted under sec. 553 of The Code, permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of cost of transcript or in Supreme Court in advance.
2. The leave to sue as a pauper, under sections 210 and 212 of The Code does not extend in civil actions beyond the trial in the Superior Court, his appeal being governed by section 553 of The Code, which only relieves him from giving security for the costs of the appeal, but he must pay the fees as to the appeal due the officers of both courts for services rendered.
3. Where a party who has had leave to sue as a pauper and to appeal without giving bond refuses to pay the costs of the transcript, a *certiorari* will not be granted.

ACTIONS, tried at Spring Term, 1892, of BERTIE. The defendants, appellants in the first-named case, were permitted, by an order of court, to appeal without giving bond; being plaintiffs in the other case, they had been allowed to sue *in forma pauperis,* and were also permitted to (357) appeal without giving bond, etc. The clerk refused to send up the transcripts of the record on appeal unless appellants paid his fees for so doing in advance, which they refused to do, and moved in this Court for a *certiorari* in each case.

R. B. Peebles for appellants.
F. D. Winston for appellees.

CLARK, J. The point presented has already been three times passed upon by this Court: in *Martin v. Chasteen,* 75 N. C., 96; *Andrews v. Whisnant,* 83 N. C., 446, and in *Bailey v. Brown,* 105 N. C., 127, all decided since the Act of 1873-74, ch. 60, which was relied on by the petitioners. It is pointed out in the case last named that The Code, sections 210 and 212, permitting an action to be brought *in forma pauperis,* not only exempts such pauper plaintiff from giving bond to indemnify the defendant for his costs, but excuses him from paying fees to any officer and deprives him of the right to recover costs, while section 237, allowing a defendant in an action of ejectment to defend without giving bond, and section 553, allowing an appeal to this Court without bond, go no further than dispensing with the bond, and neither exempts the party from paying his own costs nor forbids his recovering costs. The reason is very plain. As to section 237, a defendant who is

allowed to remain in possession without security for *mesne* profits or for plaintiff's costs should be able to pay his own or secure them out of the *mesne* profits; and an appellant who has had a gratuitous trial in the Superior Court, without paying anything to officers for their services, when he seeks to reverse the presumption of the correctness of the result should not receive further gratuitous services of the court officers. It is enough that he is excused from giving any security to indemnify the appellee for his costs on the appeal. Such was the ruling also under the former system of procedure. *Office v. Lockman,* 12 (358) N. C., 146.

The above applies only in civil cases. In criminal actions the appellant, whether the State or defendant, and whether the latter appeals *in forma pauperis* or not, is not required to pay costs of transcript in advance. *S. v. Nash,* 109 N. C., 822; *S. v. Deyton, post,* 880.

Instead of extending the cases in which officers shall perform duties to litigants without charge, the tendency of legislation is the other way; as chapter 149, Laws 1895, provides that where a plaintiff, admitted to sue in *forma pauperis,* recovers in his action, he shall recover costs, and of course must pay them; for if he does not pay costs there is none he could recover. The leave to sue as a pauper, Code, secs. 210 and 212, does not go beyond the Superior Court. The appeal as a pauper is governed by section 553.

The petitioner, having refused to pay the costs of the transcript, is not entitled to a *certiorari,* but, if diligent, he can, by paying the costs therefor, still docket his appeal in time, provided he does so at this term before the appellee has docketed and had the appeal dismissed. *Triplett v. Foster,* 113 N. C., 389, citing *Bailey v. Brown, supra.*

CERTIORARI DENIED.

Cited: Brown v. House, post, 623; *S. v. Deyton, post,* 883; *Smith v. Montague,* 121 N. C., 94; *Benedict v. Jones,* 131 N. C., 474.

---

(359)

IN RE W. M. HYBART, LUNATIC.

Lunatics—Asylums—Estate of Lunatic—Allowance to Family—Appointment of Receiver of Lunatic's Estate.

1. The term "indigent insane," as used in section 10, Article XI, of the Constitution, and section 2278 of The Code, includes all those who have no income over and above what is sufficient to support those who may be legally dependent on the estate.

2. Under sections 2273, 2274, and 2278 of The Code, a wife who lives in the mansion house of her insane husband has the right to remain there and to use such supplies as may have been provided for his family, or a sufficient quantity of them to maintain her and her family according to their condition in life, as determined by the situation and resources of the husband.

3. A first cousin, who was partially and voluntarily supported by a person when in his right mind, is not dependent upon him within the meaning of section 2274 of The Code, so as to be entitled to support from his estate when declared a lunatic.

4. Where the wife is not a party to proceedings to have a receiver appointed for an insane husband's estate, the validity of the marriage cannot be attacked by *ex parte* affidavits.

5. Under sections 1584, 1585, 1676 of The Code, and chapter 89, Laws 1889, the appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge *at Chambers* or in term.

6. Casual mention to the father of the wife of a lunatic that steps would be taken to have the lunatic's property taken care of by the court was not such notice to a friend or relative of the wife as required by the statute.

PETITION for the appointment of a receiver for the estate of W. M. Hybart, a lunatic and patient in the North Carolina Asylum for the Insane, heard before *Greene, J.*, at May Term, 1896, of CUMBERLAND. The facts are set out in the opinion of *Associate Justice Avery.*

T. H. Sutton and R. T. Gray for Delia J. Hybart (appellant).
G. M. Rose contra.

(360) AVERY, J. The statute (The Code, sec. 1676) provides that, where a person is declared insane and no suitable person will act as guardian, the clerk shall secure the estate of such person, according to the law relating to orphans whose guardians have been removed, which is embodied in section 1584 and 1585 of The Code. It is provided in the last-named section that the Judge of the Superior Court before whom an action is brought by the solicitor against a removed guardian shall appoint some discreet person as receiver, to take possession of the ward's estate, to collect all money due him, to secure, loan, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to the rules and orders, in every respect as the said judge may from time to time make in regard thereto.

W. M. Hybart was sent to the Asylum for the insane at Raleigh prior to the April Term, 1896, of the Superior Court of Cumberland County, and at said term a verified petition was offered by C. W. Broadfoot, setting forth the fact that Hybart had become insane and was confined

in the asylum; that he had a wife to whom he was married in November, 1895, and a *first cousin, Miss Mary Weeks, who lived with him* up to a short time before his marriage, but then lived with a niece, Mrs. James N. Smith, of Fayetteville, and that Miss Weeks was very feeble, had very little means, and that her board had been paid by W. M. Hybart up to the time he went to the asylum. It set forth the further facts that Hybart's property consisted of three stores in Fayetteville, which rented in the aggregate for the sum of $45.83 per month, and a small farm, worth about $1,500, where he lived, but which (361) was then in need of repairs and *without a tenant.*

Upon hearing this petition and, in any aspect of the testimony, without notice to the wife of the insane man, the judge appointed the petitioner receiver, and ordered him to pay out of his estate—

1. To W. M. Hybart, or those having him in charge, such sums of money, or supply him with such necessaries or comforts as are suitable to his condition in life, and as are approved by the superintendent of said asylum.

2. To the wife of said Hybart, $10 per month.

3. To the person who may furnish board for Miss Mary C. Weeks, $7 per month, she being partially dependent on said W. M. Hybart.

4. Taxes due on Hybart's property, insurance and necessary repairs, his doctor's bills and druggist's accounts.

5. A small amount to his nurse, who took care of him while here, a debt due H. A. Tucker & Bro., of Wilmington, of $35.

It seems that Hybart lived with his wife at his country home, where he was supplied with household and kitchen furniture, and had corn and meat in his smoke-house when he was taken to the asylum.

The receiver has taken possession of the household effects and supplies, including the trunk of Mrs. Hybart. Meantime Mrs. Hybart has been sick, and, it appears, has incurred a doctor's bill of $33, and, expecting to be confined soon, with all of the attendant expense, she insists that $10 per month is totally inadequate to support her. The small allowance to the wife seems to have been made upon affidavits that she was of low origin, and upon the idea that her condition in life had not been changed by the mesalliance of her husband with her. The affidavit also collaterally and incidentally attacked the validity (362) of the marriage by averring that it was contracted when Hybart's mind was failing, and that he was duped and tricked into it by the wiles of her father, Elias Godwin.

The validity of the marriage contract between W. M. Hybart and Delia J. Hybart can not be questioned collaterally—certainly not upon an *ex parte* affidavit suggesting that it was procured by her father. Being but 17 years old, she was a child (though capable of contracting

marriage). If it be true that she was pregnant at the time of the marriage by W. M. Hybart, the child, when born in lawful wedlock, will be legitimate, and will be entitled to such protection and such benefits as the law extends to the legitimate offspring of any person whose misfortune it is to be immured in an asylum for the insane.

In interpreting the meaning of statutes, it is the duty of the courts to look at all of the provisions of the Constitution and laws of the State that bear upon the subject of the act under consideration, and construe all as in *pari materia.* If W. M. Hybart had died at the date of his removal to the asylum, his widow could have claimed dower in his land and an allowance out of his personal property for the support of herself and child. The small amount of indebtedness would probably have been settled without sale of any, or at most, by disposing of a small portion of the real estate. A guardian would have been appointed for the child when born, and the net income of the estate would have been devoted to its nurture and education, according to its condition in life as heir of the father. No portion of the rents would have been devoted to the support of his collateral heirs or kin next in degree to his child. If he had continued to be of sound mind, the rents of his property could not have been sequestered and devoted by a receiver to the payment of his debts without giving him the right to claim personal property exemptions and the allotment of his homestead. The (363) statute providing for sending persons of sufficient means to asylums outside of the State contemplates that the guardian shall supply funds for supporting them in such asylums, so long as their incomes may be sufficient for that purpose, "over and beyond *maintaining and supporting those persons who may be legally dependent on the estate of such insane persons.*" Code, secs. 2273 and 2274.

The Constitution (Art. IX, sec. 10) empowers the Legislature to "provide that the *indigent* deaf mute, blind, insane of the State shall be cared for at the charge of the State." Construing The Code, sec. 2278, with the other sections already cited, it was plainly the legislative intent to define "indigent insane" so as to include all those who have no income over and above what is sufficient to support and maintain those who may be legally dependent on the estate. Such is the construction that has also been placed upon the law by those charged with the duty of governing our charitable institutions. But if such interpretation had not been acted upon, there can be no doubt that the framers of the Constitution who provided for the establishment and maintenance of the asylums, intended that no such narrow construction should be given to the word "indigent" as would deprive the family of one, stricken with so terrible a visitation, of the services of the head of the household, and at the same time divert to his own use the income derived from his

property, when it is not more than sufficient for the support, according to their condition in life, of those who had been legally dependent upon him when in his right mind.

It is a part of the history of the Constitutional Convention of 1875 that ordinances were introduced contemplating the application of the profits of the estates of insane persons to the payment of the expenses of maintaining them in asylums, without regard to the (364) necessities of those dependent on them. But, in consequence of the prevalence of a liberal spirit, those measures were defeated, and the Constitution was allowed to remain as it was originally framed in 1868.

The condition in life of Delia J. Hybart must be determined by inquiring as to the situation and resources of her husband, and not by her own environments or mode of living before marriage. Schouler on Domestic Relations, secs. 61 and 413. The husband's obligation, when in his right mind, is to support her in a manner that comports with his circumstances in life, for her condition is his condition; and this is true, though he may have been induced to marry her by the fear of a prosecution for seduction or bastardy. Schouler, *supra*, sec. 61. Miss Weeks, however worthy she may be, and notwithstanding the fact that Hybart aided her voluntarily, when in his right mind, is not one of those that he would, were he restored, be under legal obligation or duty to support, and she is not, therefore, dependent on him within the meaning of the law. The Legislature has made no provision for supporting persons standing in such relations to an insane person as she does out of their estates, if indeed it had the power to make such disposition of his property. The law evidently contemplates giving a wife who lives in the mansion house of her husband the right to remain there and to use such supplies as have been provided for his family, or a sufficient quantity of them to maintain her and her family according to their condition in life.

The superintendents of the asylums and hospitals for the insane in this State, while adopting the construction of the Constitution which we have stated, have not, as we are informed, been in the habit of demanding the payment of expenses out of the estates of those (365) unfortunates who have had abundant income to defray them. Our attention has been called to no special provisions of law under which it could be done. Where insane men have families it is not often they have a sufficient income, apart from their own personal earnings (which cease to come, of course, on their committal to an asylum), to provide for those dependent on them according to their station in life. The danger in the attempt to legislate upon the subject is that while the stricken man is being treated it may happen that his family is being starved, and probably for that reason the General Assembly has hesitated to take action.

The high character of the gentleman who is acting as receiver in the case at bar justifies the conclusion that the solicitor would have approved of the order appointing him. The statute (section 1673) authorizes the clerk to appoint a guardian for any person on certificate of the superintendent of the asylum that he is of unsound mind. Where no suitable person will act, the clerk shall secure such estate in the same way provided where the guardians of orphans have been removed. The Code, sec. 1676. In such cases the clerk certifies the facts to the solictor (see 1584), who institutes an action on the bond of the guardian. "The Judge of the Superior Court before whom the action is brought shall" (says the statute) "have power" to appoint the receiver (section 1585), and it would seem to be contemplated, not that the solicitor shall bring an action, but that he shall take some action in such cases. Interpreting the statutes together, it would seem that it was intended that the solicitor, as the representative of the State, whose office it is to look to the protection of insane persons and infants, and not any person who might by chance hear of the circumstances, should be the mover. When a guardian is removed, the attention of the infants and those who (366) are near to them is called sharply to what is being done by the displacement and prosecution that follows in the court. Laws 1889, chap. 89, after pointing out the manner of making service on and bringing an insane person into court, provides that on the trial of any action or special proceeding to which an insane person has been made a party, such insane person shall have the benefit of any defense that might have been made for him by his guardian or attorney, whether it has been pleaded or not, and that the court, at any time before the action or proceeding is finally disposed of, may order the bringing in by proper notice of one or more of the near relatives or friends of such insane person. Conceding that this power is to be exercised within the discretion of the judge (which we do not determine), if there was ever a time when the family proper of an insane person ought to be heard, it would seem that this is one. In view of all these provisions of the law it would seem that receivers, in cases like that before us, ought to be appointed by the judge, on motion of the solicitor, either in or out of term time, and certainly that the rule ought to be, if there are any exceptions to it, that the wife and one or more adult children, if there are such, or some near relative or friend, should be brought before the judge *at chambers* or in term before any order of this character is made. It is needless to say that a casual mention of the matter to the wife's father is not notice to him.

The order of the judge is reversed and the case is remanded, to the end that the wife be brought in, a receiver appointed, or the appoint-

ment of the acting receiver approved on motion of the solicitor, and that the Court shall in other respects proceed in accordance with this opinion.

REVERSED.

Cited: Hospital v. Fountain, 128 N. C., 25.

---

(367)

J. A. MORGAN v. G. A. ROPER.

Action on Account—Judgment on Pleadings.

1. Section 243 (1) of The Code does not require that a defendant, who avers that he has "no knowledge or information sufficient to form a belief," and therefore denies the same, shall set out the reasons why he has not such information and belief.

2. Where, in an action on an itemized account, made a part of the complaint, for goods sold to the defendant, aggregating $630.90, plaintiff admitted credits to the amount of $295.43 and asked judgment for $345.47, and defendant admitted the purchase and receipt of items in plaintiff's account to the amount of $259.48, specifying which they were; and as to the other items he averred that he had no knowledge or information sufficient to form a belief, and therefore denied the same: *Held,* (1) that the form of the defendant's denial was in accordance with section 243 (1) of The Code, and put plaintiff to the proof of his account, except the admitted items; (2) that it was error to apply the credits to the items of debt denied by defendant and render judgment on the pleadings in favor of the plaintiff for $233.48.

ACTION, tried before *Greene, J.,* at April Term, 1896, of RICHMOND, on a motion for judgment on the pleadings, the nature of which and the facts upon which they were based, are fully set out in the opinion of *Associate Justice Clark.* From a judgment for the plaintiff for $233.48, which the court held to be admitted by the answer, the defendant appealed.

John D. Shaw & Son for plaintiff.

M. L. John and Frank McNeill for defendant (appellant).

CLARK, J. The plaintiff sues upon an itemized account (made a part of the complaint) for goods sold and delivered to the defendant, aggregating $630.90, admitting credits amounting to $295.43, and asking judgment for the balance of $345.47, which it is averred the (368) defendant promised to pay. The defendant, answering, denies promising to pay the alleged balance. He admits the purchase and receipt of the items in plaintiff's account, to the amount of $259.48,

specifying which they are; and as to the other items of plaintiff's account, he avers that he "has no knowledge or information sufficient to form a belief, and therefore denies the same." This is in the very words of the denial in such cases authorized by The Code, sec. 243 (1), and puts the plaintiff on proof of his account (*Bank v. Charlotte,* 75 N. C., 45), outside of the admitted items, amounting to $259.48, and against that amount are the plaintiff's admitted credits of $295.43; besides, the defendant pleads additional payments by him to the amount of $151, which "are not entered among the credits on plaintiff's statement."

The court below made the mistake of applying the credits, admitted by the plaintiff, to the items of debit denied by the defendant. Applying the admitted credits to the admitted debits, there was no balance admitted by the defendant for which judgment could be entered. The plaintiff must go on and prove his disputed items of account, and it will devolve upon the defendant to prove his allegations of additional payments, for not being pleaded as a counterclaim, they are taken as denied. Code, sec. 268; Clark's Code (2 Ed.), p. 215.

The case relied upon by the plaintiff (*Gas Co. v. Mfg. Co.,* 91 N. C., 74), differs from this in that there the complaint averred that a certain matter was "within the personal knowledge of the defendant," and the court held that that allegation must be specifically met and could not be denied in the authorized formula that the defendant had not knowledge or information sufficient to form a belief, because, from the very nature of the averment, he must have knowledge or must be able to deny (369) having it. But the averment, here, of a sale and delivery of goods of the defendant is not an averment that the "matter is in the personal knowledge of the defendant." It is not specifically averred, nor is it a necessary implication, for the allegation would be sustained by proof of a delivery to his wife, children, employees or agents, if authorized to act for him in the matter, and of their action he might well have neither knowledge nor information, by reason of the death, removal or changed disposition towards him of such agents. Even if the sale had been to him personally, the items not admitted may have escaped his memory, and while satisfied within himself that he did not get them, he might justly be averse to denying their receipt as a fact, and be content to let the plaintiff prove their delivery. The Code, sec. 243 (1), does not require in such cases that the defendant shall encumber the pleadings with the reasons why he has not such knowledge or information, and it is sufficient if he makes the denial (upon the responsibility of an oath, if, as here, the complaint is sworn to) in the form and manner prescribed by the statute. The judgment below is set aside, that the disputed matters of fact may be tried by a jury.

ERROR.

(370)

ELIZABETH LATIMER v. A. M. WADDELL, JR., ET AL.

Fee-Simple Estate—Condition—Restriction Upon Alienation for a Certain Time Void.

A condition annexed to a conveyance in fee-simple, by deed or will, preventing alienation of the estate by the grantee within a certain period of time is void.

CONTROVERSY without action, heard before *Coble, J.*, at October Term, 1896, of NEW HANOVER, upon an agreed statement of facts, as follows:

"On 4 May, 1896, the plaintiff executed a conveyance as follows: (after describing the property) unto the said Ellen S. Waddell, to her sole and separate use, for and during the term of her natural life, and if the said Alfred M. Waddell, husband of the said Ellen S. Waddell, shall survive his said wife, then at her death unto the said (371) Alfred M. Waddell, for and during the term of his natural life, and at the death of the survivor, whether it be the said Ellen S. Waddell or the said Alfred M. Waddell, then unto the said Alfred M. Waddell, Junior, and the said Elizabeth S. Waddell, his sister, to them, their heirs and assigns respectively forever. Provided, however, and it is hereby made a condition of the estate of the said Alfred M. Waddell, Junior, and the said Elizabeth S. Waddell, that neither they nor either of them shall alien, sell, release or dispose of his or her interest or estate in the premises herein conveyed, during the lifetime of the said Ellen S. Waddell or within five (5) years from her death, thence next ensuing. And if the said Alfred M. Waddell, Junior, or the said Elizabeth S. Waddell shall so alien, sell, release or dispose of his or her estate or interest in the said premises, then the said estate and interest of him or her so aliening, selling, releasing or disposing of the same (372) shall become forfeited, and shall cease and determine, and the said Elizabeth Latimer and her heirs shall have full right and privilege and shall be empowered to enter upon the said estate and interest so forfeited and hold the same free and discharged of the obligations of this conveyance. And it is further provided that, in the event that there shall be no such forfeiture as is above described, and to the extent that there shall be none such, it is moreover herein covenanted and is made a condition of this conveyance, that if either the said Alfred M. Waddell, Junior, or Elizabeth S. Waddell shall die intestate and without leaving any heirs of her or his body living at her or his death, that in that event the interest of the party so dying shall vest in the survivor and his or her heirs. And if both the said Alfred M. Waddell, Junior, and Elizabeth S. Waddell shall die intestate and without having aliened

their said interest after the right to do so shall have accrued to them, and shall have no heirs of his or her body living at their death, then and in that event all the estate, right and interest of the said parties shall revert to and become vested in the said Elizabeth Latimer and her heirs forever. But, subject to the restriction in the foregoing proviso mentioned, the said Alfred M. Waddell, Junior, and Elizabeth S. Waddell, or either of them, shall have full and absolute power to dispose, by deed, will or otherwise, of his or her estate in the premises herein conveyed."

(373) On 6 August, 1892, all of the grantees of said deed of conveyance, without the consent of the plaintiff, mortgaged the premises to the Mechanics' Home Association to raise money to be applied (and it was applied) to the betterment of the premises.

On 26 October, 1895, Ellen S. Waddell, the grantee of the life estate, died, and it is admitted, for the purposes of this controversy, that the life estate of her husband has also expired. On or about 8 January, 1896, the defendants, without the consent of the plaintiff, and in continuation and renewal of the above-mentioned mortgage, mortgaged the premises to the Mechanics' Home Association, and said mortgage remains unpaid, and the property has been advertised for sale under foreclosure. The defendants are in possession of said premises and withhold the same from the plaintiff, Elizabeth Latimer.

On this state of facts the plaintiff contends:

1st. That the condition on which the estate was conveyed has been broken, and the estate granted is void, and the fee simple estate is now in her by virtue of the reversionary interest in her provided for in the deed, and she is entitled to the immediate possession of the premises.

The defendant contends:

(374) 1st. That the restriction or limitation placed upon the right to alien the property by the terms of the deed is a restraint upon alienation repugnant to the estate granted, and is void.

2d. That the grantees, Alfred M. Waddell, Jr., and Elizabeth S. Waddell, having conveyed the property by mortgage, and thereby conveyed the whole estate, the contingent interest of the plaintiff has been cut off, and the mortgagee takes the whole estate, subject to the terms of the mortgage.

His Honor rendered judgment as follows:

The above-entitled cause, coming on be heard upon the statement of the case agreed, and being heard, and the court, holding that the restriction or limitation placed upon the right to alien the property by the terms of the deed, a copy of which is attached to the case agreed, is a restraint upon alienation repugnant to the estate granted, and void; and that the grantees, Alfred M. Waddell, Jr., and Elizabeth

S. Waddell, having aliened the property by mortgage and thereby conveyed the whole estate, the contingent interest of the plaintiff has been cut off, and that the mortgagee takes the whole estate, subject to the terms of the mortgage. It is therefore considered and adjudged that the plaintiff do not recover, and that the defendants go without day and recover of the plaintiff their costs, to be taxed by the clerk."

From this judgment plaintiff appealed.

T. W. Strange for the plaintiff.
George Rountree for defendants.

MONTGOMERY, J. The question in this case is, can an estate in fee simple be limited by a condition preventing alienation on the part of the grantee for the certain time of five years? No such limitation was recognized by or known to the common law. There can not be a co-existence of a fee-simple estate and a total restriction upon its (375) alienation during any period of time, however short it may be. One person can not own the fee and another person the right of alienation. It is written in Littleton (section 360): "Also, if a feoffment be made on this condition, that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements he hath the power to alien them to any person by law." Coke, in commenting on that section, confirms it, and adds to the principle releases, confirmations and all other conveyances in which a fee-simple estate is passed, and also devises. Mr. Cruise (Cruise's Digest, title 13, chap. 1, sec. 22), says: "A condition annexed to the creation of an estate in fee simple that the tenant shall not alien is void, being repugnant to the nature of the estate, a power of alienation being an incident inseparably annexed to an estate in fee simple." There is not the slightest modification of this principle to be found in any of the books of the early English common-law writers except in Littleton, sec. 361, and Coke's Commentary on that section, and in Shepherd's Touchstone at page 129. And the modification suggested by those writers does not permit a restraint upon alienation *for a certain time,* but only that it may be restrained in reference to a certain person or persons. The text of Littleton is as follows: "But, if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." Coke, in commenting upon this section, adds to it, "And in this case if the feoffee enfeoff I. N. of intent and purpose that he shall enfeoff I. S., some hold that this is a breach of the condition." In the Touchstone the modification is in these words, "If a feoff- (376)

ment or other conveyance (by deed or will) be made of land, or a grant or rent in fee simple, by deed or will, upon condition that the feoffee or grantee shall not alien to certain persons (or shall alien to a particular person, Lit., sec. 361), as to J. S. or J. S. and W. S., this is a good condition." This modification has been extended by recent writers on the law of real estate. For example, it is said in 2 Washburn, page 448, "There may be valid conditions restricting the free conveyance of an estate even in fee, as where the grantee is not to convey it *before a certain time,* or is not to convey to certain persons named." The authorities in the note to that section, cited to sustain the author in the statement that the alienation for a *certain time* may be restrained, do not bear him out. He refers to *Atwater v. Atwater,* 18 Beav., 330, and to Tudor's Cases, 794, and to Coke on Littleton, 223a, and to *Anderson v. Cary,* 36 Ohio State, 506. In all of these references, except the last one, the restrictions upon alienation were confined *to certain individuals,* and not in restraint of alienation for a certain time. In the last reference, that of *Anderson v. Cary,* the point raised was upon the right to prevent alienation for a *certain time,* and the decision of the Court was against the position of the author. The language of the will, which gave rise to the suit in the last-named case, was as follows: "I give and bequeath the farm on which I now live . . . to my two sons, Thomas and Lincoln, upon the following conditions: (1) I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son Charles Lincoln arrives at full age, except to one another; nor shall either of my said sons have authority to mortgage or encumber said farm in any manner (377) whatsoever, except in the sale to one another, as aforesaid." And the Court held the condition to be void. Authorities in the courts of the States of the Union on this question can be found on both sides, but if we had to decide the question upon them we would give our preference to those which declare void such conditions. But we are not left to decide between these conflicting decisions. We think that the principle has been settled by the adjudications of our own Court. In the case of *Twitty v. Camp,* 62 N. C., 61, the question before the Court was upon a nonalienation clause in a will, which undertook to prevent the alienation by devisees in fee before they arrived at thirty-five years of age. And the Court held that the condition was contrary to the nature of the estate, and on that account void, and that the devisees had the full power to dispose of the property without incurring a forfeiture. The Court, referring to the case of *Pardue v. Givens,* 54 N. C., 306, in which was involved the attempt to prevent the alienation of a fee-simple estate during the lives of the devisees, and which condition was held

void, said: "The present case differs from that (*Pardue v. Givens*) only on the circumstances that here the restriction is confined to a disposition of the land under the age of thirty-five years. But this, we think, makes no difference. If the testator had the power to impose such a condition for thirty-five years, he might have imposed it for fifty, seventy or one hundred years, for we are not aware of any particular age up to which the restriction would be good, and beyond which it would be bad. Coke and Blackstone and other elementary writers lay down the rule generally that a condition of non-alienation annexed to the conveyance *inter vivos,* or to a devise of a fee, is void because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies." The same principle was decided and approved in the late cases of *Hardy v. Galloway,* 111 N. C., 519, and (378) *Pritchard v. Bailey,* 113 N. C., 521. The counsel of the plaintiff in his argument here referred us to the case of *Munroe v. Hall,* 97 N. C., 206, not as being directly in point, but as an indirect authority. In that case the testator, in his will, attempted the absolute restriction of all alienation. Of course, the Court held that that was void. The judge who delivered the opinion of the Court went on to say: "The rule, however, is not so comprehensive in its operation as to prevent all conditions and restraints upon the power of alienation. Such as are limited and reasonable in their application as to the time they must operate are valid and will be upheld." The learned judge cited as authority for this position 1 Washburn on Real Property, 67, 69, and 4 Kent Com. We have already referred to the unauthorized addition, as we think, of Washburn to the modification of the general principle, which modification allows restrictions of alienation in the conveyance of fee-simple estates, as laid down by Littleton and Coke, and Shepherd in the Touchstone, to be good when limited to a certain person or persons only. Upon a full examination of the learning on this subject in Kent's Commentaries, it will be seen that the illustrious author does not agree even with Littleton in his modification of the general principle which prevents all restraint upon the right of alienation in fee-simple estates. He adopts the rule without any modification. In volume 4, page 126, of his Commentaries, he says: "A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void. . . . If, however, a restraint upon alienation be confined to an individual named, to whom the grant is not to be made, it is said by every high authority (Littleton, section 361), to be a (379) valid condition. But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day." This author further says, at page 5, volume 4: "It (a fee

simple) is an estate of perpetuity and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple, and if a partial restraint be annexed to a fee as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple and becomes a fee subject to a condition."

Under the common law and the decisions of our own Court we find the question presented in this case free from doubt, and we are of the opinion that the condition which undertook to restrain the tenants in fee, Alfred M. Waddell, Jr., and Elizabeth S. Waddell, from aliening the property conveyed in the deed for five years from the death of the life tenant is void, and that they under the deed had, after the death of the life tenant, the full power of selling or otherwise disposing of the property without the danger of incurring a forfeiture for so doing.

AFFIRMED.

Cited: *Wool v. Fleetwood,* 136 N. C., 465; *Christmas v. Winston,* 152 N. C., 48; *Trust Co. v. Nicholson,* 162 N. C., 264; *Schwren v. Falls,* 170 N. C., 252; *Lee v. Oates,* 171 N. C., 722.

---

(380)

H. B. SHIELDS, ADMINISTRATOR OF BRAXTON SHIELDS, v. UNION CENTRAL LIFE INSURANCE COMPANY.

Administration—Appointment of Administrator of Resident of Another State Having Property in This State—Right to Sue Foreign Insurance Company.

1. The grant of letters of administration on the estate of a decedent who at his death was domiciled and had assets in another State, is valid if it be shown that he owned property then in this State, no matter how or when it was brought into the jurisdiction of the court granting such letters.

2. An administrator having in his possession a policy issued on the life of his intestate has a right to bring an action to recover the amount thereof, although an administrator has also been appointed in the State of the decedent's domicile.

3. A corporation of a foreign State is permitted to do business outside of the State in which it was chartered as a matter of comity, but always with the proviso that it is subject to the law of the State where it does business, and has no greater privileges than domestic corporations under its statutes, and a provision in the charter of a life insurance company that

it shall be sued only in the State where it was chartered and organized is no defense to an action by an administrator of a decedent in another State.

4. Sections 194 and 195 of The Code confer jurisdiction against all corporations doing business in this State.

ACTION, tried at August Term, 1906, of Moore, before *Starbuck, J.* The decedent, Braxton Shields, was domiciled at the time of his death in the State of Alabama, where according to the finding of the jury, he left sufficient assets, outside of the policy of insurance sued on in this action, to discharge his indebtedness due there. His body was brought to North Carolina and interred in Moore County, where he left assets, and where there were creditors of his estate, one debt due by said estate being a part of the burial expenses, and where his only (381) heirs-at-law (his brother, Thomas Shields, and Lydia Fry, wife of James Fry), reside. The decedent was at the time of his death engaged, under the firm name of Shields & Co., in the business of selling drugs in Selma, in the State of Alabama, with Clement Ritter, who is the sole surviving partner, and has, under the laws of the State of Alabama, the exclusive right to wind up the affairs of said partnership and settle its indebtedness. The intestate, outside of the obligations of the said partnership, owed in Alabama at the time of his death to L. A. Moore $75, evidenced by note dated 26 March, 1894, and his estate incurred liability there, after his death, to J. Brislin for a casket $70, and to Clement Ritter individually $139.60 for expenses of attention to and removal of the body of the deceased to North Carolina for burial. J. Brislin, who held the claim for $70, was duly appointed and qualified as administrator in Alabama. Subsequently the plaintiff H. B. Shields was appointed administrator by the Clerk of the Superior Court of Moore County, and was duly qualified. In order to facilitate the settlement of the estate, the administrator Shields and the heirs-at-law and distributees, Thomas Shields and Lydia Fry, together with her husband, entered into an agreement with the surviving partner, Clement Ritter, of Selma, Alabama. They sold and assigned to him all of the right, title and interest of Braxton Shields in the property and effects of the firm of Shields & Co., and authorized him (Ritter) to pay $70 due Brislin, and to reimburse himself for expenses incurred in bringing the body to Moore County for burial. Ritter executed a bond to indemnify Shields as administrator against any indebtedness of Braxton Shields as a member of the firm of Shields & Co., and all individual indebtedness of Braxton Shields. H. B. Shields signed an agreement to repay Ritter his own advancements for expenses after the death of the intestate, and to hold him harmless on account of his promise to pay (382)

Brislin $70 for the casket, provided the insurance policy sued on should be paid to him, or other funds received by him, sufficient to settle the indebtedness. Brislin assented to the agreement entered into with Ritter, and Ritter, who had possession of the policy, turned it over to Shields as administrator.

The issues and findings were as follows:

"1. Did the plaintiff's intestate die intestate in the city of Selma, in the State of Alabama? Answer: 'Yes.'

"2. At the time of his death was the plaintiff's intestate due his creditors for debts contracted in the State of Alabama? Answer: 'Yes.'

"3. Have letters of administration been granted on the estate of plaintiff's intestate in the State of Alabama, and if so, when? Answer: 'Yes, on 28 October, 1895.'

"4. Has the administrator of said intestate in the State of Alabama made a demand on the defendant company for the amount alleged to be due on the policy of insurance set out in the complaint? Answer: 'No.'

"5. Did the plaintiff enter into the contract and agreement with Clement Ritter, and said Ritter have executed and delivered the indemnifying bond, as alleged in the complaint of plaintiff? Answer: 'Yes.'

"6. Did Judson Brislin agree in February, 1895, to the arrangement and contract made by the plaintiff with Clement Ritter, as alleged in the complaint? Answer: 'Yes.'

"7. Was a part of the burial expenses of Braxton Shields contracted in the county of Moore, State of North Carolina? Answer: 'Yes.'

"8. At the time of his death was the domicile of the plaintiff's
(383) intestate, Braxton Shields, in the State of Alabama? Answer: 'Yes.'

"9. Is there sufficient assets in the State of Alabama belonging to the estate of Braxton Shields to fully pay off and discharge the indebtedness due from said estate in the State of Alabama, outside of the policy of insurance sued on? Answer: 'Yes.' "

The defendant admitted issuing the policy, the death of the insured, and its liability to the rightful representative of the deceased, but (among other defenses) averred:

"1. That it is denied that H. B. Shields is the duly appointed administrator of the estate of Braxton Shields, for the reason that the Clerk of the Superior Court of Moore County did not have jurisdiction to appoint the plaintiff such administrator, said appointment having been made on the ground that the plaintiff's intestate was a resident of the State of North Carolina at the date of his death; whereas, in fact, at the date of his death he was a resident of the State of Alabama.

"2. That at the date of his death said Braxton Shields was a resident of the State of Alabama, was engaged in business in said State, and was largely indebted to various residents thereof. The defendant further states that it is ready and willing to pay said policy to any administrator who shall properly and legally be appointed at the place of said Braxton Shield's domicile, but it denies the right of the plaintiff herein to compel the payment of said policy in the State of North Carolina."

As an amendment to its answer the defendant said:

"1. That since the filing of its answer herein letters of administration have been granted upon the estate of Braxton Shields to Judson Brislin, by P. G. Wood, Probate Judge of Dallas County, in the State of Alabama, of which said county and State the said Braxton Shields was a resident at the time of his death, and in which he died. (384) That said administrator has demanded of the said defendant company the amount due the estate of said Braxton Shields by reason of his death and the policy of insurance in this action declared on.

"2. That the defendant is advised and believes that the policy of insurance herein declared on is properly and legally payable (if at all) to the administrator of the estate of said Braxton Shields in the county of Dallas, in the State of Alabama, where the said deceased had his residence, owed debts and died; and that the plaintiff is not entitled to recover in this action for the reasons aforesaid."

The judgment rendered was as follows:

"It being admitted by the plaintiff that defendant company is a nonresident corporation, and a resident of the State of Ohio, and having a branch office in the State of North Carolina, it is adjudged that the plaintiff recover and take nothing by his suit, and that defendant recover from plaintiff and his surety the costs of action."

The plaintiff moved for judgment on the pleadings, findings of the jury and admissions. The Court denied the motion for reasons set forth in the judgment, and the plaintiff appealed.

Douglass & Spence for plaintiff.
Black & Adams for defendant.

AVERY, J. The grant of letters testamentary to H. B. Shields on the estate of Braxton Shields, upon proof that he owned property then in this State, no matter when or how such chattels were brought within his jurisdiction, was valid, although it appeared that the decedent at the time of his death was a resident of the State of Alabama, and left assets there also. *Hyman v. Gaskins,* 27 N. C., 267; Code, sec. 1374 (3). Being in under a valid appointment, and having in his hands

(385) the policy sued on, the law did not allow the debtor to contest his right to collect on behalf of the administrator in Alabama. Whether Brislin, as the administrator appointed in the jurisdiction where his domicile was at the time of death, could in a proper proceeding recover the policy, as an evidence of debt due the estate or the proceeds when collected, is a question that does not arise. The acts of an administrator who is not entitled to the appointment are not invalid. He is clothed with all the power of a properly constituted personal representative, and, though one who has the better right may insist upon his removal, he can not impeach his acts while in office. In so far as he who has been ousted has administered the estate his acts, like those of a *de facto* officer, are as valid and binding as if he had been the incumbent *de jure*. *Garrison v. Cox,* 95 N. C., 353; *Springer v. Shavender,* 116 N. C., 12; *Lyle v. Siler,* 103 N. C., 261; *London v. R. R.,* 88 N. C., 584. Having been appointed by a court having jurisdiction, and being bound to administer all assets that come into his hands or the hands of any other person for him, the plaintiff, with the policy in his possession, has the right to demand payment and the authority to have his demand, if resisted, enforced through the courts. Indeed, the law devolves upon him the duty of collecting it. *Williams v. Williams,* 79 N. C., 417. The payment of the money in satisfaction of a judgment in this action could not be hereafter drawn in question by Brislin, as administrator of the jurisdiction where he resided, leaving out of view all of the agreements between the heirs at law and distributees and the two administrators. *London v. R. R., supra.* Whether Brislin in his representative capacity could recover or whether the Alabama
(386) creditors could recover against the plaintiff, is a question which in no way affects the rights of the defendant.

It is needless for the reasons given to discuss or pass upon the effect of Brislin's execution of the agreement operating as an assignment. It is sufficient for the maintenance of this suit that the plaintiff is lawful administrator, and has in his hands an unpaid *chose in action* which the defendant owes to the decedent's estate.

The judge who tried the case below seems to have rendered judgment for the defendant upon a demurrer *ore tenus* to the jurisdiction on the ground that an action could only be brought against the defendant company, under the provisions of its charter, in the State of Ohio. It is familiar learning that a corporation is permitted to do business outside of the State where it is created, as a matter of comity, but always with the proviso that it is subject to the laws of the forum and has no greater privileges than domestic corporations under its statutes. *Barcello v. Hapgood,* 118 N. C., 712, at p. 728. The defendant has been brought

into court and has answered on the merits. The Code, secs. 194 and 195, confers jurisdiction against all foreign corporations doing business in the State, and provides for removal to the proper county when that named in the summons and complaint is not the proper one. *McMinn v. Hamilton,* 77 N. C., 300.

The Court below erred in refusing the plaintiff's motion for judgment, and the ruling below is reversed. The case must be remanded, to the end that judgment may be entered for the plaintiff in accordance with the verdict.

REVERSED.

Cited: Morefield v. Harris, 126 N. C., 627, 628; *Page v. Ins. Co.,* 131 N. C., 116; *Goodwin v. Claytor,* 137 N. C., 232; *Bank v. Pancake,* 172 N. C., 515.

(387)

S. S. TURNER v. GOLDSBORO LUMBER COMPANY.

Personal Injury—Action for Damages—Master and Servant—Vice-principal—Dangerous Occupation—Warning—Duty of Employer—Degree of Care—Evidence.

1. The test of the question whether one in charge of other servants is to be regarded as a fellow-servant or vice-principal is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal.

2. Where, in the trial of an action for damages sustained by the plaintiff as an employee of the defendant, it appeared that plaintiff was an inexperienced workman, employed to take boards from defendant's planing machine; that certain knives of the machine were dangerous to an inexperienced person, but were usually guarded by a shavings hood; that it was defendant's orders to leave the hood down while the knives were being adjusted and till, by passing boards through, they were found to be properly adjusted, and that at such time the plaintiff was asked to assist in taking a test-board from the machine, and in doing so his foot was brought in contact with the knives: *Held,* that defendant was negligent in failing to warn plaintiff of the danger from the knives when the hood was down.

3. The objection that a charge to the jury was not sustained by the evidence cannot be raised for the first time in this Court on appeal.

4. If a servant has equal knowledge with the master of the dangers incident to the work, and has sufficient discretion to appreciate the peril, his continuance in employment is at his own risk.

5. Where there are latent defects or hazards incident to an occupation, of which the master knows, or ought to know, it is his duty to fully warn

the servant of them, and he is liable for an injury resulting from his failure to do so, but the master is not liable for his failure to avert or avoid peril that could not have been foreseen by one in like circumstances and in the exercise of such care as would be characteristic of a prudent person so situated.

6. Where, in the trial of an action for damages for personal injuries, it appeared that the conditions were precisely the same as when plaintiff was injured, it was competent to prove that once before an employee had been injured by the exposed knives of a planing machine, as tending to show reasonable ground for the master to apprehend like danger if the knives should be covered.

7. In the trial of an action for damages for personal injuries sustained by plaintiff while working at the defendant's planing machine, evidence was properly admitted to show that the danger connected with certain parts of the machine could have been avoided by a slight alteration in such parts, since the failure to make such alterations tended to show want of due care.

ACTION to recover damages, tried at March Term, 1896, of PENDER, before *Starbuck, J.*, and a jury.

The following were the issues submitted to the jury and the responses thereto:

"1. Was the plaintiff injured by the negligence of the defendant? Answer: 'Yes.'

"2. If so, did the plaintiff, by his own negligence, contribute to his injury? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover? Answer: '$500.'"

S. S. Turner, the plaintiff testified as follows:

"I was injured 25 September, 1894. I was working for the defendant at Dover. I had worked for them nine days. I loaded cars three days and worked around the planing machine five days. Two of these days I helped a boy take lumber from the planer and put on the cars. They put the boy at something else and left me to take the lumber from the planer. While doing this I got my foot cut, I had been working at the planer four days. Carpenter called me to help pull out a board. One end of the board was in the planer and the other had run out of the planer and was on the bench. About twelve feet of the board was (389) out of the planer. Carpenter told me to go up close to the planer where Ricks was and help him pull the board out. I caught hold of the board—the floor was very slick from shavings and oil—and I set my foot up against a cross-piece on the machine to get a purchase to pull. I saw no danger. When I put my foot up the bits or knives caught it. It was done just as I put my foot on the cross-piece. The cross-piece is an iron that extends from one side of the machine to the other. It is a part of the machine. There are two cross-pieces. I

put my foot on the lower cross-piece. The bits or knives caught my foot right above the cross-piece and jerked it up against the upper piece, which caught and stopped my foot. Nearly half of my foot was cut off. There are two knives which revolve on a cylinder. Carpenter was foreman of the shop. Mr. Z. T. Brown, general superintendent of the defendant company, employed me to work. I had pulled boards out of the machine before I was hurt by catching hold of the end, but had never before gone right up to the planer to pull one. The place I usually stood in pulling boards was ten or twelve feet from the machine. In pulling this board I just caught hold there, and Carpenter told me to go up to the planer. This was the first time I ever worked around machinery. Carpenter told me to go to work at the planer. I had before been loading cars. I never had any instructions or warning in regard to the machinery. There is an iron frame in front of the knives, which keeps me, when standing up, from seeing the knives. I thought this frame was a protection against the knives. The knives can be seen by stooping down. I am 23 years old. I was 22 when my foot was cut, 25 September, 1894. I have little education and no business qualifications. My occupation is that of a common laborer. The defendant paid me 75 cents per day. My foot was cut off at the instep. . . . " (390)

Cross-examined: "The cross-piece I put my foot on was two feet from the floor. Carpenter told me to come and help pull out the board. He had hold of it eight feet from the machine and Ricks right at the machine. I caught hold where Carpenter was, and he told me to go up where Ricks was and catch hold. This was all that was said. I knew the knives were there, but thought they were protected. I had been working at the planing machine four or five days. I had seen the front of the machine let down, and I could then see the knives and see where they were. I do not think the shavings hood was bought with the machine. With the shavings hood up I could not have put my foot in. The shavings hood was down when I was injured. I did not take the shavings hood down. I do not remember who took down the shavings hood, but think it was Ricks. He usually took it down. They had been sharpening knives on the machine before 12 o'clock. Carpenter did not tell me not to put my foot up. Ricks had never cautioned me to be careful. Thompson had never cautioned me to be careful about the machine, it was dangerous; but did on one occasion, when I had my hand on the belt, tell me it might hurt me. . . . When I put my foot up to the machine I could see the hole between the cross-pieces. My attention was not attracted to something else, and I was not looking off when I put my foot up."

Reëxamination: "Carpenter assisted in adjusting the machine. He would give orders to me and Ricks. He would give orders about fixing

the machine. He was the foreman of the shop. Ricks made any common changes needed in the adjustment of the knives. If (391) anything particular was to be done Carpenter would do it."

James Carpenter, a witness for defendant, testified as follows: "I am foreman of the shops of the defendant company. I have had experience with machinery twenty years and have been with the defendant company thirteen years. The planing machine at which the plaintiff was injured is as good as is made. It is in good shape, and there is nothing defective about it. On the day the plaintiff was injured we were adjusting the machine by putting on extra knives. After putting on the knives we put a board in to run through the machine to see if it was properly adjusted. When the machine started off I told the plaintiff there were extra knives on, and to get out of the way. He stepped back to where he usually stood, ten or twelve feet from the machine. Ricks ran the plank out and called to the plaintiff to help him. Instead of standing where he was he ran up to the machine, caught hold of the plank and stuck his foot into the knives. I saw Ricks catch at his foot to keep it from going in. I did not tell the plaintiff to help Ricks pull the plank out. The shavings hood is made of heavy sheet tin. It is not part of the machine, but the defendant company had it made to be used with the machine for the purpose of catching shavings and carrying them under the machine. The plaintiff had taken the shavings hood down when we started to adjust the knives. It was necessary to take it down for that purpose. With the shavings hood up the plaintiff could not have been injured. I heard the plaintiff say, about six weeks after he was injured and after he had gotten out of the doctor's hands, that it was his own d—n carelessness that caused him to be injured. When the plaintiff stuck his foot into the knives (392) he was looking across the shop at some colored men. His foot did not strike the cross-piece at all. The cross-piece extends three inches below the knives."

Cross-examined: "A man named Faucette was injured about four years before, while in the employment of defendant, by another machine with a front just like this, and with knives that worked the same way and were protected the same way. Faucette slipped on the floor and his foot caught in the machine. (This evidence was objected to by defendant; overruled; excepted.) The machine was operated at Goldsboro without a hood. I did not caution plaintiff when he started to the machine. I cautioned the plaintiff at other times besides the day he was injured to be careful."

Redirect: "We were simply running a plank through the machine to see if the knives were properly adjusted."

Wm. Ricks, a witness for defendant, testified as follows:

"I have been in the employment of the defendant seven years, running a planing machine. The machine by which the plaintiff was injured was a good standard machine. There was no defect in it. The shavings hood was not a part of the machine. It was made to keep the shavings from falling on the floor, and to aid in carrying them off. With the hood up it was impossible for his foot to get into the knives. The plaintiff took down the hood when we started to adjust the knives. It was his business to take the planks as they came out of the machine. His place to stand was twelve feet from the machine. We were running a plank through to see if the knives were working all right. I was pulling the plank out and asked the plaintiff to help me pull it out. The board was twelve feet long and only about twelve inches of it was in the machine. When I asked him to help me pull it out I meant for him to pull where he stood, but he came up to me and raised his foot. I caught at it, but it went on the knives. Carpenter did not say (393) anything to him then. Just before the accident Carpenter cautioned him to stand farther off. I had cautioned him several times before to be careful about putting his hands about the bits or knives while in motion. Thompson, at the time of the accident, was about twelve feet distant, running another machine. The plaintiff could have helped me all right by pulling where he was standing. Carpenter set the knives on this occasion."

Cross-examined: "One could have seen the knives by standing in front of the machine. I have not told the plaintiff I did not caution him. The instructions from the defendant were to keep the shavings hood up while the machine was running, but not while we were adjusting the knives. The instructions as to the hood being kept up were given so the shavings might be carried off."

O. R. Rand, an admitted expert and witness for plaintiff, testified as follows: "I am a machinist and know the machine by which the plaintiff was injured. If you put your foot on the upper cross-bar, your foot will slip and the knives will catch it. [The bar ought to have extended down farther. If it had extended down four inches farther, as planing machines of other makes do that are in common use, there would be no danger, as a man could not possibly get his foot on the knives.] (Evidence in brackets objected to by defendant; objection overruled, and defendant excepted.) An inexperienced man could not see the knives nor their location in the front of the machine. The cross-bars do not come down low enough. If cross-bar was extended four inches lower, or plank put over the space between the bars, which would not

interfere with operating the machine, it would be safe for employees. This machine was dangerous. With shavings hood up plaintiff could not have been hurt."

Cross-examined: "This machine was in common use up to (394) a few years ago, but is being supplanted now by the Glencoe. The machine is still right commonly used. I have known James Carpenter fifteen or twenty years, and his general character is good. He is an experienced machinist and stands at the head of his profession in North Carolina for planing lumber. Rick's character good."

The Court charged the jury on the first issue (in part) that the defendant could not be held responsible for any alleged act or neglect on the part of Ricks or Carpenter, for they were fellow-servants with the plaintiff.

That the evidence shows that the machine was of standard make, in common use and reasonably safe as a planing machine. That a machine may contain a hidden danger and yet not be a defective or unsuitable machine. If it contains such a danger, that bare fact does not make the defendant negligent. Under the evidence in this case you can not find the defendant negligent for not having another or different machine.

["If you are satisfied that the plaintiff was inexperienced in the use of machinery, and that the knives were so arranged as to make them a hidden danger—such a danger as not to be obvious to inspection—then, if the defendant company, by the exercise of ordinary care—as will be hereafter explained—could have foreseen the happening of the accident, it became its duty either to provide an adequate protection against the knives or to give the plaintiff proper warning of the danger."]

The defendant excepted to the part of the charge in brackets.

Could the defendant company, by the exercise of the care to be expected of a man of ordinary prudence, have discovered that the arrangement of the knives, taking in consideration the manner in which the machine was used and the position and nature of the plaintiff's work, was (395) such as to give reasonable cause to apprehend that such an accident might happen, as did happen?

"If the accident was so unusual and unlikely to occur that the defendant, in the exercise of such care, would not have had reasonable cause to apprehend its occurrence, you will answer the issue, 'No,' without further consideration."

(To this the defendant excepted.)

"If the exercise of such care would have given such reasonable apprehension, then there was imposed on the defendant the duty of guarding

against its occurrence, not by getting another machine, but by providing an adequate protection against the knives, or by particularly pointing out to the plaintiff the hidden danger."

(Defendant excepted.)

"The evidence shows that the shavings hood while used was an absolute protection. If the defendant gave positive instructions to keep the hood up while the machine was being used, it performed its duty, and you will answer the issue "No." If, however, the instructions were simply to use the hood for the purpose of carrying off the shavings, and if the defendant failed to give the plaintiff proper warning of the alleged hidden danger, it failed in its duty and was negligent."

(Defendant excepted.)

Upon the question whether the defendant had reasonable ground to apprehend the happening of the accident, the Court recited the contentions on both sides, and among the circumstances relied upon by plaintiff mentioned and told the jury they might consider the injury to Faucette, testified to by the witness, James Carter.

(Defendant excepted.)

The Court charged on the second issue (among other things) (396) that plaintiff was bound to use his senses for his own information and protection, and to act and conduct himself with the care that the nature of his work and surroundings required of a man of ordinary prudence in the plaintiff's place.

"If plaintiff ever had information or knowledge, or if by ordinary care he could have had knowledge, that the knives were so arranged and located as to make it dangerous for him to put his foot where he did, he was negligent and the issue should be answered 'Yes.'

"If he had ever seen the knives projecting below the bar, then he was negligent in acting as he did, and it made no difference whether or not he had, at the time, forgotten about the location of the knives, the issue should be answered 'Yes.'"

There was a judgment for plaintiff for $500, and defendant appealed.

J. T. Bland and H. L. Stevens for plaintiff.
Allen & Dortch for defendant.

AVERY, J. Though the Court instructed the jury that James Carpenter, the foreman, was a fellow-servant of the plaintiff, and there was no exception to that ruling, it has been suggested that none of the exceptions must be discussed for the reason that, in any aspect of the evidence, Carpenter was a vice-principal, and in ordering the plaintiff to put himself in peril relieved him of culpability and rendered the defendant company liable for his carelessness. The test of the question whether one in charge

of other servants is to be regarded as a fellow-servant or a middleman is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior
(397) will or may be followed by a discharge from the service in which they are engaged. *Mason v. R. R.*, 111 N. C., 482; *S. c.*, 114 N. C., 718; *Shadd v. R. R.*, 116 N. C., 970; *Patton v. R. R.*, 96 N. C., 455; *Logan v. R. R.*, 116 N. C., 940, at p. 951. Though the authority to employ and discharge the laborers subject to him may be evidence to show that the fear of loss of employment, in case of disobedience of the orders of the company, is well founded, it is not essential that it should always appear that such authority is expressly given. *Mason v. R. R., supra.* To concede that is to afford opportunity to evade just responsibility by making the rule (where it neither will nor can be carried into effect) that the power to discharge shall be lodged in another than the immediate superior, though the latter's recommendations of dismissal from service are always acted upon favorably. *Mason v. R. R., supra.* The designation as foreman of the business or a branch of it does not, *ex vi termini,* import, as does the place of conductor or manager of an independent train and its crew, the existence of such authority as would of necessity inspire the fear of suffering such a penalty for disobedience. But, owing to the fact that the foremen of some establishments are clothed with different powers and sustain different relations towards their subordinates from those existing between superior and subordinate in other places, the circumstances in each case must be developed in order to determine whether the under-servant has acted in fear of losing his place on account of a disregard of the command of him who is above him in authority. Where a servant never comes in direct contact with, or receives orders or instructions from one higher in position or power than the foreman, he is justified in looking upon the foreman as the very embodiment of the authority of a corporation. *Mason v.*
R. R., supra; Bailey's Master's Liability, p. 341; McKinney, F. S.,
(398) sec. 41. There is therefore no inflexible rule, growing out of the name or term, that a foreman exercising authority over those who work in a manufacturing establishment is or is not a vice-principal, but the question whether he is a fellow-servant or *alter ego* of the company depends upon the proof in each case of the relations subsisting between the two. Wood, Master & Servant, sec, 450. Unless the relations of the two are a matter of universal knowledge, it devolves on him who would excuse carelessness on the ground that he was under the obligation to obey an order to show satisfactorily that his relations to the superior, under whose command he acted, were such as to inspire a well-founded fear of dismissal in case of disobedience. Wood, *supra,*

secs. 449 to 452. Where the servant or his representative meets this requirement the law holds the principal answerable. A corporation can not stipulate against or make regulations to protect itself againt the negligence of its servants without running counter to a well-defined rule of public policy. *A fortiori,* it can not evade its responsibility for the negligence of one who represents the supreme authority of the body in a particular branch or in all of its departments by taking shelter under a published by-law of the company. *Mason v. R. R., supra;* Wood, *supra,* sec. 278. Under the evidence developed in this case, it was not made to appear that the authority of Carpenter over the plaintiff was such as to raise the implication that the former represented the company as a vice-principal. The appeal therefore depends upon the merits of the other exceptions.

As to the application of the doctrine that a servant of a company contracts to incur all risks arising out of the negligence of fellow-servants, the Court further instructed the jury as follows: "The evidence shows that the shavings hood while used was an absolute protection. If defendant gave positive instructions to keep the hood up (399) while the machine was being used, it performed its duty, and you will answer the isue 'No.' If, however, the instructions were simply to use the hood for the purpose of carrying off the shavings, and if defendant failed to give plaintiff proper warning of the alleged hidden danger, it failed in its duty and was negligent." The duty of the company to warn an inexperienced servant of hidden danger in the use of machinery was explained to the jury as follows: "If you are satisfied that plaintiff was inexperienced in the use of machinery, and that the knives were so arranged as to make them a hidden danger, such a danger as not to be obvious to inspection, then, if defendant, by the exercise of ordinary care, as will be explained hereafter, could have foreseen the happening of the accident, it became its duty either to provide an adequate protection against the knives or to give the plaintiff proper warning of the danger."

Under the instructions the jury evidently inferred from the testimony of the witness Ricks that the orders of the company were to keep the hood down, as was done while the knives were being adjusted and afterwards, till by running a plank through it appeared that they had been properly arranged. The adjustment was being tested by passing a plank through with the hood down, according to the testimony of Carpenter, and, taken in connection with that of Ricks, it was the order of the company to keep the hood down, as was done until the knives were shown by experiment to be in proper place. If the jury believed the hood was down under

such orders when the plaintiff was injured, they were warranted in finding as they did, and the Court did not err in giving the instruction under which they acted in doing so.

(400) If, however, it did not appear that the testimony sent up in the transcript tended to show in any aspect that the hood was left down under the orders of the company, it is too late to take the exception here for the first time that there was in fact no evidence to sustain the charge. *S. v. Kiger,* 115 N. C., 746; *Holden v. Strickland,* 116 N. C., 185.

There was testimony from which the jury might have drawn the inference that the knives were so concealed from the view of one called upon to work as plaintiff was as to constitute a hidden danger, of which he had received no caution or warning, and had no actual knowledge.

Where the servant has no equal knowledge with the master of the dangers incident to the work, if the servant has sufficient discretion to appreciate the peril, he takes the risk upon himself on continuing in the employment. "Where there are latent defects or hazards incident to an occupation of which the master knows or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable for any injury which the latter may sustain in consequence of such neglect." Wood, *supra* (1 Ed.), sec. 349.

Where more than one inference may be drawn from the testimony by fair-minded men as to the controverted questions, it is held in the more recent adjudications of this Court that, after instructing the jury at the request of counsel, if made, as to the law of negligence applicable to particular aspects of the evidence, the Court may submit issues of negligence, with the instruction that it is the province of the jury to say whether the party whose conduct is in question has met the test rule of the prudent man. *Hinshaw v. R. R.,* 118 N. C., 1047 at p. 1054; *Russell v. R. R., ibid.,* 1098 at p. 1111. It is not error in explanation of that rule to tell the jury that the law requires the exercise of such care only as would enable one to provide against danger that he

(401) has reasonable ground to apprehend, and that he can by due diligence avoid. A person is not capable and answerable at law for failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated. It was not error to allow the jury, in the light of the other instructions given, to determine whether the defendant had used due diligence to protect the plaintiff, by ordering the hood to be placed over the knives, or by warning the plaintiff against hidden danger.

If the plaintiff had offered to prove that Faucette had been previously injured by a machine of a different kind operated by the defendant, the

testimony would have been clearly incompetent. But where it appeared that the conditions were precisely the same as when he was injured, the circumstance was properly allowed to go to the jury, as tending to show reasonable ground to apprehend like danger, if the knives should not be covered, when in motion at any subsequent time. *Pomfrey v. Saratoga,* 104 N. Y., 469; *District of Columbia v. Ames,* 107 U. S., 519; *Quinland v. Utica,* (74 N. Y., 603,) 11 Hun., 117; *Emery v. R. R.,* 102 N. C., 209, 228.

The evidence tended to show that the shape or extent of the hood could have been readily changed. It was admitted that the witness Ricks was an expert machinist. He testified that if the bar had extended four inches further down, as other planing machines do, there would have been no danger of catching or injuring the plaintiff's foot. If the testimony was material, it was clearly within the peculiar domain of an expert witness. The question whether a certain machine, or a given condition of the same machine, is dangerous is not so readily determined by untrained persons as by an experienced machinist. He had peculiar means of knowing whether there was danger and how it could have been averted in operating a machine. The testimony was material, (402) because it tended to show that the plaintiff could have removed the danger by a little alteration in the machine, and because his leaving the knives exposed with a knowledge that they were more dangerous when uncovered than other similar knives, and that another servant had been injured in the same way, were circumstances from which the jury might have inferred a want of care. The defendant was not bound to procure the best machinery, but it was its duty to exercise greater care when that in use was known, or might by inquiry and inspection have been ascertained to be, dangerous than when it was comparatively safe under all circumstances.

It is a well-settled principle that the care which the law requires of one who is using dangerous machinery becomes greater as the hazard increases. Upon a review of the whole case the judgment is

AFFIRMED.

Cited: Purcell v. R. R., post, 737; *Williams v. R. R., post,* 749; *Rittenhouse v. R. R.,* 120 N. C., 546; *Pleasants v. R. R.,* 121 N. C., 495; *Johnson v. R. R.,* 122 N. C., 958; *Ward v. Odell,* 126 N. C., 954; *Smith v. R. R.,* 129 N. C., 177; *Kiser v. Barytes Co.,* 131 N. C., 615; *Lamb v. Littman,* 132 N. C., 980; *Marks v. Cotton Mills,* 138 N. C., 408; *Ruffin v. R. R.,* 142 N. C., 127; *Hipp v. Fiber Co.,* 152 N. C., 747; *Horne v. R. R.,* 153 N. C., 240; *Beal v. Fiber Co.,* 154 N. C., 155; *Ensley v. Lumber Co.,* 165 N. C., 692; *Hollifield v. Telephone Co.,* 172 N. C., 724; *Sumner v. Telephone Co.,* 173 N. C., 31.

(403)

J. L. ANDREWS AND WIFE v. POSTAL TELEGRAPH COMPANY.

Trial—Issues—Instructions—Exceptions.

1. In the trial of an action against a telegraph company for damages for failure to send a telegram, in which contributory negligence had not been alleged by defendant, the court submitted issues involving (1) the negligence of the defendant; (2) the contributory negligence of plaintiffs; (3) the question whether, notwithstanding the contributory negligence of plaintiffs, defendant could by ordinary diligence have avoided the injury; and (4) the amount of damages: *Held*, that, as under the first and fourth issues, plaintiffs could develop their whole case and have every principle of law to which they were entitled applied in any aspect of the case, the submission of the issues as to contributory negligence (while not necessary) was harmless error.
2. Where, in the trial of an action against a telegraph company for damages for negligent failure to deliver a telegram, the jury answered the issue as to the negligence of the company in the affirmative: *Held*, that the verdict cured any error in the refusal of the court to give proper instructions prayed by plaintiffs touching the negligence of defendant.
3. A broadside exception to a charge "for error in the charge as given" will not be considered.

ACTION, for damages, tried before *Greene, J.*, and a jury, at May Term, 1896, of CUMBERLAND. There was a verdict for plaintiffs, assessing their damages at twenty-five cents, and from judgment thereon and for errors assigned (as referred to in the opinion of Associate Justice MONTGOMERY) the plaintiffs appealed.

N. W. Ray and G. M. Rose for plaintiffs.
J. C. and S. H. MacRae & Day, for defendant.

MONTGOMERY, J. This is an action for damages in which the (404) plaintiffs claim for injury alleged to have been received on account of the negligent failure of the defendant to send and deliver a telegram from the *feme* plaintiff to her husband, the other plaintiff, informing him of the death of her father, by reason of which negligence the plaintiff husband, it is alleged, was not notified of his wife's father's death in time to be present at the funeral, and to be with and console his wife, the consequence being that they both suffered great anguish of mind. The answer denies all the material allegations of the complaint, and on the trial the testimony, on the most important questions of fact, was conflicting and contradictory. The plaintiff alleged that when the telegram was delivered to the operator in Fayetteville 25 cents was paid for its sending, and the operator agreed and promised to send the same immediately, and the plaintiff introduced testimony to

this effect. There was testimony for the defendant, tending to show that the operator told the sender of the message that the operator at Elizabethtown, the point to which the telegram was directed, was not there; that he was out on the line on duty, and that he would have to accept the telegram subject to delay on this account. The operator at Fayetteville also testified that he often called the operator at Elizabethtown, and that he transmitted the message on first response to call. The operator at Elizabethtown testified that, after he returned to his office and received the telegram, he immediately went to every boarding house in town to find the plaintiff husband, but he was not to be found; that on the next morning he went to every store in the town in search of him, without avail; that when he was found he was outside of the free-delivery limits. Several witnesses testified also that the plaintiff husband said, after he had received the telegram, that the (405) delay in delivering it made no difference, as he could not have gone. The plaintiff denied that. The following issues were submitted to the jury, and were excepted to by both plaintiff and defendant:

1. Did defendant negligently fail to transmit or deliver the message as alleged? Ans. "Yes."

2. Did plaintiffs, by their own negligence, contribute to the injury? Ans.....

3. Notwithstanding the contributory negligence of plaintiffs, could defendant, by ordinary diligence, have prevented the injury? Ans. "Yes."

4. What damage, if any, have plaintiffs sustained by reason of the negligence of defendant? Ans. "Twenty-five cents."

We can not see why the second and third issues should have been submitted. Contributory negligence on the part of the plaintiffs had not been pleaded. But the exception of the plaintiffs to the issues ought not to be sustained, because under the first and fourth they were enabled to develop their whole case, and to have every principle of law to which they were entitled applied in any aspect of their case.

The plaintiff's exception to the charge, which was in these words, "for error in the charge as given," is not sufficiently explicit, and we will not review the charge. Exceptions to errors in the charge of the Court must be assigned specifically. *McKimmon v. Morrison,* 104 N. C., 362, and a long line of cases cited in Clark's Code, p. 382.

Many special instructions were prayed for by the plaintiffs, and the Court declined to give them, or any of them. They were each and all bearing on the subject of the negligence of defendant. If there was any error in refusing them it was cured by the verdict, for in response to the first issue (whether or not the defendant was negligent) the jury answered "Yes." There was no instruction asked concerning the rule

(406) by which the jury should estimate the plaintiffs' damages, and no proper exception having been made to the charge of the Court, in that or any other particular, the plaintiffs are bound by the verdict and judgment.

This Court, in *McNeill v. McDuffie, ante,* 336, has decided that the May Term, 1896, of CUMBERLAND, was held in accordance with law, and the plea to the jurisdiction was overruled.

The plaintiffs are not entitled to a new trial upon their exceptions, and the judgment is affirmed.

JUDGMENT AFFIRMED.

Cited: Helms v. Tel. Co., 143 N. C., 394; *S. v. Johnson,* 161 N. C., 266.

NOEL RILEY ET AL. V. W. J. B. HALL ET AL.

Action to Set Aside Deed Obtained by Undue Influence—Pleading—Trial—Discretion of Judge—Appeal—Exhibiting Paper to Jury—Issues—Validity of Deed—Undue Influence.

1. Where, in an action to set aside a deed alleged to have been obtained by undue influence, the complaint states that the said deed was obtained by the undue influence of the defendants over J. R. (the grantor), and of other persons in their behalf: *Held,* that the complaint states a cause of action.

2. The refusal by the trial court of a motion to require a party to make his pleading more explicit will not be reversed on appeal unless it appears that there has been a gross abuse of discretion.

3. The rule that evidence must be addressed to the ears and not to the eyes is to prevent the exhibition of papers about which there is some defect, such as forgery, erasure, etc., concerning which only expert testimony is admissible; but, when there is no defect in an instrument which has been put in evidence, it is not error to permit it to be exhibited to the jury during argument.

4. In the trial of an action, brought by persons admitted to be the heirs of a deceased person, to set aside a deed of their ancestor obtained through undue influence, and to recover the land conveyed thereby, it is not necessary to submit an issue as to plaintiff's ownership, the validity of the deed being the only question of fact involved.

5. In the trial of an action to set aside a deed alleged to have been obtained from the grantor by undue influence of the defendants and others in their behalf, evidence that the mother of the grantees had, prior to its execution, acquired a strong influence over the grantor, who was an old man, in poor health and of feeble mind; that she caused a separation between him and his wife, and continued to live with him until his death, is

admissible on the issue of undue influence in obtaining the deed, and, together with the failure of the grantees to show payment of but a small part of the value of the property, is sufficient to authorize the submission of the issue to the jury.

ACTION, to set aside a deed alleged to have been obtained from plaintiff's ancestor by the undue influence of the defendants and others in their behalf, and to recover the land conveyed thereby, tried before *Greene, J.*, and a jury, at May Term, 1896, of CUMBERLAND. The issues submited and the responses were as follows:

"1. Was the execution of the deed dated 29 September, 1887, from John Riley to W. J. B. Hall and the other defendants, obtained by the undue influence of the defendants, or any one in their behalf?

"Answer. 'Yes.'

"2. At the date of the execution of the said deed did the said John Riley have sufficient mental capacity to execute a deed?

"Answer. 'Yes.'

"3. If the said John Riley did have mental capacity to execute the said deed, was he at that time a person of weak and feeble intellect?

"Answer. 'Yes.'

"4. What was the value of the land described in said deed at (408) the time of its execution?

"Answer. '$3,160.'

"5. What was the consideration paid for the said lands by the defendants?

"Answer. '$200.'

"What is the actual rental value of the said land?

"Answer. '$200.'

Judgment was rendered, directing that the deed be delivered up and canceled, and that plaintiffs recover possession of the land and the sum of $1,600 damages for detention and costs. From this judgment defendants appealed. The facts necessary to an understanding of the opinion are set out in the same.

J. W. Hinsdale, MacRae & Day and J. C. & S. H. MacRae for plaintiffs.

N. W. Ray for defendants.

FURCHES, J. This action is for the purpose of declaring void a deed from John Riley to the defendants, dated 29 September, 1887, and for the possession of the land therein described. The plaintiffs, in the first article of their complaint, allege that on or about 29 September, 1887, John Riley, the father of plaintiffs, executed to W. J. B. Hall, J. R. Hall and I. J. Hall, the defendants in this action, a deed for the following tract of land (describing it).

In the second article of the complaint they allege that John Riley died soon thereafter, to wit, in February, 1888, leaving the plaintiffs his children and only heirs at law.

Third. That John Riley, at the time he executed said deed, was of weak and feeble intellect.

Fourth. That at the time of executing the deed he did not have (409) mental capacity to make a deed.

Fifth. That the said deed was obtained by the undue influence of the defendants over John Riley, and of other persons in their behalf.

Sixth. That the consideration paid was grossly inadequate, if anything at all.

Seventh. That said deed was obtained from John Riley by the fraudulent practices of the defendants, or of other persons in their behalf.

The eighth, ninth and tenth paragraphs are as to the possession of the defendants, and the eleventh is that the yearly rental value of the land is at least two hundred dollars.

Defendants contended that the allegations of the complaint were not sufficiently specific, and moved the Court to require plaintiffs to make them more specific, especially the fifth paragraph, or to strike them from the complaint. This the Court declined to do, and defendants excepted. We see no error, and can not sustain the exception. All that we can do is to see that a cause of action is stated. The manner of stating it, upon objection and motion to correct, must be left with the Court below as a matter of discretion, and can only be reversed on appeal where it appears to this Court there has been a gross abuse of discretion. *Wyche v. Ross, ante,* 174. This action had been investigated before the Court and a jury once before, when the jury failed to agree, and a mistrial was had. This, it would seem, was sufficient to give defendants such information as they demand in their motion, if they did not have it before.

Defendants then contended that the first issue had been found by the jury on the former trial in their favor, and should not be submitted to the jury again. But as the jury failed to agree, and a mis- (410) trial was ordered, we fail to see how this can be so, and the learned counsel who argued the case failed to cite any authority to sustain this position.

During the argument of the case the deed from John Riley to defendants, which had been introduced in evidence during the trial, was exhibited to the jury under the objection of defendants, and defendants excepted. And defendants say in their supplemental brief "There was no testimony that there was any defect in this deed."

This is the reason it was not error to allow it to be exhibited to the jury. This rule that defendant insists on, that evidence must be

addressed to the ears and not to the eyes, is to prevent papers from being exhibited to the jury where there is an alleged defect, as forgery, erasure, etc., where the matter depends on expert testimony, for the reason that the jury are not experts. This distinction has not always been kept in mind as it should have been. But still it is the rule that should be observed and which should govern in cases of the kind.

We have cases where the bastard child has been exhibited to the jury as evidence of paternity, where weapons used in affrays and homicides have been exhibited, and this evidence has been allowed and sustained by this Court. But if the rule was allowed to the extent claimed by defendant it would destroy the rule allowing the body to be exhibited, etc. The exception is not sustained.

John Horne, a witness for plaintiffs, in answer to a question (which is not stated) answered: "I am 67 years old. Knew John Riley ever since he was a little boy; I know his wife." Objected to. Again, question: "When did Sally Hall come to live with Riley?" Objected to by defendants. These exceptions are without merit and can not be sustained.

Defendants insist that the issues submitted are not sufficient to (411) determine the title to the land, that plaintiffs are claiming that they are the owners, and there should have been an issue submitted to the jury as to their ownership. This objection can not be sustained.

Defendants claimed under John Riley by deed from him. Plaintiffs claim as the heirs at law of John Riley. And it was admitted that he was dead, and that plaintiffs were his children and only heirs at law. So both plaintiffs and defendants claimed under John Riley, the common source, and neither party could dispute his title. So the question was as to the validity of the deed of 29 September, 1887, to the defendants. If it is valid, the defendants are the owners; if it is not, the plaintiffs are the owners. This result followed the finding on the deed as a matter of law.

Defendants objected to the 3d, 4th, 5th, and 6th issues. And it seems to us that the third issue might have been omitted. It is in its nature evidentiary, and it might have been supplied by the charge of the Court in its instructions upon the first issue. But if the Court chose to submit it as a distinct issue, we are unable to see what harm it could work to the defendants. His feeble condition of mind was certainly a proper subject for the consideration of the jury in making up their verdict on the first issue. And the fourth, fifth and sixth issues, under certain views of the case, were presented by the pleadings, and in our opinion proper, and this objection can not be sustained.

Defendants asked the Court to instruct the jury that all evidence introduced as to undue influence should be considered solely upon

determining that issue, and that they should not allow it to prejudice them, as to the defendants, upon any other issue. This the Court declined, and we think properly. It is proper for the Court to instruct the jury in proper cases that certain evidence is not substantive (412) but only corroborative, or that confessions or declarations of one defendant are not evidence against another defendant. But how the Court could instruct the jury as to what consideration they should give to substantive evidence, that was proper evidence against all the defendants, without invading the province of the jury, we are unable to see.

But if defendants had been entitled to this instruction, it appears from the case that the Court's failing to give it was harmless, as the only other issue that it could have had any bearing upon was the second issue, which is as follows: "At the date of the execution of the said deed, did the said John Riley have sufficient mental capacity to execute a deed? Answer: 'Yes.'"

This issue, being found in favor of the defendants, cures the error complained of, if there was error, and we are of opinion there was not.

The consideration of the foregoing questions brings the case down to the main question, of undue influence.

The jury having found that defendants' deed was obtained by undue influence, and there being no error found as to the evidence submitted to them, and no error appearing as to the instructions of the Court, the verdict must stand if there was any evidence, or any evidence upon which the jury might reasonably find, that there was undue influence. Then the question is—

Whether the facts testified to (because in considering this question we must take it that the jury found them to be true), that John Riley at the date of the deed was an old man, in bad health, having had two paralytic strokes, was of a weak and superstitious mind and intellect, had become enamoured of Sally Hall, the mother of defendants, who had supplanted Mrs. Riley in the affections of her husband, had been the cause of John Riley's whipping and abusing Mrs. Riley for (413) alleged insults to Sally Hall, and had actually caused a separation between John Riley and his wife; that Sally Hall was mistress of the house and carried the keys before Mrs. Riley left, and continued to live with John Riley until his death; that she was not only entrusted with the household duties, but also, to some extent at least, with the store; that she was in the habit of cursing John Riley in the presence of others, and he quietly submitting to this abuse without resentment; that John Riley had children of his own (plaintiffs), and the grantees (the defendants) were the children of Sally Hall and not his;

that John said that whenever the Halls wanted anything done there was no peace until it was done; that the land conveyed was worth more than three thousand dollars, and defendants were only able to show that they paid two hundred dollars; that it was in evidence that there was a note given by defendants for the land, which defendants alleged had been paid off, and if so, is presumed to be in their possession, and which they failed and refused to produce or account for; that one of the defendants, on the morning of the death of John, took a paper out of his desk, claiming it was the deed, and saying that he did not know what might happen; that he said after he had paid John Riley for the land, he refused to make the deed, until he threatened him with Tom Sutton—which, according to his own evidence (Bullock's), was not true, as he testified that he saw two hundred dollars paid, which was said to be the last payment, and that John then and there made the deed and he witnessed it; that defendants had lived on the land for many years prior to the making of the deed, as the tenants and laborers of said Riley; that the defendant John Hall, outside of this land, is not worth over five hundred dollars, and the other two defendants are worth very little; that the said John continued to live on the land and controlled the same until his death, the defendants referring a renter to him (414) after the date of this deed, under which they now claim title, is such evidence as should be submitted to the jury as tending to establish undue influence.

So taking *Wittkowsky v. Wasson,* 71 N. C., 451, and *Best v. Frederick,* 84 N. C., 176, as the correct exposition of the rule as to no evidence, or no sufficient evidence, to go to the jury, the defendant's exception can not be sustained. These cases are the leading cases on this question, and go as far or farther than any other cases we have to support the defendant's exception. And they are the cases cited by defendants and relied upon for their contention that there was not sufficient evidence to go to the jury. But, further, it seems to us that defendants' prayer for instructions to the jury admits that there was evidence sufficient to go to the jury, which is as follows:

"The defendants ask the Court to charge the jury that all the evidence admitted exclusively as to the issue upon undue influence, such as the relations between Riley and his wife, why they separated, the alleged relations between Riley and Mrs. Hall, and other kindred evidence, was admitted solely upon the issue of undue influence."

So, upon a full consideration of all this evidence and the prayer of defendants, we are driven to the conclusion that it goes far beyond *Wittkowsky v. Wasson, Best v. Frederick, supra,* or any case where it has been held not to be sufficient. It was properly left to the jury, and the Court would have committed an error not to have done so.

Defendants complain that there was not sufficient evidence to sustain the findings on the fifth issue as to the payment of two hundred dollars. We do not feel called upon to review the evidence on this question, first, for that it was not made until after verdict, upon a motion for a new trial, and was therefore too late. *S. v. Kiger,* 115 N. C., 746; (415) *S. v. Varner,* 115 N. C., 744; *S. v. Hart,* 116 N. C., 976. And for the further reason that this finding is not necessary to support the judgment of the Court in declaring the deed to the defendants void.

But we are of the opinion that defendants are entitled to a credit on plaintiffs' judgment against them of two hundred dollars and interest since 29 September, 1887, which seems to be the date of payment. With this modification the judgment is

AFFIRMED.

Cited: *S. v. Wilson,* 121 N. C., 657.

SILVER VALLEY MINING COMPANY v. NORTH CAROLINA SMELTING COMPANY ET AL.

Case on Appeal—Printing Record—Costs of Printing Record.

1. An appellant, being compelled to print the whole of the "case on appeal," he is, when successful in this Court, entitled to have taxed against the appellee the cost of printing the whole case on appeal and such other matter as may be required by Rule 31 to be printed, but not for the printing of matter beyond the requirements (if the whole is in excess of 20 pages).

2. Since all irrelevant and immaterial matter sent up as a part of the case on appeal unnecessarily adds to the cost of copying and printing, trial judges and counsel are admonished not to make cases on appeal dumping ground for the entire evidence and other minutiæ of the trial below.

MOTION, by successful appellant, to tax cost of printing record.

M. H. Pinnix, Watson & Buxton, and Robbins & Long for plaintiff.
Robbins & Raper for defendants.

(416) CLARK, J. The printed record is 80 pages, and the appellant being successful in obtaining a new trial here moves under Rule 31 to tax the cost of printing the excess above the regulation 20 pages in the costs. The appellant was compelled to print the whole of the "case on appeal" and the exhibits made a part thereof. *Barnes v. Crawford,*

ante, 127. He is therefore entitled to have taxed the cost of printing the whole case on appeal (*Durham v. R. R.,* 108 N. C., 403), and also of printing other matter besides, if of the nature required by the rule, but not for the printing of matter beyond the requirements (if the whole is in excess of 20 pages). *Roberts v. Lewald,* 108 N. C., 405. Counsel having agreed on the case on appeal, the losing party can not complain because taxed with the whole of the same with the exhibits made a part thereof though much of it might well have been omitted, being unnecessary to elucidate the point on review. Of the additional matters, probably some ten pages were not required by the rule and were unnecessarily printed. The clerk will therefore tax in the cost against the losing party the printing of 70 pages, being 50 pages in excess of the 20 allowed ordinarily.

In *Durham v. R. R., supra,* on p. 404, this Court cautions trial judges against the injustice and oppression which would follow if, to save labor to themselves, they should permit "cases on appeal to become dumping ground for the entire evidence and other minutiæ of the trial below," and that only "so much of the evidence or other matters occurring on the trial should be sent up as may be necessary to present and illustrate the matters excepted to." All irrelevant and immaterial matters sent up as part of a "case on appeal" unnecessarily adds to the cost of copying and printing, and should be avoided by counsel settling a "case on appeal" as well as by the judge.

MOTION ALLOWED.

Cited: Simmons v. Allison, post, 564; *Hancock v. R. R.,* 124 N. C., 228; *Parker v. Express Co.,* 132 N. C., 129; *Sigman v. R. R.,* 135 N. C., 183; *Cressler v. Asheville,* 138 N. C., 486.

---

(417)

SILVER VALLEY MINING COMPANY ET AL. V. NORTH CAROLINA SMELTING COMPANY.

Corporations—Insolvency—Fraudulent Conveyance.

1. Solvency or insolvency of a living person or a decedent's estate depends upon the question whether the value of the entire assets equals or is less than the total indebtedness.

2. A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property sufficient, if converted into money at market prices, to meet its liabilities.

MINING CO. *v.* SMELTING CO.

ACTION, to recover judgment for money due, against the North Carolina Smelting Company, and to set aside and cancel a mortgage executed by said North Carolina Smelting Company to defendant F. T. Johnson, and also to cancel judgments confessed by said smelting company to the other defendants than Johnson, and tried before *Greene, J.*, and a jury, at Fall Term, 1896, of DAVIDSON. The issues related principally to the solvency or insolvency of the defendant company at the dates of the mortgage and confessions of judgment. There was a verdict for the plaintiffs, and from the judgment thereon the defendant appealed. The exception upon which the decision of the appeal is based is set out in the opinion of Associate Justice AVERY.

M. H. Pinnix, Watson & Buxton, and Robbins & Long for plaintiffs. Robbins & Raper for defendant (appellant).

AVERY, J. Looking alone to the derivation of the words "solvent" and "insolvent," they mean respectively, able and unable to pay.

Whether the adjective insolvent is used to define the condition of (418) a decedent's estate or the financial status of a living person, its signification is the same. It means, unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. This is substantially the definition given by the reputable lexicographers, as will appear by reference to Webster's, Worcester's, or the Standard Dictionary; and not only is the same meaning given to the term by common acceptation, as it is used in the ordinary transactions of life, but, appyling the crucial test, we will find that in the discussion of almost every appeal involving an issue of fraud and depending in any way upon the ability of a debtor to pay his debts at the time of making a conveyance, the discussions in the opinions of this Court have been predicated upon the assumption that solvency or insolvency depends upon the question whether the entire assets equal or exceed in value the total indebtedness. Without specifying it would seem sufficient to refer to cases of this class everywhere, but the citation of a few of the later adjudications will suggest numberless others. *Bank v. Adrian,* 116 N. C., 537; *Peeler v. Peeler,* 109 N. C., 628; *Berry v. Hall,* 105 N. C., 154; *Helms v. Green, ibid.,* 251; *Brown v. Mitchell,* 102 N. C., 347; *Woodruff v. Bowles,* 104 N. C., 197. It would prove subversive of settled principles, and would tend to impair credit and embarrass trade, to give our sanction to a definition of an insolvent that would bring within the class of which it is descriptive every person, natural or artificial, who in the course of active business is unable to meet the demands of creditors without borrowing money.

The Court below instructed the jury that "property is not a legal tender in payment of debt, and a debtor has no right to pay a debt with property of any kind. Therefore the amount of defendant's (419) corporate property (if you believe it consisted mostly of valuable mining machinery) was of little consequence. If defendant was unable to pay its matured debt in lawful money, and if it was unable to pay its debts from its own means, and had to obtain money from the personal endorsement of other parties with which to pay maturing obligations, then the defendant was, in contemplation of law, insolvent."

The instruction asked, and in lieu of which the foregoing was given, was as follows:

A corporation is not insolvent so *long as it has property sufficient to meet its liabilities,* and *there is no evidence sufficient to go to the jury that, at the time said mortgage was executed, said corporation did not have property sufficient to meet its liabilities,* and therefore the jury should find and answer the issues as to insolvency accordingly, and there is no evidence sufficient to go to the jury that said mortgage was given in contemplation of insolvency, and the jury should so find.

It is needless to discuss other exceptions. For the error in substituting the instruction given for that prayed for the defendant is entitled to a

NEW TRIAL.

(420)

P. A. HEDRICK, ADMINISTRATOR OF W. A. DARR, v. ELI BYERLY AND WIFE, SUSAN BYERLY.

Action to Foreclose Mortgage—Limitations—Husband and Wife—Wife's Land as Surety for Husband's Debt.

1. Although a debt may be barred by the statute, yet a mortgage by which the debt is secured, if itself not barred, may be foreclosed by the mortgagee in proceedings for that purpose.

2. While a married woman's land, which has been mortgaged to secure her husband's debt, is to be treated as a surety, and will be discharged by any act of the creditor or principal which would release any other surety, yet the fact that action on a note signed by husband and wife and secured by mortgage on the wife's land is barred as to her, does not bar a suit to foreclose the mortgage.

ACTION, tried before *Hoke, J.,* at Spring Term, 1896, of DAVIDSON. The facts appear in the opinion of Associate Justice MONTGOMERY. There was judgment for plaintiff and defendants appealed.

Robbins & Raper for plaintiff.
Walser & Walser, and R. T. Pickens for defendant.

MONTGOMERY, J. This action was commenced 6 August, 1895, to foreclose a mortgage on real estate. The land conveyed was the property of the *feme* defendant, and the debt that of the husband, evidenced by a sealed promissory note executed by both of the defendants and payable 1 November, 1884. A payment was made on the debt 8 September, 1893. The *feme* defendant requested his Honor to hold as matter of law "that the land mortgaged, being the property of the wife, put her interest in position of surety to the debt of the husband. That the (421) demand as to her was barred in three years, and that no act of the husband after the three years had run could renew or continue the lien or mortgage on the land of the wife for the debt of the husband." His Honor refused to so decide as to the mortgage, and held that the payment made by the husband on the debt within ten years from maturity would continue the lien of the mortgage. There was no error in this ruling. "It is well settled by repeated decisions of this Court that where a wife joins her husband in a conveyence of her separate property to secure a debt of the husband, the relation which she sustains to the transaction is that of surety." *Purvis v. Carstarphen,* 73 N. C., p. 581; *Gore v. Townsend,* 105 N. C., 228; *Hinton v. Greenleaf,* 113 N. C., 6. And it is also true that whatever act which, on the part of a principal, would discharge a surety, would also discharge the property of the wife from liability under a mortgage or deed of trust made to secure the debt of her husband. *Hinton v. Greenleaf, supra.* But it is to be borne in mind that a married woman can not, in this State, make a legal contract, either as principal or as surety for her husband, which will bind her real estate.

She can, if she chooses, charge her separate real estate with the payment of a debt of her husband by way of mortgage or deed of trust with privy examination. *Farthing v. Shields,* 106 N. C., 289. Therefore, when a married woman charges her separate real estate with the payment of her husband's debt, the land is not conveyed to make good any legal contract that she has made with the creditor, but to secure the husband's contract to make good his debt by a charge on her separate estate. She, by her act, makes no contract, but appropriates the property conveyed in the deed to the payment of her husband's debt, and as long as the mortgage is not barred by the Statute of Limitations the (422) lands can be subjected to the payment of the debt. And it has been held in the case of *Cross v. Allen,* 141 U. S., 528, that the payment of interest by a husband upon his note, secured by a mortgage upon the separate real estate of his wife, operates to keep alive the

mortgage security. But for the sake of the argument, suppose it be admitted that the *feme* defendant's plea of the Statute of Limitations had been a good one and so held by the Court below, it could avail her nothing. The Statute of Limitations defeats the remedy when the note is sued upon, but it does not discharge the debt; and, although the debt might be barred by the statute, yet the mortgage by which the debt is secured, if itself not barred, may be foreclosed by the mortgagee in proceedings for that purpose. *Capehart v. Dettrick,* 91 N. C., 344; *Arrington v. Rowland,* 97 N. C., 127; *Jenkins v. Wilkinson,* 113 N. C., 532.

NO ERROR.

Cited: Smith v. B. & L. Assn., ante, 259; *Sherrod v. Dixon,* 120 N. C., 67; *Meares v. Butler,* 123 N. C., 208; *Fleming v. Barden,* 127 N. C., 215; *Harrington v. Rawls,* 131 N. C., 40; *Menzel v. Hinton,* 132 N. C., 663, 672.

W. L. CECIL v. W. F. HENDERSON.

Trial—Witness—Impeaching Question—Inadmissible Question.

In the trial of an action to which the defendant had set up the plea of the statute of limitations, it was improper to allow the plaintiff to ask the defendant on cross-examination, for the purpose of impeaching him, whether he had not interposed the same defense to various claims previously.

ACTION, tried at Spring Term, 1896, of DAVIDSON. The facts appear in the opinion of Chief Justice FAIRCLOTH. There was a verdict for the plaintiff, and defendant appealed from the judgment thereon.

M. H. Pinnix for plaintiff.
Shepherd & Busbee, and Walser & Walser for defendant. (423)

FAIRCLOTH, C. J. Action on a note against defendant, as surety for one Loftin. Plea, Statute of Limitations.

The controversy on the trial was whether defendant had agreed with plaintiff not to rely on the Statute of Limitations. The evidence on that question, of plaintiff and defendant, was conflicting. On cross-examination the defendant was asked, for the purpose of impeaching the witness, if he had not pleaded the Statute of Limitations to various claims, specifying them. Objection by defendant overruled. Exception.

The plaintiff insists that the question is not prejudicial to the defendant, and relies on *Bost v. Bost,* 87 N. C., 477. That case does not support his contention, because the question was not asked for the purpose of impeaching any witness or party to the action, but went only to the testamentary capacity of the testator. No Court can allow a suitor or witness to be impeached or discredited because he had entered a plea allowed by statute and enforced by the courts. The question then was irrelevant; and, if answered in the affirmative, it would have been the duty of the Court to withdraw the same from the jury. The admission of the question would allow an appeal to local prejudice, if any should exist, on the question of pleading a debt out of date, as it is usually termed in the country, and this would result in trying the same question in different localities according to local sentiment, and there would be no uniform rule to govern courts and juries. The principle announced was decided in *Russell v. Hearne,* 113 N. C., 361, where the question was, Did not the plaintiff have the reputation of suing for usury, and if he had not so sued before? Held incompetent.

NEW TRIAL.

Cited: Johnson v. R. R., 163 N. C., 450.

---

(424)

A. F. CATHEY v. W. F. SHOEMAKER.

Trial—Witness—Impeachment—Appeal—Omission of Judge to Recapitulate Testimony Must be Objected to Before Verdict.

1. While the answer of a witness to a collateral question, drawn out on cross-examination, is ordinarily conclusive, yet, when such question is as to declarations of the witness and is asked to show his temper, bias, or disposition, and he is apprized of the time and place of the declarations, the opposite party is not bound by the answer but may contradict the witness by other testimony.

2. The omission of the trial judge to recapitulate any portion of the testimony which a party may deem material should be called to the attention of the judge at the conclusion of the charge, so as to give him an opportunity to correct the omission. After verdict, it is too late to except to the omission.

3. Where, in the trial of a summary process of ejectment, on appeal, there was testimony tending to show that, after some contentions between plaintiff and defendant, the latter agreed to work the crop to the satisfaction of the plaintiff, if he were allowed to remain on the land, and that, if he failed to do so he would surrender possession, it was not error to instruct the jury that, if such agreement was made by the defendant,

his violation of it was a forfeiture of the lease, and the plaintiff had a right to eject the defendant by summary proceedings before the justice of the peace, and the jury should answer in the negative an issue as to whether the removal of the defendant was wrongful.

Summary proceeding in ejectment, commenced before a justice of the peace, and tried before *Hoke, J.*, and a jury, at February Term, 1896, of IREDELL.

1. Plaintiff alleged that he rented to defendant a tract of land in 1895 —plaintiff to furnish supplies, defendant to cultivate crop, and that defendant failed to comply with the terms of the lease.

2. Plaintiff demanded that he comply with the terms or quit, (425) and defendant thereupon expressly agreed to surrender and deliver up the premises, provided the crop was not worked according to agreement; and thenceforward defendant failed to comply, and declined to permit plaintiff to cultivate the crop and save it from loss or damage, whereupon plaintiff demanded possession and brought suit.

3. Plaintiff furnished supplies to defendant in excess of the value of defendant's interest in the crop, the said value having been decided by reference to W. Hanner and M. C. Caldwell, by agreement between plaintiff and defendant.

4. That defendant damaged plaintiff by reason of his failure to cultivate the crop, about $30. Wherefore plaintiff demanded judgment for possession and damages, etc.

Defendant, answering, denied allegation in first paragraph of complaint, except as to the renting and furnishing of supplies.

2. Denied allegation in second paragraph, except as to agreement that plaintiff might cultivate crop, and that he brought suit.

3. Denied allegations in paragraphs 3 and 4. And further answering he averred that he fully complied with contract, and while in possession the plaintiff instituted suit against him without just cause, and he was ejected from the premises and thrown out of employment for himself and family, without a place to shelter them, one of his children being seriously sick at the time, and that plaintiff took possession and received the proceeds of the crop to his own use without paying defendant anything for his labor, and that thereby he had been damaged $200. Wherefore he demanded judgment, etc.

"Issues: 1. Was defendant willfully and wrongfully removed from premises? Ans. 'No.'

"2. What amount is due plaintiff for advancements to defend- (426) ant on his crop? Ans. '$49.69.'

"3. What was the value of defendant's interest in the crop? Ans. '$45.'

"4. What damage is defendant entitled to recover by reason of his wrongful removal, over and above his interest in the crop? Ans. 'Cathey, supplies, $49.69; value of defendant's interest in crop, $45; balance due Cathey $4.69.'"

On the first issue the Court charged the jury that a landlord had no right to eject a tenant simply because the crop was not worked to his own notion. To warrant such procedure there must be some breach of agreement which, by the terms of the contract, was to forfeit the lease; that if plaintiff and defendant, after agreement to surrender the original lease and arbitrate, had entered into a new agreement by which defendant had agreed to vacate premises unless the land was properly worked, and defendant willfully failed thereafter to properly work and was ejected for that reason, then the ejectment was rightful, and the jury should answer the first issue "No." Defendant excepted. But if defendant had worked properly, and if the neglect was caused by plaintiff's failure to comply with his contract and furnish sufficient supplies to defendant, then defendant was in no default, and the jury should answer the issue "Yes."

In reciting the evidence to the jury on the question as to whether defendant had willfully failed to work the land after the new agreement, the Court stated that the only evidence for defendant which the Court could recall was evidence of the defendant and his wife, and recited the evidence of them and the other witnesses as the Court recalled it. Defendant's counsel did not except to this at the time, but did except on the motion for a new trial and before the judgment was
(427) signed.

When defendant was being examined as a witness he was asked by the plaintiff, and properly cautioned, if he had not told one Allison, after this suit had begun and a short time before plaintiff's barn was burned, that he wished he could see the plaintiff's house on fire and the plaintiff burned up in it. Defendant denied ever having made any such statement. Plaintiff was then permitted to show by witness Allison, over defendant's objection, that defendant had made such statement to him, and defendant excepted. Verdict for plaintiff. Motion for new trial for alleged errors in charge and for errors in ruling on questions of evidence. Motion overruled, defendant excepted and appealed from the judgment rendered.

Robbins & Long for plaintiff.
No counsel for defendant.

CLARK, J. The answer of a witness to a collateral question, drawn out on cross-examination, is ordinarily conclusive; but this is subject to the

exception that when, as in this case, the impeaching or collateral question is as to a declaration of the witness and is asked to show the temper, bias or disposition of the witness, and he is given the time and place of the alleged declaration, the opposite party is not bound by the answer, but may contradict him by other evidence. 1 Greenleaf Ev., sec. 450; *S. v. Patterson,* 24 N. C., 346; *Jones v. Jones,* 80 N. C., 246.

When the judge fails or omits to recapitulate any portion of the evidence which a party deems material, he must call it to the judge's attention at the conclusion of the charge, that he may have opportunity to correct the omission. It is too late to except to the omission for the first time after verdict. *S. v. Grady,* 83 N. C., 643; *S. v.* (428) *Reynolds,* 87 N. C., 544.

The exception to the charge, in the particular specified, is also without merit.

NO ERROR.

Cited: S. v. Murray, 139 N. C., 545.

F. H. STITH, EXECUTOR OF N. L. SMITH, v. A. B. JONES ET AL.

Judgment of Nonsuit—Motion to Set Aside—Excusable Neglect—Reference by Consent—Failure to Prosecute.

1. The fact that a plaintiff may, when nonsuited, bring a new action within a year does not prevent the judgment being set aside, like any other judgment, on the ground of excusable neglect, but to authorize the court to set aside such judgment excusable neglect must clearly appear.

2. Where, after the failure of the plaintiff for four and a half years to prosecute an action that had been referred by consent, a motion for nonsuit was made during the first week of a term of court, and adjourned for hearing until the next week, it was inexcusable neglect in the plaintiff to give no attention to the matter, it not appearing that he or his counsel was prevented, by sickness or other cause, from so doing.

3. While it is ordinarily the rule that consent references cannot be set aside except by consent or by the death of the referee, yet the court retains jurisdiction of the action and may direct a nonsuit for failure to prosecute it.

4. The failure of a plaintiff for four and a half years to prosecute an action which has been referred by consent, authorizes the court to enter a nonsuit for such neglect.

5. The discretionary power of the trial court to set aside a judgment duly rendered exists only where excusable neglect is shown; and where a

judgment setting aside the nonsuit was not based on excusable neglect, but is stated to have been on the ground that the nonsuit was "improvidently and erroneously adjudged," the action of the lower court in setting aside the judgment of nonsuit will be reversed.

MOTION of plaintiff, heard at Fall Term, 1896, of DAVIDSON, before *Greene, J.*, to set aside a judgment of nonsuit entered at Fall Term, 1895, of said court. The motion was granted, and defendants appealed. The facts appear in the opinion of Associate Justice CLARK.

J. B. Batchelor and Robbins & Long for plaintiff.
R. O. Burton for defendants (appellants).

CLARK, J. This action was begun in 1886, and was referred by consent at March Term, 1889. The referee held two or three sittings, the last being in February, 1891. Thereafter the plaintiff took no further steps to procure a hearing or to have the report made, and at Fall Term, 1895, the cause being reached regularly on the docket, the defendant moved for judgment as of nonsuit. This motion was continued over till the second week, when, the case being reached, the plaintiff was called, and not appearing by counsel or in person, judgment was entered as of nonsuit. It is true that the plaintiff, after nonsuit, can bring a new action within a year, but we do not concur with appellant that therefore a judgment of nonsuit can not be set aside, like any other judgment, if there was excusable neglect, because a plaintiff in such cases might be unjustly mulcted in a large bill of costs or otherwise prejudiced when not in default. We think, however, the facts in this case do not show excusable neglect on the part of the plaintiff. The delay to
(430) prosecute the case before the referee, or to take any steps to secure a report, or to give any attention whatsoever to the case from February, 1891, till September, 1895, a period of more than four years and a half, was inexcusable neglect. When the case was reached the first week of the term, and that state of facts appeared, his Honor might well have adjudged that the plaintiff had failed to prosecute his action. The case was continued over to the second week, with the motion to nonsuit still pending, and the parties to an action pending in court are fixed with notice of all motions therein made at term. *Coor v. Smith,* 107 N. C., 430; *Wilson v. Pearson,* 102 N. C., 290; *Spencer v. Credle,* 102 N. C., 68; *Hemphill v. Moore,* 104 N. C., 379; *Stancill v. Gay,* 92 N. C., 455; *University v. Lassiter,* 83 N. C., 38; *Sparrow v. Davidson,* 77 N. C., 35. When, therefore, the case was again regularly reached on the second week, the plaintiff certainly should have shown cause why the nonsuit should not have been entered. It was inexcusable neglect not to have shown that much attention to the case, for the judge does not find that

the plaintiff or his counsel was sick or unable to attend. Besides, upon the facts now shown by him, if the plaintiff had been present he could not have successfully opposed the nonsuit, when for four years and seven months he had given no attention to the cause.

It is true that ordinarily the rule is that a consent judgment can not be set aside except by consent or the death of the referee, (Clark's Code, p. 405, 2d Ed.,) though there may be exceptions to that rule as to most others. This, however, is not an attempt to set aside a consent reference, but a dismissal of the action for a failure to prosecute it, and such failure may be shown by long-continued failure to prosecute it before the referee as well as in any other way (431) (*McNeill v. Lawton,* 99 N. C., 16), for the Court retains jurisdiction of the action. If this were not true, then, if a plaintiff can once get his case referred by consent, and finds it likely to go against him, he can vex the defendant by continuing it indefinitely. Judges and lawyers might come and go, but that case, like Tennyson's brook, would

"go on
Forever and forever."

The judge does not find that there was excusable neglect, nor does he find facts which would justify such conclusion of law. If there was excusable neglect, the judge in his discretion might set aside the judgment or refuse to do so, and the exercise of such discretion is not reviewable. *Simonton v. Lanier,* 71 N. C., 498; *Brown v. Hale,* 93 N. C., 188. But the discretionary power only exists when excusable neglect has been shown. Code, sec. 274.

The judgment setting aside the nonsuit is not based upon excusable neglect, or indeed any other ground, but the "case on appeal" settled by the judge apparently rests his action on the ground that the nonsuit "was improvidently and erroneously adjudged." If so, it could only have been corrected by an appeal.

The action of the Court below in setting aside the nonsuit is

REVERSED.

Cited: Cowles v. Cowles, 121 N. C., 275; *Vick v. Baker,* 122 N. C., 100; *Manning v. R. R., ib.,* 831; *Marsh v. Griffin,* 123 N. C., 667, 670; *Norton v. McLaurin,* 125 N. C., 188; *Hardy v. Hardy,* 128 N. C., 183, 184; *Koch v. Porter,* 129 N. C., 136; *Clement v. Ireland, ib.,* 222; *Morris v. Ins. Co.,* 131 N. C., 213; *Riley v. Pelletier,* 134 N. C., 318; *Wooten v. Drug Co.,* 169 N. C., 66; *Hardware Co. v. Banking Co., ib.,* 746; *Lumber Co. v. Cottingham,* 173 N. C., 327.

(432)

J. W. CAUDLE AND WIFE v. W. E. MORAN.

Practice—Irregular Judgment—Order in One Action Invalid as Affecting Separate Action.

1. While an action to foreclose a contract for the sale of land was pending, an attachment was sued out against the defendant and levied upon personal property. The plaintiffs also brought summary process of ejectment before a justice of the peace, and from a judgment removing the defendant from possession the latter appealed to the Supreme Court. Defendant afterwards moved in the foreclosure action for an order vacating the attachment and restoring him to possession of the land: *Held*, that an order restoring the defendant to possession, made in the foreclosure action before the appeal in the ejectment case had been tried, was erroneous.
2. In such case, however, it was proper to appoint a receiver of the rents and profits of the land.

ACTION, pending in STOKES, heard before *Norwood, J.*, at chambers, in Winston, on 18 May, 1896, on motion of defendant. The facts appear in the opinion of Associate Justice FURCHES. Plaintiffs appealed.

A. M. Stack and Jones & Patterson for plaintiffs.
Watson & Buxton for defendant.

FURCHES, J. It appears from the pleadings in this case that plaintiffs sold the defendant a tract of land and gave him a bond for title when paid for; and the defendant executed to plaintiffs his note for the purchase-money and a sale of the land.

That after this action was commenced the plaintiffs sued out warrants of attachment, which were levied upon certain articles of personal property of the defendant.

That after this action was commenced the plaintiff also commenced summary proceedings in ejectment before a justice of the peace
(433) against the defendant for possession of this same land, *and managed the matter so that he got judgment and turned the defendant out of possession.*

The defendant appealed from this justice's judgment to the Superior Court, where the case now stands for trial, as well as this action, brought for the purchase-money.

The defendant, wishing to have the said attachments vacated, upon notice moved the Court for an order vacating the same; but as the parties were not able to have the same heard at Stokes court they agreed that it might be heard at Forsyth court, which was done.

Upon this hearing the Court refused to vacate the attachments, but made an order restoring the defendant to the possession of the land

from which he had been ejected by the justice of the peace, and appointed a receiver of the rents and profits. The plaintiff, being dissatisfied with that part of the order restoring the defendant to possession, excepted and appealed.

However just this order of restitution may have been, it was a legal error and cannot be sustained. It was erroneous because it was not made in the case then being heard by the Court, but in another case then pending, and for trial in Stokes County. It was erroneous because it was made before the case on appeal was tried, in which the defendant was ejected.

The order appointing a receiver seems to us to have been proper, and that part of the order is affirmed. But that part of the order restoring the defendant to the possession of the land is erroneous and is reversed.

ERROR.

---

(434)

A. M. STACK v. N. M. PEPPER ET AL.

Action of Trespass Quare Clausum Fregit—Boundaries—Survey—Presumption as to Mode of Survey—Surface and Perpendicular Measurement.

1. While the surface and not the level or horizontal mode of measurement is generally adopted in surveys, and the general presumption is that a survey of the surface was contemplated by the parties to a deed, yet that presumption prevails only where it appears feasible and reasonable to have pursued that course.

2. Where a line of survey crossed a perpendicular cliff at a place where it could not be climbed, and to give the quantity of land called for by the survey and to take the line to a boundary shown to have been marked in an old survey, it was necessary to exclude the distance up the face of the cliff, it was not error to instruct the jury to exclude it in determining the boundary.

ACTION FOR DAMAGES for alleged unlawful entry upon land and cutting and carrying away wood, tried before *Brown, J.*, at Fall Term, 1895, of STOKES. A verdict was rendered for plaintiff, but judgment not having been entered thereon at that term, judgment *nunc pro tunc* was entered at Fall Term, 1896, by *Hoke, J.*

A. M. Stack, J. T. Morehead and Jones & Patterson for plain- (438)
tiff.

W. W. King, A. E. Holton and H. R. Scott for defendants (appellants).

AVERY, J. It is a fact generally known and acknowledged that in all of the early surveys of entries, and in most of the latter ones, made in this State, the surface and not the level or horizontal mode of measurement is shown to have been adopted. This is the general rule, and the courts take notice of this fact and presume that lands embraced in grants and deeds were originally measured in that way, both because it is a matter of general knowledge that such has been the custom and because the judicial annals of the State are corroborative of that fact. *Duncan v. Hall,* 117 N. C., 443. The surveyor testified to this custom as universally adopted by practical surveyors.

While, however, the presumption is generally that a survey of the surface was contemplated and adopted by the parties to a deed, that presumption prevails only where it appears feasible and reasonable to have pursued that course. On the contrary, the courts will not assume that the surveyor and chain-bearers procured ladders and climbed over a rugged boulder or cliff situated as in this instance, but that they adopted practicable methods. It is well known that where surveyors encounter a river at a point where it is lined with rocks rising above the surface, and it proves impassable by ordinary methods, the distance across is determined by making an offset and running up and down from the actual point of crossing, not by climbing over the sides
(439) of the rocks. It was not improper for the Court to instruct the jury in this instance that the surveyor, if his testimony was believed, ascertained the distance, and thereby fixed the location of the disputed corner by the correct mode of measurement. The surveyor Shelton testified that if he included the distance from the bottom of the cliff up its perpendicular surface to the top as a part of the 23¾ chains called for the disputed land would not be embraced within the boundaries of the deeds under which plaintiff claimed title; but if, instead of measuring up this surface, he walked around and measured from the top of the cliff, the defendant would, under that theory of surveying, be a trespasser. The distance up the cliff could only have been ascertained by letting fall a line from the top to the bottom, as the surveyor was compelled to depart from his course to find a point where it was possible to even climb across it. It is not to be presumed that the State of North Carolina sold to Shober by means of his grant the space represented by the perpendicular surface of this cliff. The original surveyor did not find it necessary to ascend its surface in order to ascertain with accuracy what the State was selling. But very steep mountain sides are often very valuable for timber as well as for agricultural purposes, and when a line crosses a steep mountain or succession of hills the grantee would get from the State, for cultivation, by horizonal

measurement, a number of acres largely in excess of that estimated upon the basis of surface measurement. *Duncan v. Hall, supra.* In the case before us, however, the measurement adopted by the surveyor and sanctioned by the Court gave the grantee, under the operation of the maxim *cujus est solum ejus est usque ad cœlum,* the ownership of the perpendicular cliff, and whatever of minerals, if any were imbedded in it, without robbing the State of the price of a single acre of cultivable land.

Where the elevation of the ground is very different at different (440) points of a line, the grantee may start his lines toward the center of the earth from points nearer to each other than his points of departure would have been by the horizonal measurement, but he will generally acquire title for every acre of surface for which he pays the State.

The undisputed testimony of the witnesses examined tended to show that the succession of deeds constituting plaintiff's chain of title embraced the land in dispute, and that the plaintiff had an actual possession of a part, and a constructive possession over the whole, of the land embraced within the boundaries of these deeds. This is an action in the nature of trespass *quare clausum fregit,* not in the nature of trespass in ejectment. In order to establish, *prima facie,* the right to recover, it was necessary, therefore, for the plaintiff to show possession in himself and a trespass upon his possession by the defendant, not, as in ejectment, an adverse occupancy by the latter. If the testimony was believed, the defendant entered upon the land embraced within the boundaries of plaintiff's deeds, as run without estimating the distance up the face of the cliff, and cut and removed timber trees; so that, if the testimony was credible, the *locus* where the trespass was committed was within the limits of plaintiff's lands, to which he had, *prima facie,* shown both title and possession, and the plaintiff was entitled to recover at least the nominal damages awarded.

As we understand the case and the argument, the assignment of error that has been discussed is the only one relied upon by the defendant, of which, according to the transcript, he was entitled to the benefit. It ought to be needless to state that the appellate court is confined to the record. There was

NO ERROR.

Cited: Gilmer v. Young, 122 N. C., 810.

(441)

CULLEN & NEWMAN v. ABSHER & CHURCH.

Constable—Notice of Depositions, Service of, by Constable.

1. Service of notices, under section 597 of The Code, must be made by an officer authorized generally and by virtue of his office to serve process of the court having jurisdiction of the action in which the notice is given.
2. A notice of deposition signed by a party to the action is not process.
3. A town constable cannot serve a notice to take depositions in an action pending in the Superior Court.

ACTION, tried before *Norwood, J.*, and a jury, at Spring Term, 1896, on appeal from a judgment of a justice of the peace.

Plaintiffs offered to read in evidence a deposition of C. S. Newman, one of the plaintiffs, in proof of their claims, when the defendants' counsel objected to the reading of the said deposition before the jury for the reason that after said cause was docketed in the Superior Court for trial the plaintiffs obtained from the Clerk of the Superior Court a commission to take depositions, and that the notice issued by the plaintiffs' attorneys to the defendant of the time and place of taking deposition was served by a town constable instead of by a sheriff, which objection was taken before the clerk at the opening of said deposition. His Honor overruled the objection of defendants, and defendants excepted. Said deposition was read as evidence. There was a verdict for the plaintiffs. Defendant moved for new trial on the ground that the Court erred in allowing the deposition to be read in evidence. Motion overruled; defendants excepted. Judgment for the plaintiffs and appeal by defendants.

W. W. Barber for defendants.
No counsel contra.

(442) MONTGOMERY, J. The notice to take the deposition was served upon the defendant by a town constable. At the proper time objection was made to the reading of the deposition. Such service was not valid. Service of notices, as required by section 597 of The Code, must be made by an officer who is authorized generally and by virtue of his office to serve process of the court which has jurisdiction of the action in which the notice was given. A town constable has no such authority. He can serve *process* issuing from the Superior Court, and in that case only when it is directed to him. *Forte v. Boon,* 114 N. C., 176; *Davis v. Sanderlin, ante,* 84.

The paper which he undertook to serve was not process of the court. It was only a notice signed by the plaintiff. The deposition ought not to have been read as evidence in the case.

NEW TRIAL.

Cited: *Brown v. Myers,* 150 N. C., 444.

(443)

T. J. BROYHILL v. W. E. GAITHER.

Mechanic's Lien—Work and Labor Done and Material Furnished—Contract Indivisible—Homestead—Entire Tract Subject to Lien—Segregation of House—Sale in Parcels.

1. A "laborer's lien" is solely for labor performed, while a "mechanic's lien" is broader and includes the "work done," *i. e.*, the "building built," or superstructure put on the premises.
2. Where a contractor undertakes to put up a building and complete the same, the contract is indivisible and his "mechanic's lien" (section 1781 of The Code) embraces the entire outlay, whether in labor or material; and, under section 4 of Art. X of the Constitution, is superior to the homestead exemption of the owner.
3. The "material lien" is by virtue of the statute only, and does not come under the constitutional priority given to the "mechanic's lien for work done on the premises" over the homestead exemption.
4. Where a house is built by a contractor for the owner upon an undivided tract of 80 acres in the country, the mechanic's lien attaches to the whole tract, especially where it appears that the house alone, apart from the tract of land, would be of comparatively little value.
5. The fact that a house and improvements, built by a contractor upon a tract of 80 acres belonging to the owner, are enclosed by a fence including about three acres, is not a segregation or division of the house from the tract so as to confine the mechanic's lien to the enclosure.
6. In such case, though the lien is upon the whole tract, it should be divided, if practicable and desired by the defendant, in making sale, and the parts sold in such order as he may elect, so that, if possible, the lien may be discharged without exhausting the entire tract.

ACTION, heard before *Hoke, J.,* and a jury, at Fall Term, 1896, of WILKES. The action to recover a sum due and enforce a lien claimed to be a mechanic's lien against the lands of defendant, (444) situated in Wilkes County. The lien was admitted to be in due form and properly filed, and defendant resisted its enforcement, claiming that so much of the demand as was admitted to be due plaintiff was

for material furnished, and that defendant or agent had demanded the right of homestead exemptions. Defendant further contended that if lien was valid and superior to homestead the same was confined in its operation to so much of the land as was included in fence and improvements about the house, and does not extend to entire farm.

The evidence showed that the plaintiff contracted to furnish the material for and to build a house, etc., for the defendant upon defendant's farm, being an entire tract of eighty acres in the country about four miles from Wilkesboro, and that the house alone would be of comparatively little value, as no one would wish the house apart from the land; also, that the house and improvements were enclosed in a fence to include about three acres, and there was no other cleared land immediately adjoining; but the arable, cultivated land, consisting of fourteen to eighteen acres, was on the opposite side of the farm and the remainder was woodland, and that the tract of eighty acres was all the real estate owned by the defendant, and was not worth $1,000. The defendant offered no evidence.

The Court instructed the jury that on the evidence, if believed, plaintiff was entitled to recover the entire contract price for the building, subject to credits; that plaintiff had a lien for the entire amount on the building and farm, and that under the term "mechanic's lien on the residence" was included the whole amount of plaintiff's demand,
(445) and same was superior to defendant's right to homestead, and extended to the building and entire farm on which same was placed. Defendant excepted.

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

T. B. Finley for plaintiff.
W. W. Barber and Glenn & Manly for defendant (appellant).

CLARK, J. The plaintiff having built a house for the defendant was entitled to his mechanic's lien therefor, not merely for the value of the labor expended but for the contract price of the house (The Code, sec. 1781), which lien is superior to the homestead. Const., Art. 10, sec. 4. When the contractor undertakes to put up a building and complete the same, the contract is indivisible and his "mechanic's lien" embraces the entire outlay, whether in labor or material, being for "work done on the premises," *i. e.* for the betterments on it. The "laborer's lien" is solely for labor performed. The mechanic's lien is broader and includes the "work done," *i. e.* the "building built" or superstructure placed on the premises. *Merrigan v. English,* 9 Mont., 113, 124; *Phelps v. Stray,* 32 Neb., 19.

It is otherwise when there is simply material furnished which the owner places upon the building either himself or by employing others. The "material lien" is by virtue of the statute only, and does not come under the constitutional priority given to the "mechanic's lien for work done on the premises" over the homestead exemption. *Cumming v. Bloodworth,* 87 N. C., 83.

The house being built upon an undivided and entire tract of 80 acres in the country, the mechanic's lien was upon the whole tract, especially as it is found as a fact or not denied, that the "house alone would be of comparatively little value, as no one would wish the house (446) apart from the land." It was no segregation or division of the house from the tract that "the house and improvements were enclosed in a fence including about three acres." The lien is on the whole tract, but it should be divided if practicable and desired by the defendant in making sale, and the parts sold in such order as the homesteader may elect, so that it may be the lien will be discharged without exhausting the tract, and the part preferred by the debtor not subjected to sale. Thus modified, the judgment is

AFFIRMED.

Cited: Cheeseborough v. Sanatorium, 134 N. C., 248; *Isler v. Dixon,* 140 N. C., 529; *Alexander v. Farrow,* 151 N. C., 323; *Hall v. Jones, ib.,* 424; *Roper v. Ins. Co.,* 161 N. C., 160.

C. S. JOHNSON ET AL. v. GEORGE RODEGER ET AL., EXECUTORS OF JOSEPH FISCHESSER.

Action on Note—Consideration.

Where, in an action on a promissory note, it appeared that the testator of defendants executed the note for his part of the purchase money for land conveyed by plaintiffs to a corporation, of which the testator of defendants and others were incorporators, under an agreement that they should so convey, one-fourth of the purchase money to be paid in cash or by notes of such incorporators, and that the corporation should execute its note to each incorporator for the cash he had paid or note he had given for his part of the purchase money, and should issue stock to him for that amount, all of which was done: *Held,* that a consideration for the note was shown.

ACTION, tried before *Norwood, J.,* and a jury, at February (447) Term, 1896, of FORSYTH. There was judgment for the plaintiffs, and defendants appealed. The facts in the opinion of *Associate Justice Montgomery.*

Watson & Buxton for plaintiffs.
A. E. Holton for defendants (appellants).

MONTGOMERY, J. The action is upon a plain promissory note executed by the testator of the defendants to the plaintiffs. The defendants in their answer aver that there was no consideration for the note and that it was an accommodation paper. Upon the trial the testimony introduced by the defendants showed that the plaintiffs and defendants were members of a company incorporated as the Boston Cottage Company; that the plaintiffs conveyed a tract of land to the company; one-fourth of the purchase-money to be paid in cash or to be secured by the personal notes of the incorporators; that the company was to execute a mortgage to the plaintiffs for the balance of the purchase-money upon the land; that the corporation was to execute its note to each incorporator for the amount of the cash he had paid for the land or the note he had given for his part of the purchase-money, and also to issue stock for that amount, which was done; and that the note sued upon was the note executed by the testator of the defendants for his part of the purchase-money of the land. Upon this evidence the defendants asked the Court to instruct the jury.

"1. That upon all the evidence of witnesses to the jury they should find in favor of the defendants.

"2. That if the jury find that the note in suit was given for the purchase-money of the land, and the plaintiffs deeded the land to
(448) another, to wit, the Boston Cottage Company, then there would have been a want of consideration to support the note.

"3. That it was for the jury to say what the Boston Cottage Company's note was given for to Fischesser, defendant.

The instructions were refused and the defendants excepted. Verdict and judgment for the plaintiffs, and appeal by defendants.

The testimony introduced by the defendants showed that the note was executed for a valuable consideration. There was not even a scintilla of evidence going to show a failure of consideration. The matter is too plain for discussion.

NO ERROR.

(449)

WILEY PASLEY v. ALLEN RICHARDSON AND WIFE.

Action to Recover Land—Evidence—Payment of Taxes—Tax Lists.

Where, in the trial of an action of ejectment, the defendant, for the purpose of showing the character of his own possession and in rebuttal of plaintiff's title, offered in evidence the tax lists for a large number of consecutive years to show that the land in dispute had been listed for taxation by him and those under whom he claimed, and that plaintiff did not list the land during any of said years: *Held*, that such evidence was competent and that its weight was for the jury.

ACTION, for the recovery of land, tried before *Norwood, J.*, and a jury, at March Term, 1896, of ALLEGHANY. There was verdict for the plaintiff, and from the judgment thereon defendant appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

R. S. Doughton and W. C. Fields for defendants (appellants).
No counsel contra.

FAIRCLOTH, C. J. This was an action of ejectment. Each party introduced evidence of title. Defendants proposed to introduce the tax lists of Alleghany County for the year 1874 and all following years to show that Samuel Pasley, under whom defendants claimed title, listed the land in dispute, and that plaintiff did not list said land for taxes during any of said years. This was offered to rebut plaintiff's title, and to show the character of defendants' and Samuel Pasley's possession. Plaintiff objected to this evidence. Objection sustained and defendants excepted. Verdict and judgment for plaintiff and defendants appealed.

In this ruling of his Honor there was error. The evidence was competent and its weight was for the jury. *Austin v. King,* 97 (450) N. C., 339; 1 Greenleaf Ev., section 493.

NEW TRIAL.

Cited: Ridley v. R. R., 124 N. C., 39; *Gates v. Max,* 125 N. C., 144; *R. R. v. Land Co.,* 137 N. C., 332.

MARTHA M. SHEW v. M. C. CALL.

Action to Cancel Deed—Mortgage to Clerk of Superior Court—Power of Sale—Purchase by Mortgagee—Mortgage by Husband and Wife—Wife's Land as Surety— Exoneration of Wife's Land—Landlord and Tenant—Estoppel.

1. Where land, mortgaged to a clerk of court to secure fine and costs as provided by statute, was sold by the clerk under the power in the mortgage, a deed executed by him after he has gone out of office is invalid and vests no title in the purchaser.

2. A mortgagee is a trustee and cannot purchase at his own sale; if he does so, he remains a trustee.

3. Tenancy is the result of a contract between a lessor and lessee whereby the latter admits lessor's title, and he and his privies are estopped, while continuing in possession, to deny the title or to bring action to defeat it; but

4. A married woman is not estopped to deny the title of a grantor by the fact that she is in possession of the land with her husband, who is the grantee's tenant.

5. Where a married woman joined her husband in a mortgage on land, partly his and partly hers, to secure the husband's debt, his land should first be sold and the proceeds paid upon the debt in exoneration of the wife's land.

6. Where the lands of a husband, together with lands belonging to his wife, are included in a mortgage to secure the husband's debt, and a sale and conveyance under the mortgage are invalid, the wife may alone maintain an action to have the deed declared void, both as to her own and her husband's land.

(451) ACTION, to cancel a deed, tried before *Norwood, J.*, at Spring Term, 1896, of WILKES, on a case agreed, the facts of which are set out in the opinion of Associate Justice FURCHES. His Honor gave judgment as follows:

"It is adjudged and decreed that plaintiff is not estopped, and the deed executed to J. S. Call by the ex-clerk, J. F. Somers, be canceled; that the sale of the land mortgaged be set aside, and that a new sale be ordered. It is further ordered that the matters of the amount—principal and interest—owing by plaintiff, and that the amounts paid by her in money—rents and otherwise—be referred to T. B. Finley to take and state an account, showing the amount now due; that when the same shall be ascertained and the plaintiff notified of the amount she shall have thirty days in which to pay the same, and if she shall fail to pay the amount ascertained to be due then the said T. B. Finley is hereby authorized and directed, as commissioner, to expose said lands to

sale in accordance with law, and report his proceedings to this Court for further orders; and that this cause is to be continued on the docket." From this judgment defendant appealed.

Glenn & Manly for plaintiff.
W. W. Barber for defendant (appellant).

FURCHES, J. This case comes to this Court by appeal of defendant from the judgment of the Court on a case agreed, from which it appears that the plaintiff is the wife of Peyton Shew; that she was the owner in her own right of all the lands mentioned in the com- (452) plaint except a tract of about thirty-nine acres, which was the husband's. That to secure a bill of costs and a fine of $35 she joined her husband in making a mortgage to J. S. Call, clerk, to secure the payment of said fine and cost. That soon after that said Call went out of office, and J. F. Somers was qualified and inducted into office as his successor. That said Somers, as clerk, advertised said land and sold the same, when said Call became the purchaser thereof at the price of one dollar for each tract. That soon after said sale Somers was removed from said office without having made a deed for said land, but after he went out of office did make a deed to said Call for the same. That after said sale Peyton Shew, the husband of plaintiff, being in possession of said land, rented the same from said Call, and has paid him rent thereon, and is still in possession. That J. S. Call is dead, and the defendant is the owner of whatever estate he had in said land as his devisee. The complaint alleges that the land is worth $1,000 or more, and this is not denied in the answer. And it was so argued by plaintiff's attorney in this Court, and not denied by the attorney of defendant.

The defendant contended that the sale by Somers was fair and regular; that Call, though named as mortgagee in the mortgage, and the power of sale given to him, it was as clerk, and as he had gone out of office could not execute the power; that Somers was the proper party to do so, and Call had the right to become the purchaser; and that the deed made to him by Somers after he went out of office conveyed the estate in the land to him.

But the principal question discussed and relied on by defendant (453) was that of estoppel existing between landlord and tenant; that the husband of the plaintiff having rented of defendant's devisor she was estopped to deny defendant's title while still remaining in possession.

A mortgagee is a trustee, and is not allowed to purchase at his own sale. *Kornegay v. Spicer,* 76 N. C., 95. If a mortgagee purchases at his own sale, he is still a trustee. *Whitehead v. Hellen,* 76 N. C., 99.

The right to give a mortgage to secure a fine and cost is a statutory right, and the statutory provision must be observed in its execution to

make it effective. And statutory powers of sale given to an officer must be strictly observed to confer title. *Taylor v. Allen,* 67 N. C., 346. A sheriff whose term of office had expired could not execute a deed for land sold while he was in office until authorized to do so by statute. Section 1267 of The Code. This statute does not extend to clerks, and they cannot exercise this power after they go out of office. *Taylor v. Allen, supra.*

Mortgages with power of sale are not looked upon with disfavor as they once were. But courts of equity, or of equitable jurisdiction, will still guard the rights of the mortgagor with jealous care. And where manifest wrong and oppression are made to appear the Court will give relief. *Mosby v. Hodge,* 76 N. C., 387.

The only remaining question to be considered is the question of estoppel. It was argued by plaintiff's counsel that this being equitable relief asked by plaintiff this rule does not apply, citing *Allen v. Griffin,* 98 N. C., 120; *Forsyth v. Bullock,* 74 N. C., 135; *Griffin v. Richardson,* 33 N. C., 439, and Wood Landlord and Tenant, 486. But we do not feel called upon to decide whether this case is an exception to the general rule, so firmly established by the decisions of this State that a tenant is estopped to deny his landlord's title or not. But we put our (454) judgment upon the ground that the plaintiff is not the *tenant* of the defendant. The case states that the husband rented and paid rent to defendant's devisor. But this does not make the plaintiff his tenant. Tenancy is the result of a contract between the landlord and the tenant, whereby in legal contemplation the tenant admits the title of the lessor, and will not allow him to dispute this title while he still remains in possession. And it is true that this estoppel is held to apply to privies as well as to the original lessee. But it is the *contract,* followed by possession, that creates the estoppel. Possession without the contract will not.

But the plaintiff is not affected by this rule. She made no *contract* with Call. It is not contended she did. And though she is the wife of Peyton Shew she is no privy in estate, under or through him. She claims no estate through, by, or under his contract with Call. Privy means a privity in estate—a property right acquired from the lessee by contract or inheritance. Bigelow on Estoppel, p. 142. A may be the son of B, but this creates no estoppel unless A takes some estate under B, either by purchase or inheritance.

We therefore hold that the plaintiff is not the tenant of the defendant, nor is she a privy in the estate under her husband, and is not estopped to bring and prosecute this action. There are 37 acres of the land, bought at this sale by Call, that did not belong to the plaintiff, but was the estate of the husband. He is not made a party. And while the case

shows the same infirmities exist as to the sale and purchase of this tract as the other, which belonged to the plaintiff, there would be no ground or authority for setting aside the deed for the husband's part but for the relation of the plaintiff and her husband, and part of the land being hers and a part being his. The debt which the mortgage was given to secure was the liability of the husband. His land (455) and that of plaintiff were both included in the mortgage to secure the husband's liability. This being so, the land of the wife (the plaintiff) in law was but security for the husband. And his lands should be first made liable and first sold in exoneration of the wife's land. *Hinton v. Greenleaf,* 113 N. C., 6; *Gore v. Townsend,* 105 N. C., 228. The lands never having been sold according to law, the sale under which defendant holds her deed, being without authority of law, passed no title to defendant's devisor.

We are therefore of the opinion that the plaintiff, who has mortgaged her lands as a security for her husband's liability, has such an interest in his land as entitles her to have the defendant's deed from Somers declared void as to her husband's land as well as to her own. It was admitted that since the date of the mortgage and the lease to the husband the plaintiff has become a free trader under the statute.

The judgment of the Court (inadvertently, we suppose) speaks of plaintiff's paying rent. There is nothing in the pleadings or in the *facts* in the case agreed that sustains this statement in the judgment, and the same will be stricken out. And the judgment of the Court will be so reformed as to direct an account of any rents or profits the defendant has received from said land, giving her credit for any taxes she may have paid, and if anything shall be found for the defendant the same shall first be applied to the satisfaction of the judgment for which said lands were mortgaged.

After making this application, if the residue of the judgment be not paid in a reasonable time, to be determined by the Court, the commissioner shall sell, first, the 37 acres belonging to the husband, W. P. Shew, and if it brings enough to pay the residue of the judgment and the cost of sale the lands of plaintiff will not be sold. But (456) in the event the tract belonging to the husband shall not bring enough to pay the balance of the judgment, etc., then the plaintiff's land, or a sufficient amount of the same, shall be sold and reported to Court.

The judgment setting aside the sale of Somers and his deed to Call, amended as above directed, is

AFFIRMED.

Cited: Fleming v. Barden, 127 N. C., 215, 217; *Eubanks v. Becton,* 158 N. C., 234.

W. A. KIGER ET AL. v. T. W. TERRY ET AL.

Advancement by Parent to Child—Presumption—Intent of Grantor.

1. Where property is transferred from a parent to a child the question whether it is a gift, loan, or advancement is to be settled by the intention of the parent and surrounding circumstances, to show which parol evidence is admissible.

2. Where a deed from a parent to a child recites a valuable consideration, near the value of the property conveyed, the presumption is that the conveyance was not intended as an advancement, and the burden of proving it to be an advancement is upon him who alleges it to be such.

SPECIAL PROCEEDING, for the partition of real estate among the heirs at law of Charity Shackleford, pending in Stokes Superior Court, and heard on report of referees before *Norwood, J.*, by consent, at chambers, in Winston.

(457) From a judgment of his Honor overruling the exceptions to the report of the referees the plaintiffs appealed. The facts sufficiently appear in the opinion of Chief Justice FAIRCLOTH.

A. M. Stack for plaintiffs (appellants).
Watson & Buxton for defendants.

FAIRCLOTH, C. J. This is a special proceeding for partition, and the only matter in dispute below and now before this Court is whether certain deeds, made for several small tracts of land by Charity Shackleford to some of her children, are advancements to be accounted for in a partition of the estate with the other children. A reference was had to state an account in regard to the question of advancement, and to ascertain how much, if anything, had been advanced to each child. The referees report much confused and conflicting evidence and their findings of fact and law.

They find that in the deeds conveying the lands a substantial and valuable consideration is recited; that the amount of consideration recited in the deeds is about three-fifths of the estimated value of the lands conveyed; that the consideration was paid in board of the intestate for fifteen years, taxes, cost, etc.; that the grantor did not intend to charge the grantee with a difference between the recited consideration and the estimated value as an advancement. It does not appear whether the value was estimated at the date of the deeds or at the death of the intestate, who boarded with T. W. Terry, the principal grantee, at $3 per month, and that she performed some very small service for him dur-

ing said time; that they had several settlements for rent, board, etc., and conclude that none of the grantees are chargeable with any sum as advancements.

Plaintiffs filed exceptions to the report without stating dis- (458) tinctly on what grounds. We infer that they intend to say that the evidence did not justify such findings. We have looked at the evidence and find it conflicting, but there is some evidence. We can not consider the force of the evidence, but we take the facts found by the referees as true. The report was confirmed, and judgment accordingly, and an appeal by the plaintiffs.

Advancements are the creatures of statute law. Code, sections 1281 (2), 1483, 1484. When a parent places property in possession of the child it may be a loan, a gift or an advancement, and the question is settled by the intention of the parent and surrounding circumstances and other evidence, in which case parol evidence is admissible. Thornton on Gifts and Advancements, 591; *Melvin v. Bullard,* 82 N. C., 33; *James v. James,* 76 N. C., 331. In the latter case the deed recited that it was "an absolute gift and intended as an advancement, and was not to be accounted for in the distribution of his estate." Held, that the value of the property is not to be accounted for as an advancement, on the ground of the manifest intent that it was an absolute gift.

In some few States by statute the parent's intention is excluded, and all transfers of property by him to a child are held advancements to be accounted for, proceeding on the principle of enforcing absolute equality. Our statute contains nothing to exclude the intent and circumstances of the case but leaves in force the ancient principle that the owner of property may dispose of it according to his own desire.

An advancement is a gift of money or property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child. The latter are the natural duties of the parent which he is required to perform. *Meadows v. Meadows,* 33 N. C., 148; (459) *Bradsher v. Cannady,* 76 N. C., 445; Thornton, *supra,* 510; 4 Kent Com. (13 Ed.), 418. There can be no doubt that when a parent (father or mother) transfers property into the possession of his or her child, and nothing more appears, an advancement is presumed; and if land is conveyed by deed, reciting a nominal consideration or natural affection, the same presumption arises, and the burden of proof is then on the grantee or donee to show that an advancement was not intended; and to that end he may introduce evidence, parol or otherwise, not to contradict the deed but to show the intent of the grantor. *Harper v. Harper,* 92 N. C., 300.

The above-stated presumption, however, does not prevail when the deed recites a valuable and substantial consideration, especially when it is near the full value of the land or other property. The burden then to prove it an advancement is upon the person claiming it to be such. The presumption is then removed, and the question of intent is then an open one, for proof on either side. Thornton, *supra,* 552; *Harper v. Harper, supra.*

Apply these principles to the case before us; there was no error in the judgment below. Each party introduced evidence on the question being considered, and the referees found the facts as before stated.

AFFIRMED.

Cited: Griffin, ex parte, 142 N. C., 118; *Thompson v. Smith,* 160 N. C., 258.

---

(460)

PIEDMONT WAGON COMPANY ET AL. V. WILLIAM BYRD ET AL.

Writ of Assistance—Practice—Res Judicata—Estoppel.

1. The judgment or decree of a court of competent jurisdiction is conclusive not only as to the subject-matter actually determined thereby but also as to every other matter which properly belonged to the subject in litigation, and which the parties, by the exercise of reasonable diligence, might have brought forward at the time and had determined respecting it.

2. In an action to foreclose a mortgage against B., one M. intervened and by his answer denied the allegations of the complaint, and alleged, as a further defense why decree of sale should not be made, that he was the owner in fee and in possession (through B., his tenant) of the land. At the trial he assented to the issues tendered by the plaintiff, which did not include the one raised as to his title. There was a decree of foreclosure (from which he failed to prosecute an appeal), a sale, confirmation and conveyance by the commissioner: *Held,* that the plea of sole seizin by M., not being a counterclaim, was denied by operation of law, and thus an issue as to the title was raised by the pleadings which M. should have tendered and supported by proof, and having neglected to do so he is estopped by the judgment in the cause.

3. In such case the purchaser at the sale is entitled to a writ of assistance to place him in possession of the land.

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

ACTION heard before *Norwood, J.,* at Spring Term, 1896, of WILKES, on a motion for a writ of assistance by the plaintiff, the Piedmont

Wagon Company, which had purchased the land sold under a decree of foreclosure. The motion was refused and plaintiff appealed. The facts appear in the opinion of Associate Justice CLARK.

W. W. Barber and T. B. Finley for plaintiffs (appellants).
No counsel contra.

CLARK, J. This was an action brought against the mortgagors (461) to foreclose a mortgage. J. O. Martin, who was not one of the mortgagors, on his own application was made a party defendant, and filed his answer denying the complaint and alleged, as a further defense why decree of sale should not be made, "that he is the owner in fee and in lawful possession of the lands described in the complaint," alleging further that the mortgagors were merely his tenants and without any title to the land, and asking thereupon that the action be dismissed. This plea of sole seizin in himself, not being a counterclaim, was denied by operation of law (The Code, section 268), and thus an issue as to said Martin's title was raised on the pleadings. *Bank v. Charlotte,* 75 N. C., 45. At the trial he assented to the issues which were tendered by the plaintiff, though the one raised as to his title by his answer was not included, and judgment for sale of the land being rendered upon the verdict he appealed but did not prosecute his appeal.

Martin might possibly have stayed out of the case, but he saw proper to intervene and raised the issue of title and possession in himself, and that the other defendants were merely his tenants in order to defeat a decree that said lands be sold. This new matter of defense was therefore in litigation upon his allegation, and it was incumbent upon him to tender the proper issue, *Maxwell v. McIver,* 113 N. C., 288; *Kidder v. McIlhenny,* 81 N. C., 123; *McDonald v. Carson,* 95 N. C., 377; *Walker v. Scott,* 106 N. C., 56, and numerous other cases cited in Clark's Code, (2 Ed.), page 357, and if he did not he can not complain of the consequences of his own neglect. It was incumbent upon him not only to tender the issue raised by his allegation of title but to support it by proof (*Wallace v. Robeson,* 100 N. C., 206), and as he failed to (462) do so judgment properly went against him.

That case was "on all-fours" with this, being an interpleader who set up title to the property (and also possession, as in this case), and failed to introduce evidence to support his allegations. The defendant Martin, after coming into the action and raising by his pleadings the issue of title and possession, should have tendered the issue and offered evidence; and "not having spoken when he should have been heard, should not now be heard when he should be silent." He is estoppel by the judgment herein, which decreed the sale of the land as the property of the other de-

fendants. To hold otherwise would be to permit him to trifle with the Court and with the rights of the purchaser, who should rely upon the decree of sale as at least conclusive upon all persons who were parties to the action in which it was rendered.

The principles governing estoppels by judgment are established by a long line of decisions in this and other States, and we have no desire to take a new departure which will shake the long-settled law as to *res judicata.* This rule is thus stated in 1 Herman Estoppel, sec. 122, and is fortified by a long list of leading authorities there cited: "The judgment or decree of a Court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. It is not only final as to the matter actually determined but as to every other matter which the parties might litigate in the cause, and which they might have had decided. . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and (463) often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. The rule is founded on sound principle." And the same authority, section 123, says: "The plea of *res judicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it." It has been urged that by the decision of *Jordan v. Farthing,* 117 N. C., 181, this Court intended to abandon this beaten path and strike out a new departure. Such was not our intention. In that case land having been sold under a mortgage, the purchaser brought his action against the mortgagor and made the mortgagee additional party plaintiff. The only question raised by the pleading was whether it was a valid sale, and the Court observes that it would have been "if a mortgagor had owed only one dollar or any other amount, and that it was out of the question to contend that the accounts of the mortgagor and mortgagee (a long course of dealings outside the mortgage transaction) had been introduced in that action" between the purchaser of the land and the mortgagor. But here we have an entirely different case. In a proceeding to foreclose Martin properly interpleads (The Code, sec. 267), claiming that he, and not the mortgagors, is the owner of the land, and that therefore the foreclosure should not be ordered. The title of the interpleader having been thus put in issue, the trial is had, the foreclosure sale is ordered, and the interpleader appeals and afterwards abandons his appeal. It also appears by affidavit in this motion,

which is not denied, that the interpleader assented to the issues as tendered. Under these circumstances, when the land was sold the purchaser, seeing that Martin was a party to the proceeding, that (464) he had filed his answer setting up that there should be no sale because the title was in himself, and that after the trial the Court had decreed a foreclosure, was entitled to rely upon the principle that the judgment binds all parties to it, certainly to the full scope of the points raised by the pleadings, and was not required to go into the minutiæ of the trial to ascertain whether each and every of the parties proposed proper issues or in open court abandoned or waived his right to insist upon them. The parties to the action are equally entitled to regard the trial and judgment as decisive of the points raised by the pleadings, or which might properly be predicated upon them. *Jones v. Beaman,* 117 N. C., 259, so far as the facts of that case are concerned, is distinguishable from the present on the same grounds as *Jordan v. Farthing, supra,* and so far as it differs from the principles herein stated its expressions were merely *obiter* and are overruled.

The writ of Assistance should therefore issue. *Exum v. Baker,* 115 N. C., 242; *Coor v. Smith,* 107 N. C., 430; *Knight v. Houghtalling,* 94 N. C., 408.

REVERSED.

FAIRCLOTH, C. J., dissenting. I can not agree with the majority of the Court. On 6 March, 1891, the defendant Byrd executed his note to White for $100, and he and wife secured the same by a mortgage on 640 acres of land. In August of the same year White assigned the note and mortgage to Isley & Coffey, and this action on default was brought for judgment and foreclosure. Defendants Byrd and wife, the mortgagors, filed no answer. J. O. Martin intervened and filed an answer, in which he disclaimed any knowledge of the matters alleged between plaintiffs and the mortgagors, but alleged that he was the owner in fee and in the lawful possession of said land, and that he so notified White before the note and mortgage were executed, also that Byrd was his tenant all the time, and has been for years, and asks that the (465) action be dismissed.

At Spring Term, 1894, the cause coming on for trial, these issues were submitted "without objection," to wit:

"1. What amount is Byrd indebted to Isley & Coffey on mortgage executed to White? Answer: '$100.'

"2. Did white assign the mortgage to Isley & Coffey for value? Answer: 'Yes.'"

No other issue was proposed or submitted. It was adjudged that plaintiffs recover of Byrd and wife $100 and an order of sale and fore-

closure, and after paying the debt and costs "the residue to be paid to defendant." At Fall Term, 1895, the commissioner reported sale, and that the Piedmont Wagon Co. was the purchaser at $125. The sale was confirmed and commissioner ordered to make deed to said purchaser. All of said lands were sold by the commissioner. Martin gave notice of appeal but never prosecuted it. Early in 1896 said wagon company through its attorney, reciting the above facts, applied to Judge Norwood by petition for a writ of assistance, placing the wagon company in possession of the land described in the complaint and to oust from said land the defendants Byrd and Martin, and upon the hearing the petition was disallowed. The wagon company excepted and appealed.

It does not appear that any writ of possession has been issued. The question presented is one of practice, but a very important one. The wagon company, the only plaintiff that need now be considered, is a purchaser at a judicial sale and was not a party of record during the litigation. It purchased the interest of Byrd, whatever that may be. It is not pretended that it purchased any other interest. It could not do so. Nothing else could have been sold, and it is evident that neither party nor the Court so understood at the trial. It is equally clear that neither the parties nor the Court understood or intended a sale of
(466) Martin's title, if he had any. Title to the land was not involved in the trial. Debt or no debt and the condemnation of Byrd's interest were the only questions considered.

The plaintiff's position is that defendant Martin was in a position to have an issue of title submitted and tried (which will be adverted to later), and that failing to do so he is now estopped from asserting any title in this or any other proceeding as against the plaintiff. To grant such a request would extend the doctrine of estoppel beyond any point reached, even in a *court of law,* in the days of Lord Coke. Since that time, especially in this country, the doctrine of estoppel has been modified by preserving its benefits without its hardships. The doctrine now accepted is found in numerous cases: Bigelow on Estoppel; *Cromwell v. County of Sac.,* 94 U. S., 351; *Jones v. Beaman,* 117 N. C., 259; *Temple v. Williams,* 91 N. C., 82.

A writ of assistance is not one of right but is discretionary with a court of chancery, to be issued when just and reasonable grounds are made to appear. The Court, when it has decreed a thing to be done, as that A. B. take possession, will issue the writ in order to give effect to its decree. But in putting a purchaser into possession, in pursuance of its decree, it will not interfere with or attempt, in cases of doubt, to settle the right of any party claiming possession by title paramount to

that of the mortgagee or other party in whose favor the decree was made. The writ is discretionary and will only be granted in a clear case. *Thomas v. DeBaum,* 1 McCarter, 37. The issuance of the writ rests in the sound discretion of the Court, and it is only used when the right is clear and where there is no equity or appearance of equity in the defendant, and it is certainly not customary to issue the writ where there is a *bona fide* contest as to the right to the possession (467) of land, or where rights of the respective parties have not been fully adjudicated in the principal suit. 2 Enc. Pl. & Pr., 980; *Van Meter v. Borden,* 25 N. J., Eq., 414; *Hooper v. Yongs,* 69 Ala., 484.

Where the party in possession claimed to hold the premises before the mortgage, the Court said: "It is enough that the claim of the petitioner is not clear." *Thomas v. DeBaum,* 14 N. J. Eq., 37. "In doubtful cases the writ should be refused." *Wiley v. Carlisle,* 93 Ala., 238; *Schenck v. Conover,* 13 N. J. Eq., 220; *Knight v. Houghtalling,* 85 N. C., 17.

In consonance with these principles this Court, in the exercise of its discretion, refused the writ and said, "As the controversy as to title is still to be settled, we deem it best for the parties that we should not only declare that it was error to grant the writ as prayed but that we should pass upon the question which may still arise in another action." *Exum v. Baker,* 115 N. C., 242.

The plaintiff further insists that the averment in Martin's answer of title in fee, as above stated, was denied by the statute, and an issue of title was in that way raised, and his failure to submit or tender an issue of title was a waiver, and that he can not on appeal be heard to complain or to again assert his claim to the land, *i. e.* that he is estopped in that respect. If it be assumed for the argument only that such an issue was raised, does the conclusion drawn by him follow?

This is a question of practice, as we have said, and it may as well be candidly stated that the decisions of this Court on the question have not in all cases been uniform or consistent, and the same may be said of other State courts on mere questions of practice. The question comes up in various ways: In *Kidder v. McIlhenny,* 81 (468) N. C., 123, involving the validity of a deed, it was held that if a party failed to tender such issues as he deemed proper he could not on appeal be heard to complain that the issues submitted did not cover the entire case, and others followed to the same effect. These cases are authority for the plaintiff's contention. The injustice of this rule soon pressed itself upon the minds of this Court, and in *Bowen v. Whitaker,* 92 N. C., 367, it was held that "under section 395 of The Code, if the issues are not prepared by the attorneys, it is the duty of the judge who

tries the case to do so." Speaking for the Court in that case, *Merrimon, J.*, on The Code method of procedure said: "The Code of Civil Procedure, as at first adopted in this State, provided for the trial of issues of fact by jury, but it did not specify the particular manner of making them up and submitting them. C. C. P., secs. 219 to 240. This gave rise at once to confusion and much dissatisfaction in the practice of the law. This Court recognized the evil, and acting upon its authority to prescribe rules of practice of the Superior Courts, prescribed Rules 3, 4 and 5, adopted at June Term, 1871, and reported in 65 N. C., 705. These rules directed how and in what time issues of fact should be drawn up. They were, however, construed to be only directory, unless strictly insisted upon in apt time. The result was that, in the hurry and carelessness of practice that too much prevailed, they came to be much neglected, and, as a consequence, verdicts became unsatisfactory, and this Court very often found much difficulty in ascertaining from the record what had or had not been settled by the findings of the jury, especially where several issues of fact had been submitted. To cure this severely felt evil it has been provided by section 395 of The Code that "the issues arising upon the pleadings, material to be tried, *shall* be made up by the attorneys appearing in the action and reduced to (469) writing, or by the judge presiding before or during the trial; and further, by section 396, that issues shall be framed in concise and direct terms; and prolixity and confusion must be avoided by not having too many issues. It will be observed that the language of these provisions is strong and mandatory; they require that the issues of fact shall be made up and shall be framed, etc. They are mandatory. . . . It was the duty of the Court to see that the trial proceeded according to its (statute) mandatory requirements; having authority, it should have required the counsel to frame the issues and reduce them to writing, or, for any cause, failing to do this, 'the judge presiding should have done so before or during the trial.' It is not sufficient to say that the appellant did not propose proper issues or that he must be taken to have waived them. It does not appear that he did waive them; it certainly does not appear affirmatively that he did so; indeed, it seems that he did not. But it appearing to the Court that the pleadings raised issues of fact that have not been tried according to law, the Court could not give judgment, certainly while the appellant was present objecting."

Again, in *McDonald v. Carson,* 94 N. C., 497, the defendant excepted because his Honor submitted an additional issue raised by the pleadings, and this Court, (*Smith, C. J.*), said, "There is not only no error in this, but it was the duty of the *court* to see that all material con-

troverted matters contained in the pleadings were eliminated and put in the form of issues, as commanded by the statute," citing *Bowen v. Whitaker, supra,* as authority.

In *Maxwell v. McIver,* 113 N. C., 288, relied upon by the plaintiffs, this Court fell into the same position that his Honor did in *Bowen v. Whitaker, supra,* whose mistake was corrected by this Court in that case, as shown above.

The plaintiff relies mainly on *Wallace v. Robeson,* 100 N. C., (470) 206, as authority for its proposition, to wit, the failure of defendant to tender an issue as to title. That was an attachment of personal property. Higgins and Griffith interpleaded and averred that they were the *bona fide* owners of the attached property. His Honor drew and submitted this issue: "Did Higgins and Griffith purchase the property described in the complaint (interplea) for a valuable consideration and without notice?" The interpleaders insisted that upon this issue *the burden of proof* was upon the plaintiffs. His Honor held that the burden was upon the interpleaders. They excepted and declined to introduce any testimony to support the issue. This Court sustained his Honor, saying that the single question presented was, Upon whom did the burden of proof of the issue rest? The Code, sec. 331, provides that in attachments the interpleader must by affidavit allege that he is the owner, also "his title and right to the possession, stating the *grounds* of such right and title." The Court held that under that statute, requiring such *particularity* in the plea, the burden of proof was on the interpleaders, who lost their case solely because they failed to introduce their evidence. There is no statute requiring such full particularity by an interpleader in a case like the present. He pleads like others when title to land is in issue.

The resemblance of the last-cited case to the present is not easily perceived. There, an issue was submitted as to title; here, no issue was submitted by any one. There, the case turned alone upon the question of the burden of proof; here, no such question is presented. Apart from the foregoing, is there any correct principle upon which to grant the plaintiff's petition? Is it just or reasonable to do so? Should he, by this extraordinary process, take 640 acrces of land for $125, and cut off Martin forever from the land he claims, without a trial of his title? Would it not be better to refuse the writ, as was done in *Exum v. Baker, supra,* and let the parties have their titles passed upon (471) in the usual way? If an issue had been submitted as to the interpleader's title, the plaintiffs Isley & Coffey would certainly have had the same judgment that was rendered at the trial, and the pur-

chaser would have acquired all the interest conveyed in the mortgage under which he claims, and is there any equitable reason for giving him any more? I think the judment should be affirmed.

FURCHES, J. I concur in the dissenting opinion.

Cited: Hussey v. Hill, 120 N. C., 315; *Land Co. v. Guthrie,* 123 N. C., 189; *Tyler v. Capeheart,* 125 N. C., 69; *Glenn v. Wray,* 126 N. C., 731; *Burwell v. Brodie,* 134 N. C., 545; *McCall v. Webb,* 135 N. C., 367; *Scott v. Life Assn.,* 137 N. C., 520; *Bunker v. Bunker,* 140 N. C., 23; *Shakespeare v. Land Co.,* 144 N. C., 521; *Mfg. Co. v. Moore, ib.,* 529; *Buchanan v. Harrington,* 152 N. C., 335; *Ludwick v. Penny,* 158 N. C., 109; *Caudle v. Morris,* 160 N. C., 173; *In re Floyd,* 161 N. C., 561; *Clarke v. Aldridge,* 162 N. C., 329.

F. E. SHOBER ET AL. V. W. H. WHEELER.

Practice—Case on Appeal, Service of—Parties With Different Interests—Certiorari.

1. Where the interests of several parties on the same side are identical, a case on appeal may be served on any one of them, but when their interests are different and they are represented by different counsel, a case on appeal must be served on each set; and only as to such as are so served will a *certiorari* be granted when the judge fails to settle the case on appeal.
2. In such case the application for the *certiorari* should be based upon the docketing of the rest of the record; otherwise, upon objection on that ground, the *certiorari* will be denied.

MOTION of appellant for *certiorari.*

Watson & Buxton for plaintiff.
Jones & Patterson for defendant (appellant).

(472) CLARK, J. When there are several parties on the same side, with indentical interests and employing the same counsel, the service by the appellee of his "case on appeal" on either one would be sufficient, but here the plaintiffs (appellees) were divided in their interests and employed different counsel. The original plaintiffs were not served with the case on appeal at all. Those served with the case on appeal had been brought into the action. Except as to the parties who

were represented in whole or in part by the counsel on whom the case on appeal was served, the appellants are not entitled to a *certiorari*. As to the parties upon whose counsel the "case on appeal" was served in due time, the judge not having settled the case, the *certiorari* will issue. Such application should always be based upon docketing the rest of the record, and if that is not done upon motion on that ground the *certiorari* will be denied. *Pittman v. Kimberly,* 92 N. C., 562; *Wiley v. Lineberry,* 88 N. C., 68; *Suiter v. Brittle,* 90 N. C., 19; *State v. Freeman,* 114 N. C., 872. Objection on that ground was not made by the parties on whom the case was served, and as to them the *certiorari* will issue.

MOTION ALLOWED.

Cited: Brown v. House, post, 622; *Guano Co. v. Hicks,* 120 N. C., 30; *Burrell v. Hughes, ib.,* 278; *Parker v. R. R.,* 121 N. C., 504; *Walsh v. Burleson,* 154 N. C., 175.

(473)

DANIEL MARION v. JOHN TILLEY.

Findings of Fact by Judge—Practice—Appeal from Court of Justice of the Peace—Notice.

1. Where, on the hearing of a motion to set aside a judgment for excusable neglect, the trial judge finds the facts by consent, such findings, when there is any evidence such as would be submitted to a jury, are conclusive and not reviewable on appeal.

2. The provision of section 877 of The Code, that when the adverse party is present when appeal is prayed from a justice's judgment written notice of appeal need not be given to the justice or the adverse party, implies that when the appellee is not present in person or by attorney or agent the statutory notice must be given and served.

MOTION to set aside a judgment under section 274 of The Code, heard before *Hoke, J.,* at Fall Term, 1896, of STOKES. From an order setting aside the judgment the defendant appealed. The facts appear in the opinion of Chief Justice FAIRCLOTH.

Jones & Patterson for plaintiff.
A. M. Stack for defendant (appellant).

FAIRCLOTH, C. J. Plaintiff brought this action against defendant in a justice's court and obtained a judgment in December, 1894. The defendant prayed an appeal in open court. At Spring Term, 1896, of the Superior Court the defendant recovered judgment against plain-

tiff, who, within one year, upon notice, moved to set aside the judgment on the ground of excusable neglect under section 274 of The Code. His Honor, by request, upon affidavits, found the facts as follows: That at the trial before the justice of the peace the defendant prayed an appeal in open court. That at said trial the plaintiff was not present, either in person, by attorney or agent, and that King (the supposed (474) agent) nor the justice was authorized to act as plaintiff's agent, nor to accept or waive service of notice of appeal. That the appeal was taken and prosecuted without any notice given or served on the plaintiff, and without the plaintiff being present in person or by attorney. His Honor adjudged that the judgment at Spring Term, 1896, was irregular, and was taken by surprise and excusable neglect, and was contrary to the course and practice of the Court, and ordered the same to be set aside and that the case be restored to the docket for trial, plaintiff waiving notice. The defendant appealed, and insists that his Honor erred in holding that the notice given at the justice's trial was not valid and in his findings of fact.

His Honor was the sole judge of the weight and credibility of the evidence, and his findings of fact are conclusive upon this Court, when there is any evidence such as would be submitted to a jury upon such an issue raised by pleadings, and his findings of fact are not reviewable. Code, sec. 274; *Weil v. Woodard,* 104 N. C., 94.

In all cases the appellee is entitled to notice of an appeal as provided by statute. An appeal must be taken within ten days after judgment rendered or within ten days after notice thereof. Acts 1889, ch. 161; Code, sec, 549. Notice of appeal must be served within ten days after judgment, or if there was process not personally served and no answer is filed the notice of appeal may be filed within fifteen days after notice of the rendition of the judgment. Code, sec. 876. Parties regularly in Court are charged with knowledge of all subsequent proceedings, without service of a copy, unless specially directed, which was not the rule of practice in England. *Collier v. Bank,* 21 N. C., 328. When notice of appeal in a justice's court is given, and the adverse party is present in person or by attorney, the appellant is not required to give (475) any notice either to the justice or to the appellee (Code, sec. 877), and this plainly implies if the appellee is not present when the appeal is prayed that the statutory notice must be given and served. *S. v. Johnson,* 109 N. C., 852. We think his Honor's legal conclusion on the facts found was correct. The cases cited by defendant's counsel do not apply to the questions presented, as in this case, under The Code, sec. 877. The rule requiring parties to be charged with notice of all orders made in the progress of the action after legal service is just and

reasonable, otherwise either party could delay the court and subject the other party and the witnesses to an unreasonable expense and inconvenience.

AFFIRMED.

Cited: Norton v. McLaurin, 125 N. C., 187; *Lumber Co. v. Cottingham,* 173 N. C., 327.

KESTER BROTHERS v. MILLER BROTHERS.

Contract—Sale of Engine—Breach of Warranty—Counterclaim—Damages for Loss of Time—Interest.

1. Where there is a breach of warranty as to the quality of an article sold the purchaser may reject it and sue for damages sustained by the nonperformance of the vendor's contract, or he may keep it and set up, by way of counterclaim against the vendor's action for the purchase price, the breach of warranty in reduction, in which case the measure of damages is the difference between the contract price and the actual value.

2. Plaintiffs sold to defendants an engine with warranty as to its quality, and upon the appearance of a defect agreed to remedy it, and insisted upon the defendants' keeping and operating the engine until it should be put in satisfactory running order, at which time the balance of the purchase price should be paid. During the time the plaintiffs were attempting to remedy the defects, defendants suffered loss by reason of idle labor and the consumption of extra fuel: *Held,* in an action by the plaintiffs to recover the balance of the purchase price, that the possession of the engine by the defendants not being the exercise of a legal option to keep it and to set up a breach of contract in damages, but being at the instance and for the benefit of plaintiffs, the defendants are entitled upon their counterclaim to a credit for the loss to which they were subjected while plaintiffs were endeavoring to remedy the defects.

3. Where, in the trial of an action for the contract price of an engine which the defendants had retained and used at the instance of plaintiffs while the latter were endeavoring to remedy defects, the defendants set up as a defense the breach of warranty as to quality, it was proper, upon the verdict of the jury for the actual value of the engine, to allow interest on the same from the time the engine was delivered and first set in operation.

ACTION, tried before *Brown, J.,* and a jury, at January Term, 1896, of FORSYTH. The nature of the action and the facts are fully stated in the opinion of Associate Justice MONTGOMERY.

Watson & Buxton for plaintiffs.

Jones & Patterson and A. E. Holton for defendants (appellants).

MONTGOMERY, J. The plaintiffs sold with a warranty as to quality and finish to the defendants an engine of a certain description, and delivered the same. There appeared a defect in the machine after it was put in operation and complaint was made to the plaintiffs. The plaintiffs agreed to remedy the fault and began the work. Upon the payment to the plaintiffs on 7 August, 1893, the plaintiffs executed to the defendants a receipt expressed as follows:

"Received of Miller Bros. three hundred and eleven dollars and
(477) 97-100, part payment on engine and boiler, balance of $1,638.07 to be paid when engine and boiler are made to run satisfactorily.

"KESTER BROS."

It was in evidence that the plaintiffs continued from time to time between 1 May, 1893, and 15 October, 1894, as they were called on by the defendants, to work on the engine to remedy the defect. After the last-named date they demanded the balance due. It was in evidence that during all the time in which the plaintiffs were at work on the engine they were insisting that the defendant would retain it and that they would continue to try to remedy the knocking (the defect complained of.) The work and improvements put upon the engine by the plaintiffs under their agreement of 7 August, 1893, made no great change in the condition of the machine.

On 15 October, 1894, the plaintiffs brought this action to recover the purchase-price of the engine less the amount paid on 7 August, 1893. The defendants by way of counterclaim averred that they had been greatly damaged, during the time the plaintiffs were trying to remedy the defect in the engine, by loss on account of their hands being idle and by the increased amount of fuel consumed, made necessary by operating the engine with the defect. They also averred that they had never accepted the machinery as a full performance of the plaintiff's contract; that the engine did not come up to the warranty and description. The issues raised by the pleadings were submitted without exception from either side. The jury found the difference between the contract price and the actual value of the engine to be $450. They also found that the defendants' damages on account of idle labor were $200 and for extra coal consumed by the engine $150. His Honor reserved the question as to whether the defendants were entitled to damage for idle
(478) labor and extra coal, and upon the jury finding for the defendants for these items he held as a matter of law that the defendants were not entitled to the recovery. The judgment was rendered by his Honor for the contract price, $1,950, less the amount found by the jury to be the difference between the contract price and the actual value of

the engine ($450), less the $100 found by the jury as damages by reason of the plaintiff's failure to supervise and properly put up the masonry and work necessary to set the machine in position, and less the payment made on 7 August, 1893, with interest on the balance, $1,088.03. The defendants filed exceptions to the judgment as follows:

"1. That the Court erred in not giving defendants credit for the sum of $350, on account of idle labor and extra coal, as assessed by the jury.

"2. That the Court erred in allowing interest to the plaintiffs prior to the issuing of the summons, the plaintiffs never abandoning their efforts to remedy the defects in the machinery until that time.

"3. That the Court committed error in rendering any judgment against defendants upon the admitted receipt of 7 August, 1893, and upon other evidence in the case."

We will discuss the first exception. The defendants, when they discovered the defect in the engine, had the right to reject it and bring an action against the plaintiffs for such damages as they had sustained by reason of the plaintiffs' nonperformance of the contract, if they chose so to do, or they could have kept the engine and set up by way of counterclaim against plaintiffs' demand for the contract price the breach of warranty in reduction. *Cox v. Long,* 69 N. C., 7; *Lewis v. Rountree,* 78 N. C., 323. And the true measure of damages would have been the difference between the contract price and the actual value. This rule in principle was decided in *Spiers v. Halstead,* 74 N. C., (479) 620. His Honor's instructions to the jury on this point were to that effect, and no exceptions were made to it on either side. And if this were all in the case the rejection by his Honor of the defendants' claim for idle labor and extra coal would have been proper. But another element enters into the transaction. It is to be remembered that all the while the defendants were complaining of the defect in the engine, the plaintiffs were trying to remedy it, and the defendants were having their hands idle and consuming extra coal. The plaintiffs in the beginning insisted, and were insisting, that the defendants would not reject the machine but keep it and let them continue to try to remedy the fault. This course of the plaintiffs caused loss to the defendants. The plaintiffs, for their own benefit, that they might not have the engine returned to them, induced the defendants to keep it and to operate it while they were at work on it, at a loss to the defendants. Under these circumstances possession of the engine was not a legal option of the defendants to keep it and set up a breach of contract in damages, but the possession was at the instance of the plaintiffs and for the plaintiffs' benefit, as we have said. It was insisted here upon the argument that

if the defendants could by law recover damages on account of idle work and extra fuel, such damage might be indefinitely claimed, and as a consequence might amount to as much or more than the contract price of the engine. This is true, and ought to be the rule, for as long as the plaintiffs insisted on the defendants keeping the engine, they, the plaintiffs, promising that they would make it satisfactory and remedy the defect, can not be heard to say that they are not answerable to the defendants for loss they might subject them to by reason of their course.
(480) The contract not having been performed by the plaintiffs they, instead of forcing the defendants to make the option of receiving the engine and holding them liable for the difference between the contract price and the actual value or reject it, chose to induce the defendants to keep the engine and operate it while they were engaged in trying to put it in the condition guaranteed in the sale. If they saw fit to continue this attempt to remedy the defect, it was at their risk and on their own responsibility and that responsibility continued as long as they without success tried to put the engine in a satisfactory condition. We are of the opinion, therefore, that the Court erred in holding, on the verdict of the jury, that the defendants were not entitled to the $350 found by the jury as the damage which the defendants had sustained on account of idle hands and extra fuel.

There is no merit in the second exception. The judgment gave the plaintiffs interest, not on the amount of the contract price, but on that amount less the $450, difference between the contract price and the actual value, and $100, on account of the failure of the plaintiffs to properly construct the masonry in which to place the machinery. The defendants have had the use of the plaintiffs' property all the time. If it appeared in the record at what particular dates the extra fuel was furnished and the loss on account of idle labor occurred, we might adjust the matter of interest on $350, which was embraced in the judgment of the Court below, but as that does not appear we can make no order.

The third exception can not be sustained. The defendants kept and used the engine after the plaintiffs had ceased to try to correct the defect, after demand made for payment and after action brought and were using it at the time of trial. They will not, therefore, be allowed to keep the property and then refuse to pay for it its actual
(481) value. The evidence shows that after the plaintiffs had ceased work on the engine, the defect not having been remedied, they continued to operate it without any loss on account of idle hands and extra fuel, and that it did all the defendants' work properly. This seems to be strange, but we can not alter or change the findings of the jury. The judgment below is affirmed, except that it ought to be credited with

the $350 found by the jury to be the defendants' damages on account of the items of loss of labor and consumption of extra coal by the engine.

MODIFIED AND AFFIRMED.

Cited: Finch v. Gregg, 126 N. C., 179; *Critcher v. Porter,* 135 N. C., 547, 551; *Allen v. Tompkins,* 136 N. C., 210; *Parker v. Fenwick,* 138 N. C., 217; *Mfg. Co. v. Machine Works,* 144 N. C., 691; *Mason v. Cotton Co.,* 148 N. C., 517; *Robinson v. Huffstetler,* 165 N. C., 462; *Underwood v. Car Co.,* 166 N. C., 462; *Bond v. Cotton Mills, ib.,* 23; *Fairbanks v. Supply Co.,* 170 N. C., 320; *Winn v. Finch,* 171 N. C., 275.

W. G. SYDNOR v. McDOWELL BOYD.

Action on Note—Executory Contract—Conditional Contract—Failure of Performance by One Party to Contract Releases the Other—Married Woman—Body or Capital of Married Woman's Estate—Transfer to Husband, Invalid When.

1. Where the promises of the parties to an executory contract are not independent but conditional and dependent, the one upon the other, failure of performance in whole or part by one party thereto discharges the other.

2. An insurance policy on the life of her husband, payable to a married woman, being a vested interest, is embraced in the word "body" as used in section 1835 of The Code, which requires all contracts between husband and wife affecting "the body or capital" of the latter's estate to be in writing and accompanied by the privy examination of the wife.

3. Defendant applied for two policies of insurance, one on his own life, payable to his wife, and the other on the life of his wife, payable to himself, and agreed to execute to the plaintiff (the agent) his note for the premiums on both. Upon delivery of the policies both were found to be payable to his wife, and he refused to accept them. Thereafter the agent took back the policies, and soon returned them with what purported to be a written assignment to defendant by his wife of the policy on her own life, unaccompanied by certificate of her privy examination. Upon assurances of plaintiff that the assignment was as effectual as if the policy had been originally made payable to him, defendant executed his note for the two premiums, but soon thereafter received a letter from the insurance company acknowledging receipt of the duplicate assignment but notifying him that the company assumed no responsibility as to the validity of the assignment. Thereupon defendant stated that he did not want the policies and denied his liability on the note: *Held,* in an action on the note by the payee, that the assignment of the policy being invalid, there was a failure on the part of plaintiff to perform his contract which released the defendant from his liability on the note.

ACTION, tried at Spring Term, 1896, of SURRY, before *Norwood, J.* Application had been made for two policies of insurance, one on the life of McDowell Boyd for $1,000, for the benefit of his wife, Anna Louisa Boyd, and the other for a like amount on the life of the wife for the benefit of the husband. After a great deal of solicitation the defendant, McDowell Boyd, agreed to deliver to the plaintiff, Sydnor, agent of the Mutual Life Insurance Company of New York, a box of tobacco, and to execute his promissory note, dated 5 June, 1895, and due at a subsequent date in the same year, for $127, as the premium for both policies. When the policies were returned it appeared that Anna Louisa Boyd had been made the beneficiary in both, and her husband refused to receive them because of the failure to comply with the contract. The agent, Sydnor, thereafter took back both policies, but soon returned them with what purported to be an assignment by the wife to the (483) husband of the policy on her own life, which transfer is as follows:

"For one dollar to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer and set over to McDowell Boyd, of Pinnacle, N. C., all my right, title and interest in this policy (596,751) issued by the Mutual Life Insurance Company of New York; and for the consideration above expressed I do also for myself, my executors and administrators guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, his executors, administrators and assigns, and their title to the said policy will forever warrant and defend.

"ANNA LOUISA BOYD.

"Dated at Pinnacle, N. C., this 1 July, 1895. In presence of W. G. Sydnor."

Upon the assurance that the asignment placed the policy upon the same footing with the company, as if it had been originally made payable to him, the defendant executed the note for $127, on which the plaintiff has brought this action. Soon after executing the note, instead of the assent to the asignment expected the defendant received the following from the company:

"DEAR SIR: A duplicate of assignment of Policy 596,751 to yourself has been received and filed. The company assumes no responsibility as to its validity.

"Respectfully,

"C. F. BRESEE & SONS, Gen Agts.,
"Per Wooten."

On receipt of this the defendant tendered the policies to the plaintiff, and demanded his note, telling him that the policies were worthless to him unless written in accordance with the aplications.

The policies of insurance were introduced as evidence, both of (484) which contained the following conditions on the back thereof:

"Notice to the holder of this policy.—No person, except an executive officer of the company or its secretary at its head office in New York, has power on behalf of the company to make, modify or alter this contract, to extend the time for paying a premium, to bind the company by making any promise or by accepting any representation or information not contained in the application for this contract. Any interlineations, additions or erasures must be attested by the signature of one of the above-named officers.

"Assignments.—The company declines to notice any assignment of this policy until the original assignment or a duplicate or a certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment."

The following issues were without objection submitted to the jury:

"1st. Did the plaintiff as agent of the insurance company contract to deliver to defendant two policies of insurance as alleged by him and receive the note sued on in consideration thereof? Answer. 'Yes.'

"2d. Did plaintiff violate said contract? Answer 'No.'"

After the argument it was admitted by counsel for both parties that if the assignment was valid, so that policy could be collected by defendant in case of his wife's death, the second issue should be answered "No"; otherwise it should be answered "Yes." There was a verdict by the jury on first issue on behalf of defendant; his Honor answered (485) the second issue "No" on the evidence.

The defendant moved for a new trial on the ground that the Court erred in instructing the jury to answer the second issue "No," and appealed from the judgment rendered.

Carter & Lewellyn for plaintiff.
Glenn & Manly for defendant.

AVERY, J. (after stating the facts). At common law the husband and wife, being deemed one person, were incapable of contracting with each other, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other. The rule was different in equity, where assignments or conveyances were held to raise a trust in favor of the assignee or grantee. Now, however, the wife is allowed to acquire title to property conveyed to her by the husband

or any other person, the conveyances being liable, like other deeds or instruments that pass title, to impeachment for fraud upon sufficient grounds. *Walker v. Long,* 109 N. C., 510; *Osborne v. Wilkes,* 108 N. C., 651; *Woodruff v. Bowles,* 104 N. C., 197; *Battle v. Mayo,* 102 N. C., 413; *Brown v. Mitchell, ib.,* 347; *George v. High,* 85 N. C., 99. The statute (Code, sec. 1836) declares all contracts between husband and wife, subject to restrictions contained in the preceding section, (1835,) valid, unless contrary to public policy. The last named section provides that no contract between them made during coverture shall be valid to affect or change any part of the real estate of the wife or the accruing income thereof for a longer time than three years next ensuing the making of such contract or to impair or change the *body* or capital of the personal estate of the wife or accruing income thereof for a longer time than three years next ensuing the making of such contract, unless (486) such contract shall be in writing as required for conveyances of land, etc." The section further provides that, in order to render such contract valid, the officer taking the private examination of the wife, as prescribed, must certify, among other things, that "it is not unreasonable or injurious to her." If a policy of insurance for her benefit constituted a part of the body of her personal estate the endorsement thereon was ineffectual to pass her interest to the husband and make him the beneficiary in her stead, as was at first contemplated. It was held in *Hooker v. Sugg,* 102 N. C., 115, that where the husband takes out a policy on his life for the benefit of the wife her interest vests in her immediately upon its execution. If the plaintiff attempted to comply with his contract by transmitting the beneficiary interest in the policy indirectly through the wife of the husband by assignment, instead of directly by the terms of policy itself, it was incumbent on him to see that her interest passed. If the word "body" in the statute is not meaningless, it must have been intended to include a vested interest from which no present income is derived, though it has a present value dependent upon facts which need be enumerated. The body of one's personal estate manifestly does not include the income derived from it, but does include every such vested interest as a policy of insurance.

The wife, certainly with the assent of her husband, is empowered by law to assign her interest as a beneficiary in a life or fire insurance policy to a third person and where both join her interest passes, unless it is a violation of some enforceable stipulation in the contract of insurance to attempt to transfer the interest in that way. Here, if instead of the notice sent out by the company, it had assented to the (487) validity of the transfer, such assent would have operated as an estoppel on it to deny the right of the husband to recover in case

of the wife's death. *Blackburn v. Insurance Co.,* 116 N. C., 821. But it would still have remained to determine whether in case of the wife's death the policy, without a further transfer such as was contemplated by the statute, would not belong to the wife's estate instead of to the husband as beneficiary. Pretermitting the question upon which the judge below probably passed, viz, whether there was not a failure of consideration, unless the plaintiff complied with the original agreement by delivering the policies applied for, it is manifest that he failed to attain the same end by the indirect method of assignment. Upon his refusal to remedy the defect either by furnishing a policy in which the husband should be named as beneficiary, or making the transfer effectual in law to pass the beneficiary interest out of the wife, the husband was at liberty to renounce the entire contract. The defendant made application for the policies and agreed that, as a consideration for them, he would execute his promissory note. Upon the failure of the agent of the company to deliver the policies applied for, the defendant refused to execute his note and accept those tendered. Upon the agreement on the part of the plaintiff, which must be interpreted as meaning that the assignment should receive the assent of the company, so as at least to work an estoppel on it to deny its validity, the defendant was induced to execute the note. Where the promises of the parties to an executory contract are not independent but conditional, the one upon the other, the failure of one to perform his agreement in whole or in part operates as a discharge of the other party from promises conditioned upon such performance. Clark on Contracts, p. 651. In order to deprive the defendant of the right to insist upon a discharge from his promise, the intention to make the mutual agreements independent and (488) unconditional must be clear. Clark, *supra,* p. 653.

The mutual stipulations of the plaintiff as agent and the defendant company were dependent the one upon the other, and as between them the failure to furnish a policy on the life of the wife, of which the husband should be the beneficiary, operated to relieve him from the payment of a promissory note given as a consideration for such a policy. The two policies were of such a nature that the consideration was not divisible. It was given to provide for each in case of surviving the other. Clark, *supra,* pages 651 to 653; 2 Parson's Cont. (8th Ed.), bottom page 645 and note. If the defendant had paid the money instead of giving his note he could, on the failure or refusal to comply with the mutual and dependent promises, have recovered back. 1 Wharton, *supra,* sec. 520. For a like reason he could avoid the payment when sued by the payee on a promissory note given in lieu of the money. The defendant made application for two policies.

The insurance company distinctly and unequivocally refused to recognize the validity of the assignment, and while it recognized the agency of the plaintiff Sydnor to take the defendant's note or collect the premium paid as a consideration for a certain policy, it attempts to repudiate the promises he made as an inducement in procuring the execution of the note which was given in lieu of the money and constituted the consideration. It has been distinctly held by this Court that, where the insured is induced to pay money by a representation made by a local agent of the insurer, the latter will be estopped, after receiving the money so procured and placing it in its coffers, from denying the authority of the agent to make the representation which induced its payment. *Bergerow v. Ins. Co.,* 111 N. C., 45; *Follette v. Ins.* (489) *Co.,* 110 N. C., 377.

There was error in the instruction that the plaintiff complied with his contract, and a new trial is granted to the defendant.

NEW TRIAL.

Cited: Lamb v. McPhail, 126 N. C., 221; *Rea v. Rea,* 156 N. C., 532.

JOHN DALE v. R. K. PRESNELL.

Practice—Security for Costs—Suit in Forma Pauperis—Discretion of Court—Mortgage on Land as Security for Costs.

1. Under section 210 of The Code the judge may, in his discretion, require a plaintiff who has been allowed to sue *in forma pauperis* to give security for costs.

2. An order compelling a plaintiff who has sued *in forma pauperis* to choose whether he will give mortgage on land owned by him as security for costs or have his action dismissed is not erroneous, except to the extent that it should be modified so as to permit him to give bond for costs, if he prefers to do so.

ACTION, heard before *Norwood, J.,* at Fall Term, 1896, of BURKE, on a motion of the defendant to require plaintiff (who had obtained leave to sue *in forma pauperis*) to give security for costs.

His Honor made an order as follows:

"It is ordered that upon the giving of security in the sum of one hundred dollars, to be secured by mortgage upon real estate, the (490) plaintiff be allowed to prosecute this action. And it is further ordered that unless the said mortgage be duly executed and filed

with the clerk of the court by the first day of the next term of this court, conditioned to pay the defendants all such costs as the defendants may recover in this action, then this action shall be dismissed."

Avery & Ervin and J. T. Perkins for plaintiff (appellant).
S. J. Ervin for defendant.

FURCHES, J. This is an action commenced *in forma pauperis.* It is admitted that the affidavit was regular and sufficient in form, and that the clerk of BURKE granted the order allowing plaintiff to bring the action *in forma pauperis.* And this is a motion on the part of defendant to require plaintiff to give security for the prosecution or to have the action dismissed. Upon the hearing before *Norwood, J.,* at Fall Term, 1896 of Burke, the plaintiff answered the rule and admitted that he was the owner of two small tracts of land, worth from $120 to $150, a part of which was involved in this action. Whereupon the judge held (as we understand the order, though it is not very clearly expressed) that the plaintiff must file a mortgage on this land to secure the costs, in the penalty of one hundred dollars, or his action would be dismissed. The plaintiff excepted to this order and appealed.

It was argued before us that this is an order compelling the plaintiff to mortgage his land, and the Court had no power to do this. If this was the question presented for our determination we would agree with the plaintiff that the Court had no such power. But we do not understand this to be the meaning of the order, but that plaintiff's action would be dismissed unless he gave security or made a mortgage on his land for $100 to secure the costs. (491)

It was also contended that it would be compelling his wife to join in the mortgage, and that the Court had no power to do this. And we say again, if this was the question presented for our consideration we would agree with the plaintiff that the Court had no power to compel the wife to join in the mortgage. But we see no reason why the Court might not have made it a condition that the wife should join in the mortgage or the action would be dismissed. And then she could do so or not, just as she pleased. That would not be making her join in the mortgage. But no such question is presented here. And if the plaintiff has a wife (and it does not appear to us from the record), not a word is said about her joining in the mortgage. And the question of title under the mortgage, if made, is not before us for consideration, but simply whether he *will* make a mortgage or have his action dismissed.

And it appears singular to us that, as long as we have had a statute allowing parties to bring suits and actions *in forma pauperis,* we are not

able to find where this question has been presented to the Court. We find that where a plaintiff has given a bond for costs which has become insufficient the Court has the power to allow him to proceed with his case without giving additional security. *Holder v. Jones,* 29 N. C., 191. We also find that where a plaintiff, pending an action brought *in forma pauperis,* assigned his interest in the land which was the subject of the action, the Court will require the assignee to give security, or it will withdraw the privilege given to the assignor and dismiss the action. *Davis v. Higgins,* 91 N. C., 382. And while neither of these cases is directly in point in this case, they seem to throw some light on the question. They tend to show that the right to sue as a pauper is a
(492) favor granted the plaintiff, and is in the power and discretion of the Court. But without the benefit of any judicial construction to aid us, it seems that this must be so.

The general rule (Code, sec. 209) is that bond and security must be given before the clerk is authorized to issue a summons instituting an action. And he is liable to a penalty if he does so without taking bond and security. But in order that there should not be failure of justice, on account of poverty, section 210 of The Code provides that where a party is not able to secure the costs upon proper application made upon affidavit and proof the judge or clerk *may grant* him the privilege of bringing his action without security. Section 210 is in the nature of an exception to the general rule in section 209. And in the Revised Code, ch. 31, sec. 40, from which section 209 of The Code was taken, it is set forth as an "exception" to the general rule as a part of the same section.

Then, it being a privilege to be granted or not by the judge or clerk (and it is expressly stated as a matter of discretion in chapter 31, sec. 40 of the Revised Code), we do not see why it should not remain under the discretion of the judge. This privilege, to be granted at the discretion of the Court, was only intended for the benefit of parties who could not give the security. And when he becomes able to do so we see no reason why he should not be put to his election to do so or to have his action dismissed. This is only requiring him to do as other persons have to do under the general rule. It is only taking away from him the benefit of the exception to the general rule that he has been allowed to use. This privilege to sue as a pauper was not intended to encourage speculative litigation, where the plaintiff plays at a game with a chance to win and nothing to lose. We fear that it sometimes, and it may
(493) be many times, is used in this way. And if it is to be understood that when an order is once granted the Court has no further con-

trol of the matter we fear it would become a means of oppression instead of a means of protection to the poor, as it was intended to be.

The mortgage of the plaintiff may not be a very great protection to the defendant. But the plaintiff is not the party to complain of that. He says he owns the land, and he can make a mortgage convyenig what interest he has to secure the costs. And if he is not willing to risk what interest he has in his land to do so he has no right to complain if his action is dismissed. He ought not to be allowed to require the time and services of others if he is not willing to risk his property to pay them.

It is stated that a part of this land is involved in this action. This he need not include in the mortgage unless he prefers to do so for convenience of description. If it were all involved in this action we would not sustain the order of the Court, for the reason that this security is required for the benefit of the defendant. *Smith v. Arthur,* 116 N. C., 871. And if the plaintiff succeeds in his action, he pays no costs, but the defendant has it to pay. And if he fails, then the land is the defendant's, and the mortgage could do him no good. The Court will never require a vain thing to be done.

The judgment will be modified so as to require the plaintiff to give bond for the prosecution of his action, or to make a mortgage on his land for one hundred dollars or suffer his action to be dismissed. Thus modified the judgment is

AFFIRMED.

Cited: Christian v. R. R., 136 N. C., 323; *Alston v. Holt,* 172 N. C., 417.

(494)

FIRST NATIONAL BANK OF JOHNSON CITY ET AL. v. J. H. PEARSON ET AL.

Action on Note for the Purchase of Land—Practice—Pleadings—Frivolous Answer—Judgment—Vendor and Vendee—Reservation of Title—Rights of Purchaser—Correction of Clerical Error in Deed—Trustee's Deed.

1. Where an action was brought to Spring Term, 1895, at which time plaintiff was allowed to file and did file his complaint within thirty days, and at Spring Term, 1896, the case was tried: *Held,* that, as the case was removed by the filing of the complaint from the summons to the trial docket, the court was authorized to render judgment for plaintiff upon a frivolous and insufficient answer.

2. When the complaint in an action on a note is verified, judgment may be rendered on a frivolous answer, even at the appearance term.
3. The purchaser of land when title is reserved stands in the relation of a mortgagor as to the purchase money, and the vendor may pursue either or both of his two remedies, one *in personam* and the other *in rem.*
4. Where, in the trial of an action to recover on a note given for the purchase money of land, the plaintiff tendered a deed which was, by a clerical error, incorrectly dated: *Held*, that it was not error to allow the date to be corrected upon its being reacknowledged and reprobated.
5. When it does not appear that trustees have not obeyed and carried out the powers conferred upon them by a deed of trust, a deed by them is not objectionable because it does not contain a clause of warranty.

ACTION, on a note for the purchase of land, tried before *Brown, J.*, at Spring Term, 1896. His Honor adjudged the answer to be frivolous and insufficient, and gave judgment for plaintiffs and defendants appealed. The facts are sufficiently stated in the opinion of Associate Justice FURCHES.

(495) *J. T. Perkins for plaintiff.*
Avery & Ervin and M. Silver for defendant.

FURCHES, J. This is an action for the recovery of money, upon a plain note of hand under seal, given for land purchased by defendant Pearson at a sale by trustees under the powers contained in a deed of trust. The action was returnable to Spring Term, 1895, and was tried at Spring Term, 1896. At the trial the Judge held "that the answers of the defendants were evasive and constituted no defense to the plaintiff's cause of action set out in the complaint," and rendered judgment for the plaintiff. From this judgment the defendants appealed and assigned five grounds of error, as follows:

First Exception: "That Spring Term, 1896, is an appearance term, and the Court had no power at said term to render judgment." This exception can not be sustained for the reason that it is not true in fact nor is it correct in law. The action was returnable to Spring Term, 1895, at which term the plaintiff was allowed thirty days to file a complaint, which he did within the time allowed. This complaint removed the action from the appearance or summons docket to the trial docket. Besides, the plaintiff's complaint was on a plain note of hand, and verified. And, this being so, the plaintiff was entitled to judgment when defendant's answer was found to be frivolous and insufficient, even had it been the appearance term.

Second Exception: "That the judgment was not warranted in the form rendered by the allegations of the complaint." There is no reason assigned or authority given to sustain this exception, and it is overruled.

Third Exception: "That the judgment can not be sustained because there is no privity shown between the plaintiff and the defendants and the trustees, and that no suit for specific performance can be maintained." This exception can not be sustained. A pur- (496) chaser of land stands in the position of a mortgagor as to the purchase-money where the title has been reserved. *Killebrew v. Hines.* 104 N. C., 182. And he may pursue two remedies in the same action, one *in personam* and one *in rem.* *Allen v. Taylor,* 96 N. C., 37.

Fourth Exception: "For the reason that the trustees, Pearson and Ervin, who made the sale, are not made parties." But the judge in making the case for this Court says no such ground was taken on the trial. So this disposes of this exception if there was anything in it.

Fifth Exception: "That the deed tendered, after being amended, is wholly insufficient to pass a proper title, for want of a warranty that it has no proper *habendum,* nor is the beginning corner stated with sufficient certainty, and that the Court permitted the deed to be altered from 1893 to 1895." The judge in settling the case on appeal states that he discovered the deed was written 1893 instead of 1895, and that this was a clerical error, which he allowed to be corrected upon the grantor's reacknowledging the deed after this alteration had been made and a reprobate of the deed had as altered. This, in our opinion, was not only allowable, but was proper. And with regard to this exception his Honor further says the only other exception to the sufficiency of this deed was that it did not contain a warranty. And it seems that, while the defendants make this objection, they do not suggest that the trustees have not obeyed and carried out the powers granted them in the deed of trust. And they could not warrant more than this. Therefore, after a careful examination of not only defendant's exceptions but the complaint and answers, we must sustain the judgment of the Court.

There were some other questions discussed before us, but we find they are not presented by the exceptions, and we do not feel (497) called upon to discuss them in this opinion. But we have considered such of them as may be considered to arise upon the record and are not in the exceptions. And we find no reason why the judgment shall not be

AFFIRMED.

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

DELIA M. CHILDS v. J. G. WISEMAN.

Practice—Contempt—Disobedience of Order of Court—Ability of Party to Comply With Order—Motion to Dissolve Order—Judge, Duty of.

1. Where a party to an action, having been directed to perform an order of the court, otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits.

2. Where an order adjudging a party to be in contempt of court unless he should perform what was therein directed to be done was not appealed from, it will not be reviewed on an appeal from the refusal of the judge below to hear affidavits on a motion to discharge the party for contempt because of his inability to perform the order, unless to correct what may appear plainly to be erroneous.

3. Where a defendant was ordered to furnish the boundaries for a survey of the land involved in the action, and to execute and deliver a warranty deed to the plaintiff, his refusal to obey the order renders him liable to imprisonment for contempt.

4. Where, in an action to recover land, the title was adjudged to be in plaintiff, it was error in the court to order the defendant's wife, who claimed the land and was not a party, and her tenant to surrender possession in ten days, otherwise to be in contempt of court, since that would be depriving a person of property without process of law or trial.

PROCEEDINGS FOR CONTEMPT, heard before *Timberlake, J.*, at Spring Term, 1895, of MCDOWELL. The facts appear in the opinion of Associate Justice FURCHES.

W. C. Newland for plaintiff.
Battle & Mordecai for defendant (appellant).

FURCHES, J. This is a proceeding in contempt before *Timberlake, J.*, and appeal by the defendant. The order of contempt was made during the Spring Term, 1895, of MCDOWELL, from which order there was no appeal. On 18 March, 1895, the defendant gave plaintiff notice that he would move before *Timberlake, J.*, on 23d of said month at Morganton, to be discharged from the order of contempt for the reason that he was not able to comply with the same. In pursuance to the notice, the parties and their attorneys appeared before *Judge Timberlake,* at the time and place named in the notice, when the defendant admitted that he had not complied with the order made at McDowell, but proposed to show by his affidavit that he could not do so. The order at McDowell had given the defendant ten days to comply

with the requirements of the order. And when defendant admitted that he had not complied with the order the judge refused to hear his affidavit, intended, as defendant insisted, to show that he could not do so.

This, it seems to us, the judge should have done. Code, sec. 500. But defendant has had these affidavits certified to the "clerk (499) of this Court," and at *the request of defendant* we allowed them to be read and have examined them ourselves. They fail to show that defendant had complied with that part of the order that it was within his power to do, to make a deed to the land mentioned in the original decree.

The order made at McDowell not having been appealed from, we can not review it in this appeal further than to correct what appears upon the order itself to be plainly erroneous. This being so, it appears to us to have been manifest error for the Court to require Mrs. Wiseman, who is not a party to the action, and her tenant to surrender possession of the land, adjudged by a decree in this cause to belong to Delia M. Childs, within ten days. This would be to take land of which Mrs. Wiseman claims to be the owner without process of law or trial, so far as she is concerned. But there is no reason why the defendant should not comply with the terms of the original decree in furnishing the boundaries for a survey of this land, and that he should make and execute a deed to the fee simple estate in said land, with full covenants of warranty and seizin in himself, to the plaintiff, and he is liable to be imprisoned for contempt in refusing to do this until it is done. *Cromartie v. Commissioners,* 85 N. C., 211. The judgment appealed from, modified as above indicated, is affirmed.

MODIFIED AND AFFIRMED.

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

---

(500)

R. M. PATTERSON v. E. S. WALTON ET AL.

Name of Party—Identity—Motion to Revive Judgment—Clerical Error in Docketing Judgment—Power of Clerk to Correct—Revival of Judgment as to One of Several Defendants—Limitations.

1. Names are used to designate persons, and where the identity is certain a variance in the name is immaterial.

2. Where an admittedly clerical error was committed in docketing a justice's judgment in the Superior Court by transposing the initials of the plain-

tiff's name from "R. M. P." to "M. R. P.," such error may be corrected on a motion to revive the judgment (whether the error was committed by the justice in rendering or the clerk in docketing the judgment), where there is no dispute as to the identity of the moving party as the owner of the judgment.

3. A motion made within ten years from the rendition of a justice's judgment docketed in the Superior Court to revive the same is not barred by the statute of limitations.

4. In a joint and several judgment against several defendants, the plaintiff may elect as to which of the defendants he shall revive it.

MOTION, by R. M. Patterson, to revive a judgment, heard before *Norwood, J.*, at Fall Term, 1896, of BURKE, on appeal from the clerk's refusal to grant the motion. His Honor reversed the action of the clerk and defendants appealed.

J. T. Perkins for plaintiffs.
Avery & Irvin and M. Silver for defendants (appellants).

CLARK, J. There is no question as to the identity of the plaintiff, M. R. Patterson, named in the judgment with R. M. Patterson, who now moves to revive the judgment. Both the mover and the defendant swear to that effect and the judge finds it to be a fact. The judgment might well, therefore, have been revived in the name of M. R.
(501) Patterson, and the sheriff, when the money was collected, would have to pay it over to R. M. Patterson, though styled M. R. Patterson in the judgment upon being satisfied of the identity of the person. A similar instance is where an execution is issued in the name of a *feme sole,* and on the return of the execution she has changed her name by marriage. Names are to designate persons, and where the identity is certain a variance in the name is immaterial. *Gibbs v. Fuller,* 66 N. C., 116. "Errors or defects in the pleadings or proceedings not affecting substantial rights are to be disregarded *at every stage of the action.*" Code, sec. 276. It is true that the amendment of a record should be made in the Court where it was made (*Adams v. Reeves,* 76 N. C., 412), and that a justice's judgment can only be vacated or set aside by proceedings before him or his successor, unless it is taken into the Superior Court by *recordari. Whitehurst v. Transportation Co.,* 109 N. C., 342; *Morton v. Rippy,* 84 N. C., 611. But this is not a matter affecting the merits of the action or the integrity of the record, but a mere correction of an admittedly clerical error in the name of a party, which can not possibly prejudice any one, and which indeed might have been permitted to go uncorrected without affecting the liability of the defendant, who was unquestionably adjudged to pay

the sum named, or of the plaintiff, who is unquestionably the person to whom it was adjudged to be paid. The correction of a mere clerical error in the name of a party should have been made by the clerk on the motion to revive the judgment, whether the inadvertence was committed by the justice or himself. *Clawson v. Wolfe,* 77 N. C., 100; Code, sec. 273. The motion being made within ten years after the rendition of the justice's judgment, which was docketed in the Superior Court, was not barred by the Statute of Limitations. *Adams v. Guy,* 106 N. C., 275. Nor is there any requirement that it must be revived (502) as to all the defendants. When the judgment is joint and several, the plaintiff can elect as to whom he shall revive, just as he can whom he shall sue upon a joint and several bond.

AFFIRMED.

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

Cited: Heyer v. Rivenbark, 128 N. C., 272; *Newby v. Edwards,* 153 N. C., 112.

DANIEL BLACK v. L. C. GENTERY.

Action on Receiver's Bond—Sureties—Liability, How Enforced—Defective Statement of Good Cause of Action—Demurrer.

1. Sureties upon the bond of a receiver do not become parties to a suit on the same or officers of the court by reason thereof, and their liability can be enforced only by an independent action against them, and not by a summary proceeding to show cause or by motion in the cause.
2. Where judgment has been obtained against a receiver he is not a necessary party to an action against the sureties on his bond.
3. In cases where it is necessary to obtain leave to sue on a receiver's bond the complaint should allege that such leave has been granted, but failure to do so is not a defect in the cause of action, but a defective statement of a good cause of action, and is cured by failure to demur especially on that ground.

ACTION, against L. C. Gentery and H. S. Vannoy, sureties on the bond of Herman Williams and James E. Clayton, receivers of the Ore Knob Copper Company of Ashe County, against whom the plaintiff had recovered judgment at Spring Term, 1887, of ASHE. The action was heard on complaint and demurrer before *Norwood, J.,* at Fall Term,

1896, of ASHE. The complaint did not allege that leave to sue (503) on the receiver's bond has been obtained. The demurrer was as follows:

"1. That this action ought not to be maintained for that James E. Clayton and Herman Williams, the principals to the bond on which the action is brought, are not parties in this action.

"2. For that this action ought not to be maintained in its present form, but if plaintiff had any relief whatever it should be by a motion in the cause now pending in the Superior Court of Ashe County, entitled Daniel Black, plaintiff, against the Ore Knob Copper Company and James E. Clayton and Herman Williams, receivers, and of this the defendant prays the judgment of the Court."

His Honor overruled the demurrer, and gave judgment for plaintiff, and defendants appealed.

R. C. Strong and J. W. Todd for defendants.
No counsel contra.

CLARK, J. Sureties upon the bond of a receiver do not become parties to the suit or officers of the court by reason thereof. *Thurman v. Morgan,* 79 Va., 367; Gluck and Becker on Receivers, sec. 88. Their liability can only be maintained and enforced by an independent action in which they have the constitutional right of trial by jury. They can not be summarily proceeded against by an order to show cause, or motion in the cause, unless they have a part of the trust funds in their hands, and then only to the extent of such funds. *Bank v. Creditors,* 86 N. C., 323; *Atkinson v. Smith,* 89 N. C., 72; Beach on Receivers, sec. 186. This proposition of law is so clear that on this point the demurrer was properly held frivolous. Nor was the first ground of demurrer any more valid, for judgment is averred in the complaint and is admitted by the demurrer to have already been taken against (504) the receivers; and they having failed to pay the same, this action was brought for their default against the sureties. There could be no reason for making the receivers parties to this proceeding.

It is not necessary to obtain leave of Court to sue the sureties on the bond of a clerk of the Superior Court, or other persons who are ex officio receivers of certain funds, but in all other cases there must be leave of court to sue the receiver's bond. *Booth v. Upchurch,* 110 N. C., 62. The complaint should allege that leave to sue has been granted by the Court (in a case like the present, where such leave should be had), but failure to do so is not a defect in the cause of action, but a defective statement of a good cause of action, and was cured by failure to demur

upon that ground. If there is a demurrer in apt time, the defective complaint could be amended by averring leave of court, if such were the fact.

A demurrer should not be held frivolous unless palpably so (cases cited in Clark's Code, 2 Ed., pp. 349, 350), but no serious question was raised by the demurrer in this case. The history of this litigation, which has been presented in this Court twice before (109 N. C., 389, and 115 N. C., 382), demonstrates the impropriety of appointing as receivers parties interested in the action—here stockholders in the insolvent corporation and plaintiffs in the action in which they were appointed. *Young v. Rollins,* 85 N. C., 485. The judgment below is

AFFIRMED.

Cited: Wilson v. Rankin, 129 N. C., 449.

---

(505)

J. S. EASTMAN v. COMMISSIONERS OF BURKE COUNTY.

Juror—Resident and Taxpayer of County—Disqualification—Interest.

The interest of a resident and taxpayer of a county in an action to recover land from the county is too indirect and remote to disqualify him to serve as a juror in such action.

ACTION, heard before *Norwood, J.,* at Fall Term, 1896, of BURKE, on a motion of plaintiff for change of venue upon the ground that the facts alleged and admitted in the pleadings show that every juror in Burke County, being a taxpayer, is interested in the subject-matter of the action. The motion was denied and plaintiff appealed.

Avery & Ervin for plaintiff (appellant).
J. T. Perkins and E. J. Justice for defendants.

FAIRCLOTH, C. J. This is an action for possession of a part of the court-house square in Burke County. The plaintiff made a motion to have the cause removed to another county, on the ground that the subject of the action is county property, and that every juror in the county was interested as a taxpayer.

The same principle was considered in *Johnson v. Rankin,* 70 N. C., 550, and the motion was overruled. No judge or juror can serve in

an action in which he is interested, but the interest of a man because of his residence in a county or town is too remote and indirect. Such a rule would disqualify every judge or justice of the peace to try an action in the county or town in which he resided.

AFFIRMED.

FURCHES, J., having been of counsel, did not sit on the hearing of this case.

Cited: White v. Lane, 153 N. C., 16.

---

(506)

J. M. BERNHARDT v. G. W. BROWN ET AL.

Corporation, Foreign and Domestic—Attachment—Jurisdiction—Void Judgment.

1. When a foreign corporation is rechartered in this State it becomes a domestic corporation and is not liable to attachment as a nonresident.
2. A judgment rendered in attachment proceedings, based on the ground of nonresidence, against a foreign corporation which has been reincorporated in this State, is void, as well as a sale of its property thereunder, for want of jurisdiction.

AVERY, J., dissenting.

PETITION of defendants for a rehearing of the case between the same parties, decided at February Term, 1896, 118 N. C., 700.

Shepherd & Busbee, S. J. Irvin and I. T. Avery, for petitioners.
J. T. Perkins, J. G. Bynum and Edmund Jones, contra.

CLARK, J. This is a restricted rehearing, and the sole question presented is whether the N. C. Estate Company was a domestic or foreign corporation at the time the attachment was issued in the Brem & McDowell case, for if it was a domestic corporation no jurisdiction was acquired by virtue of the attachment issued against it as a foreign corporation. This is decided in this case (118 N. C., 700), in that part of the opinion as to which the rehearing was not granted, section 8 of the headnote. The affidavit for the said attachment sets out that the defendant is a foreign corporation, chartered in London, England, but

"that in 1887 the defendant company obtained a charter from (507) the Legislature of North Carolina," the affidavit further reciting some portions of the charter, which in fact is an usually full and complete act of incorporation. Acts 1887, pp. 892-895. The warrant of attachment was issued upon that affidavit, which on its face shows want of jurisdiction. The judgment does not contain any finding that the corporation was a nonresident. There being an incorporation of the company here, as alleged in the affidavit, and not a mere license to do business in this State, it became a *domestic* corporation, and hence not liable to attachment as nonresident (the ground relied on to confer jurisdiction), though of course it would have been for any of those causes for which a domestic corporation would be liable to attachment proceedings. Code, section 349 (2); 6 Thomp. Corp., section 7799; *Sprague v. R. R.,* 5 R. I., 233; 1 Thomp. Corp., sections 47, 320, 688, 689; 6 Thomp. Corp., sections 7452, 7472, 7817, 8012, 8020, 8128, and cases cited in those sections; Murfree Foreign Corp., sections 453, 459, 460; *Young v. South Tredegar Co.,* 4 Am. St., 752; Drake Attachments, section 479.

The foreign corporation having been reincorporated here, the case is simply such as would be the condition if a nonresident person had moved into this State and become a resident here, and thereafter a creditor, upon an affidavit alleging those facts, had sued out an attachment against him as a nonresident and sold his land under such proceeding, in which the judgment would be void, since the Court did not acquire jurisdiction of the subject-matter, *Springer v. Shavender,* 118 N. C., 33, nor of the person. The defendant in the supposed case not having been brought into Court by "due process of law," when the purchaser under a judgment thus obtained brings an action of ejectment the defendant, whether the original defendant in the action or (as here) one who has acquired such defendant's title by sale under a valid judgment and execution, can treat the judgment in such (508) attachment proceedings as void, just as he could a deed in the chain of plaintiff's title which is not properly executed or properly probated. It is not the case of an error or irregularity in a judgment, which can only be taken advantage of by an appeal or direct proceeding, but of a judgment void for want of jurisdiction, which is void everywhere.

PETITION DISMISSED.

AVERY, J., dissents.

J. M. McBRIDE v. W. N. G. WELBORN.

Practice—Motion to Quash and Dismiss Proceedings for Defect in Summons—Amendment.

1. A motion to quash and dismiss proceedings for defective summons comes too late if made after defendant has appeared and engaged in the trial of the case on the merits.

2. Upon motion of the plaintiff in an action, after trial has been entered into, the judge is empowered, under Code, sec. 908, to allow amendment of defective summons.

ACTION, tried before *Brown, J.*, at July Special Term, 1896, of ASHE, on appeal from a judgment of a justice of the peace. Under claim and delivery proceedings, property had been delivered to the palintiff, and the justice of the peace issued a summons as follows:

"*To any lawful officer of Ashe County*—GREETING:

You are hereby ordered to summon defendant to appear (509) before S. M. Transou on the 16th inst., at his office at 3 o'clock p. m., to show why judgment shall not be entered against him for cost of this action.

Herein fail not, and of this summons make due return. 12 June, 1894. S. M. TRANSOU, *J. P.*"

The return was as follows:

"Summons for W. N. G. Welborn, Rec. 12 June, 1894. Executed 12 June, 1894.

B. STURGILL, *Sheriff.*
Per E. F. TUCKER, *D. S.*"

The defendant moved to dismiss for want of a proper summons, and also for the want of proper return having been entered upon said summons, and for the further want of an undertaking justified to.

The motion was overruled, and after hearing the evidence of the above action, the justice decided in favor of the plaintiff, and charged the defendant with the cost of said action.

The defendant appealed to the Superior Court.

In the Superior Court, after the jury were empaneled, defendant moved to quash and dismiss the proceedings for defective summons. As the cause had been tried in this Court and a mistrial had heretofore, the motion was denied, and it was ordered, upon motion of plaintiff,

that the summons be amended so as to set out that the action was to recover one mule of value not exceeding $50 demanded of defendant. Defendant appealed.

George W. Bower for defendant.
No counsel contra.

FAIRCLOTH, C. J. This action commenced before a justice of the peace upon notice or summons to show cause why judgment should not be entered against defendant for cost of this action. In the Superior Court, after the jury were empaneled, the defendant (510) moved to quash and dismiss the proceeding for defective summons, the cause having been previously tried in the Superior Court, which trial resulted in a mistrial. The motion was refused, and on motion the judge allowed the plaintiff to amend his summons. Defendant excepted and appealed.

The motion came too late after the defendant had appeared and engaged in the trial on the merits of the controversy. *Redmond v. Mullenax,* 113 N. C., 505. The Court had the power to allow the amendment. Code, sec. 908.

AFFIRMED.

G. D. RAY & SON TO THE USE OF MARY E. YOUNG v. M. P. HONEYCUTT.

Funeral Expenses—Charge on Assets of Decedent's Estate—Action by Party in Interest.

1. The necessary and proper expenses of interment of a decedent are a first charge upon the assets in the hands of the personal representative, and the law will imply a promise to one who, from the necessity of the case, for any reason incurs the expense of a proper burial, and it is not necessary that the administrator should promise to pay the claim in order to obtain a judgment therefor against him.

2. A widow who pays an account for burial expenses of her husband is the proper party plaintiff in an action against the administrator, being the real party in interest.

ACTION, tried before *Bryan, J.,* at Fall Term, 1895, of YANCEY, on appeal from a judgment of a justice of the peace. A jury trial was waived and his Honor, by consent, found the facts. The action was to recover for burial expenses of T. W. Young, paid by the (511) plaintiff, M. E. Young.

Mary E. Young, the plaintiff, was introduced and testified that she was the widow of T. W. Young, deceased; that, at the death of her husband, Don Young, brother of her husband, went to the store of G. D. Ray & Son and got the burial clothes for her husband, and that within two or three days after his death, and before an administrator was appointed, G. D. Ray & Son presented her with the account sued for, which they held for the burial expenses of her husband, T. W. Young, and said she did not pay it at that time; that she advised with Mr. Banks, the clerk of the Superior Court, who advised her that if she paid it she could recover it back; and then she went to Mr. Ray's and took up the account; that she paid it with her own money and not her husband's; that there was no contract or agreement between her and the administrator for her to pay this debt; that there was no administrator when she took up the account; that she was advised by counsel that this debt was against the estate of T. W. Young, deceased, and not against her; but when she was advised that she could recover it back she paid it, but did not know that she could collect it. The defendant introduced no testimony, there being no controversy as to the amount of the debt.

The defendant, after specially pleading the Statute of Frauds, rested and contended that as the plaintiff was not compellable to pay said debts. and as she had paid the same of her own motion, she could not be allowed to recover as against the administrator in the absence of a written contract to that effect. His Honor being of the opinion that the plaintiff was entitled to recover, gave judgment for the plaintiff and defendants appealed.

(512) *Shepherd & Busbee for defendant* (*appellant*).
No counsel contra.

CLARK, J. Burial expenses, from the nature of things, are not an indebtedness of the deceased, for they accrue after his death; nor are they costs of administration incurred by the personal representative; indeed, they are created before his qualification. Yet, from very necessity, proper funeral expenses are the first charge upon the assets in the hands of the executor or administrator, being preferred at common law (2 Bl., 508) and by our statute (Code, section 1416) to taxes and debts due the State or sovereign, and to all judgments. "They bind the assets, independent of any promise by the executor or administrator, to the extent that they are proper to the estate and rank in life of the deceased." *Parker v. Lewis,* 13 N. C., 21; *Ward v. Jones,* 44 N. C., 127; *Barbee v. Green,* 86 N. C., 158. The case *of Gregory v. Hooker,*

8 N. C., 395, relied on by defendant, is explained by the first two of the cases just cited as holding only that the claimant of a charge for funeral expenses should notify the personal representative before the assets are disbursed and before action brought. In fact, as the authorities state, the funeral expenses are strictly a preferred charge upon the assets in the hands of the personal representative rather than a debt against the estate. Perley's Mortuary Law, 59 and cases cited.

It is well settled that the necessary and proper expenses of interment are a first charge upon the assets in the hands of the personal representative, and the law will imply a promise to him who, from the necessity of the case, for any reason, incurs the expense of a proper burial. *McCue v. Garvey,* 21 N. Y., 562; *Patterson v. Patterson,* 59 N. Y., 574; *Luess v. Hessen,* 13 Daly, 347; *Hapgood v. Houghton,* 10 Pick., 154. "Nor does the fact that the widow said to a stranger she did not intend any one else to pay the expenses, and that she did it voluntarily, (513) out of respect to her husband, bar her right to recover them," for this necessary expenses devolves upon the assets of the estate, and the law implies the promise to pay them, or to repay the proper person, who, as a matter of affection and duty, has incurred and paid them. *France's Est.,* 75 Pa. St., 220; Perley's Mortuary Law, 73. It is not intended, however, to say that any person who intermeddles officiously and incurs such expense can recover. *McCue v. Garvey, supra; Parker v. Lewis, supra.*

The judgment binds only the assets in the hands of the administrator as a preferred charge, and is not, of course, a judgment against him personally.

We are not advised why the action is brought in the name of "G. D. Ray & Son to the use of Mary E. Young," but even under the antiquated and obsolete system when that form was in use Mary E. Young would have been the real party plaintiff, and now the rest is to be disregarded as mere surplusage, and she is the only plaintiff, being the real party in interest. Code, section 177. The Statute of Frauds has no application, for the case does not rest upon any promise by the administrator, nor was it necessary he should agree to pay the claim, if the expense (as is not denied) was suitable and proper.

NO ERROR.

Cited: Reid v. King, 158 N. C., 91.

(514)

H. M. HEMPHILL ET AL. v. G. M. ANNIS.

Action of Trespass Quare Clausum Fregit—Deed—Description, Vague and Indefinite—Parol Evidence.

1. Every deed of conveyance must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by reference to something extrinsic to which the deed refers.
2. Where reference is made in one deed to another for more definite description, the effect is to incorporate into the deed the description in the instrument referred to, provided the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it, but when such is not the case parol testimony is not admissible to show what land the parties intended to be included in the deed.
3. Where plaintiff, claiming under M., in deraigning his title, offered in evidence a deed from W. to M. containing a description as follows: "A certain quantity of land containing 350 acres, being in six different deeds, the courses and distances referred to the original grants, which are six, lying on" a certain stream in B. County, and, to identify the land intended to be conveyed, introduced a grant to W. for fifty acres and proposed to prove by parol that the tract described therein was one of six tracts claimed by W. when he executed the deed to M., and that it was one of the six tracts actually conveyed by the deed of W. to M.: *Held*, that the reference for more accurate description to six deeds or grants did not warrant the identification of the boundaries of such grants by parol evidence of a verbal claim set up by W. at the date of the deed to M., or by showing by parol entirely that the subject-matter of the conveyance was intended to be six tracts, one of which was that described in the grant to W.
4. Chapter 465, Acts of 1891, does not act retrospectively, but if it did the word "description" used therein imports such a description as can be aided by parol proof.

ACTION, tried before *Brown, J.*, at May Special Term, 1896, of McDOWELL. There was a verdict for the defendants, and plaintiffs
(515) appealed from the judgment thereon, assigning as error the exclusion of the parol evidence offered to identify the land alleged to be conveyed by the deed upon which they relied. The excluded evidence is sufficiently referred to in the opinion of Associate Justice AVERY.

J. L. C. Bird for plaintiffs.
E. J. Justice for defendant.

AVERY, J. It is elementary learning that no contract can be enforced unless the subject-matter upon which it is intended by the parties to

operate can first be definitely ascertained from its terms, either through an explicit description therein or a reference which points to extrinsic means of identification.

This principle applies to verbal agreements as well as to those required by the statute (Code, sections 1552 to 1555) to be in writing. Hence, where a statute is passed by the Legislature making it essential to the validity of contracts conveying any interest in land that they should be in writing, the courts can no more dispense with such identification of the subject-matter of the deed by description which, either through its own definiteness or by reference to something *aliunde,* can be fitted with reasonable certainty to it, than they can hold the party to be charged therewith bound where neither he nor his lawfully authorized agent for him signs such agreement.

In the application of the maxim *id certum est quod certum reddi potest* it has always been held in construing contracts for the sale of chattels that the agreement must provide the means of making certain what is intended to be sold. *Lumber Co. v. Wilcox,* 105 N. C., 34. In the application of this maxim Judge GASTON formulated the rule (in *Massey v. Belisle,* 24 N. C., 170) that "every deed of conveyance must set forth a subject-matter either certain in itself or capable (516) of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers." The rule has been repeatedly approved, notably by Chief Justices PEARSON and SMITH in the cases of *McCormick v. Monroe,* 46 N. C., 13, and *Harrison v. Hahn,* 95 N. C., 28. But in later years disagreements have from time to time grown out of differences of opinion as to whether the particular words employed in a given instrument pointed to extrinsic proof in such a way as to make it admissible in explanation of an ambiguity. In *Perry v. Scott,* 109 N. C., 374, the Court overruled *Wilson v. Johnson,* 105 N. C., 211, but approved *Blow v. Vaughan, ibid.,* 198, except in so far as the principle enunciated was applied *arguendo* to the particular description then under consideration.

It has been well settled by a series of adjudications that where a reference is made in one deed to another for a more definite description the effect is to incorporate the description in the instrument referred to into that containing the reference, provided the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it. But a conveyance of six tracts of land lying on a specified stream and therefore granted to A. B. (if in fact patents to a dozen tracts situated on it had been issued to A. B.) no more identifies the subject-matter of the conveyance than does the conveyance of six buggies

out of a much larger number without giving the means of distinguishing those intended to be sold from the others.

The defendant claims under grant and deed, both of which it is admitted enclose the land in dispute. The plaintiff offered in evidence a deed of conveyance from James Woods to Margaret Mason,
(517) containing the following description: "A certain quantity of land, containing three hundred and fifty acres, being in six different deeds, the courses and distances referred to the original grants, which are six, lying on Thompson's Fork of Muddy Creek and Bush Branch in the county of Burke aforesaid." This description was embodied in subsequent conveyances. In order to identify the land intended to be conveyed the plaintiff introduced in evidence a grant to James Wood, issued in the year 1814, for fifty acres. Without offering any other grant the plaintiff proposed to prove by parol that the tract described in said grant was one of six tracts claimed by James Woods, when he executed the deed to Margaret Mason in 1831. The plaintiff also offered to show by parol that this was one of six tracts conveyed by the deed of 1831. The Court sustained the objection of defendant to both propositions. Whether it would have been competent for the plaintiff to have offered six grants and proven that they were located on the streams mentioned in the deed to Margaret Mason, without more specific designation of the deeds or grants referred to in the conveyance from Woods to Mason, we are not called upon to decide, though it is difficult to conceive how such identification could have been shown. But that is not the question presented by the appeal. The Court below held that the reference for more accurate description to six deeds or grants did not warrant the identification of the boundaries of such grants by parol evidence of a verbal claim set up by Woods at the date of the conveyance or by showing by parol, entirely, that the subject-matter of the conveyance was intended to be six tracts, one of which was that described in the grant offered. It would not be competent to select six out of one hundred buggies in a confused mass and attempt to prove that it was the purpose of the parties to an agreement to designate particular
(518) buggies, if there were nothing in its terms that would furnish the means of distinguishing the six intended to be sold. So, where there is language relied upon as pointing to extrinsic evidence that will identify the subject-matter, it does not follow that parol proof of the purpose of the parties becomes competent if in no way connected with or explanatory of the terms of the description. It does not appear from the descriptive words used in the deed to Mrs. Mason whether the deeds or grants referred to were executed to James Woods or another, or, if

to James Woods, whether there were six or fifty patents issued to him which embraced tracts of land on the streams mentioned in the deeds offered in evidence. If it be competent to permit a single grant for fifty acres to be identified by showing by parol an intention on the part of the grantor to convey it, it would follow that in any case the subject-matter of a conveyance or contract could be identified by parol proof of the purpose of the parties. The plaintiff's contention is not sustained by the line of cases wherein the question has arisen whether an exception in a patent of *all* land theretofore granted was sufficiently definite to admit parol proof to identify the land excepted (*Mining Co. v. Frey,* 112 N. C., 158; *McCormick v. Monroe,* 46 N. C., 13), because the reference to all that had been previously granted (as judge PEARSON says in *McCormick v. Monroe, supra*), "points to the means by which the description in the exception may be made sufficiently certain to avoid the objection of vagueness by aid of the maxim, *Id certum est quod certum reddi potest.*" Upon the same principle an exception of lands "heretofore entered" by certain persons, or a contract to convey or conveyance of the right-of-way to a railroad company, have been held sufficiently definite, because the subject-matter is made certain in the one case by a subsequent survey of the land and in the (519) other by the location of the roadbed. *Melton v. Monday,* 64 N. C., 295; *Beattie v. R. R.,* 108 N. C., 425. The description in plaintiff's deed neither refers to any previous grant nor points out any particular grants or class of grants, and is therefore as indefinite as that passed upon in *Waugh v. Richardson,* 30 N. C., 470. If the plaintiff's deed had in any way distinguished the grants or deeds referred to for description from others it would have been competent, after identifying a single one of them, to show that it embraced within its boundaries the land in dispute. But to identify one of the grants, not by any intimation contained in the deed but by proving, as an independent fact, what was the subject-matter in the minds of the parties, would be to make a description out of the whole cloth, and pass an interest in land not by a writing furnishing the means of identifying it but by verbal proof of what the parties intended. It was held in *Lowe v. Harris,* 112 N. C., 472, that the Act of 1891 (ch. 465) could not be construed to act retrospectively, if indeed the word "description" in the statute did not, *ex vi termini,* import such a description as is susceptible "of being aided by parol proof." There was no error in holding the parol testimony offered incompetent.

NO ERROR.

Cited: Harris v. Woodard, 130 N. C., 581; *Johnston v. Case,* 131 N. C., 498; *S. c.,* 132 N. C., 798; *Gudger v. White,* 141 N. C., 515; *May v. R. R.,* 151 N. C., 389; *Vick v. Tripp,* 153 N. C., 94; *Ipock v. Gaskins,* 161 N. C., 680.

(520)

R. P. WILLIAMS v. COMMISSIONERS OF CRAVEN COUNTY.

Injunction—Taxation—Constitutional Limit—Special Tax—Special Purpose.

1. Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is *infra vires*, the taxes collected beyond the requirements of the special purpose may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a "special purpose" and partly for general purposes it is *ultra vires*, and no part of the levy can be collected.

2. Where an act (chapter 201, Laws of 1895) authorized the commissioners of a county to levy a special tax in excess of the constitutional limit, "for the special purpose of maintaining the free public ferries of said county and maintaining, constructing, and repairing the bridges in said county, and meeting the other current expenses of said county": *Held,* that the levy for "meeting the other current expenses of the county" was not a levy for a "special purpose" within the meaning of the exception to section 6 of Article V of the Constitution, and rendered void the whole act in respect to the levy for the other purposes named, and the collection of the whole should be enjoined.

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

ACTION, to enjoin the Commissioners and sheriff of Craven from the levy and collection of a special tax, under chapter 201, Laws 1895, heard before *Boykin, J.,* at Fall Term, 1895, of CRAVEN. The provisions of the act are set out in the opinion of Associate Justice FURCHES.

His Honor refused the injunction, and plaintiffs appealed.

(521) *Clark & Guion for plaintiffs (appellants).*

C. R. Thomas, M. DeW. Stevenson, and MacRae & Day for defendants.

FURCHES, J. This case comes to us upon the appeal of the plaintiff from an order of *Boykin, J.,* refusing an injunction against the levy and collection of a special tax.

The general power of the Legislature to levy taxes is restricted by the Constitution to 66⅔ cents on one hundred dollars valuation of

property. Article V, section 1. And Article V, section 6, restricts the power of the counties to double the amount levied for State purposes. But both these levies, for State and county purposes together, shall not exceed the constitutional limit of 66⅔ cents on the hundred dollars. *R. R. v. Holden,* 63 N. C., 410. But section 6 contains an exception to this general provision in the following terms, "except for a special purpose and with the special approval of the General Assembly."

It is admitted that this tax, which plaintiffs seek to enjoin, is over and above the general constitutional limit of 66⅔ cents. But defendants contend that it is authorized by the exception to section 6, and that the act of the General Assembly passed and ratified 11 March, 1895, authorizing this levy for the years 1895 and 1896, is in compliance with this exception. And defendants rely specially on the following language contained in said act, to wit: "To levy a special tax upon the taxable property, real and personal, and the polls of said county, for the special purpose of maintaining the free public ferries of said county, and maintaining, constructing and repairing the bridges in said county, and meeting the other current expenses of said county in said years."

It has been held by this Court that the building and repairing of public bridges is a part of the ordinary expenses of a county. *Brodnax v. Groom,* 64 N. C., 244. But for the construction (522) given to Article V, section 6, in *Brodnax v. Groom, supra,* I would have been of the opinion that the language contained in this Act of 1895, "for the special purpose of maintaining the free public ferries of said county, and maintaining, constructing and repairing the bridges in said county," was not a compliance with the exception contained in section 6, Article V, of the Constitution; that it was not "for *a special purpose,*" "to maintain free public ferries, and to build, repair and maintain free public bridges." But I must admit that *Brodnax v. Groom, supra,* seems to justify this construction. And while I have no disposition to disturb *Brodnax v. Groom,* which has stood for more than a quarter of a century and has been cited with approval in many cases, yet in my opinion it went to the verge and should be allowed to go no further. This act, as it appears to me, goes much further than the act which the Court was construing in *Brodnax v. Groom.* If the language already quoted does not go further than the act construed in *Brodnax v. Groom,* the following, which is a part of the paragraph of the Act of 1895, quoted from, to wit, *"and meeting the other current expenses of said county in said years,"* does, in my opinion, go a bowshot further. If this language can be construed to mean *"a special purpose,"* I am incapable of conceiving what would not be a special purpose. If these other

"current expenses of the county" are not for "a special purpose," then they are unconstitutional, *ultra vires,* and their collection can not be enforced.

This proposition, it seems to me, is not met squarely in the opinion of the Court. It attempts to parry its force by saying in substance: If this provision had not been in the act it would have been constitutional; and if there had been any surplus after maintaining (523) the free ferries, and building, repairing and maintaining the free public bridges, the commissioners might have appropriated it to other purposes. And *Long v. Commissioners,* 76 N. C., 273, is cited as authority for this position. But this case, in my opinion, does not sustain the position of the Court. To make the case of *Long v. Commissioners, supra,* authority for the purpose for which it is cited by the Court it is necessary to assume the constitutionality of the act, the very question at issue. This case expressly decides that where it is unconstitutional it is *ultra vires* and the tax can not be collected. It is only where the tax levied is *infra vires* that it may be appropriated to another purpose if not needed for the purposes for which it was levied. And besides its being so decided in *Long v. Commissioners, supra,* it is logically so. In fact, it is a self-evident proposition, because there can be no surplus to appropriate if it can not be collected. There is a broad distinction between what may result from lawful legislation and the cause producing or creating unconstitutional legislation.

I have been unable to find any authority sustaining the *infra vires* of this act, and to my mind it is "so plainly" in violation of the Constitution that I can not give it my sanction and approval. In my opinion, the injunction should have been granted. There is nothing in the record to show that the tax has been collected.

(This was written as a dissenting opinion, but was adopted as the opinion of the Court.)

ERROR.

CLARK, J. (dissenting). The denial of the first application for a restraining order for want of a material averment is no ob- (524) stacle to this second application in sufficient form. *Halcombe v. Commissioners,* 89 N. C., 316, distinguishing *Jones v. Thorne,* 80 N. C., 72.

If the special levy herein had been authorized solely for the two purposes first named, of maintaining free public ferries, and maintaining, constructing and repairing bridges in said county, the validity of the act could not have been gainsaid. If the act had authorized the special

levy for the purpose of supplying "a deficiency in the current expenses of the county," we find nothing in the Constitution to forbid it. Indeed, as the county can not go beyond the constitutional limitation in levying taxation without special permit of the Legislature, when the sum raised by the ordinary rate is not enough to pay the current expenses, the only relief is to apply to the Legislature for authority to exceed the limit. Const., Art. V, sec. 6. And this has been the course pursued ever since the Constitution of 1868 was adopted whenever the current receipts of a county have not been sufficient to pay its current expenses. A county need not first get into debt and then get permission to levy the tax. The Legislature in its discretion may authorize the extra taxation whenever satisfied that it is necessary, of which necessity the General Assembly is the sole judge. Here the Legislature unites in one act the three purposes above recited as those for which this special levy is authorized. There is nothing in the Constitution forbidding this or authorizing us to declare the act unconstitutional on that account.

The commissioners of a county are authorized by the Constitution, Article VII, section 7, to create debts for necessary expenses without the approval of a majority of the qualified voters (*Evans v. Commissioners,* 89 N. C., 154), and are to judge of what expenses are necessary. *Brodnax v. Groom,* 64 N. C., 244; *Halcombe v. Commissioners, supra; Vaughan v. Commissioners,* 117 N. C., 429. Neither sound principles of political economy nor any provision of the Constitution (525) requires that indebtedness for such necessary expenses should be incurred at a heavy discount in county paper before the Legislature will authorize a tax levy to pay it. It is as much a "special purpose" if the Legislature, being satisfied that the current rate of taxation is insufficient to pay the current expenses of a county, authorizes by a special act the special tax in the beginning of the inevitable deficit, as after it has been incurred.

Besides, the other two purposes of this special tax (roads and bridges) are admittedly constitutional, and this Court has held, as recently as *McCless v. Meekins,* 117 N. C., 34 (opinion by *Montgomery, J.*), that in such case the act, being valid in part and invalid in part, the fund will be held for the benefit of the valid purposes of the act, and in *Trull v. Commissioners,* 72 N. C., 388, that only the collection of the invalid part can be restrained; and here it can not be seen till the end of the year that in fact any part of this special tax will be in excess of the expenses for roads and bridges. *Clifton v. Wynne,* 80 N. C., 145. To reverse the court below and order the injunction to issue is objectionable: (1) Because it would restrain taxes for special purposes admittedly

legal; (2) because the taxes, having already been collected since the dissolution of the injunction (December 2, 1895), it would be a vain thing to restrain an act already accomplished.

Indeed, if the levy had been authorized for the first two purposes only, and a surplus had been raised, it would have gone into the county treasury to meet current expenses without any further authorization in the act. *Long v. Commissioners,* 76 N. C., 273. That is the effect of this act, and it can not be that a course which, if tacitly pur-
(526) sued, is legal, becomes illegal because expressly authorized. The restraining order was improvidently granted, and the injunction to the hearing was properly denied.

AVERY, J. I concur in the dissenting opinion.

Cited: Herring v. Dixon, 122 N. C., 423; *R. R. v. Comrs.,* 148 N. C., 236; *Moose v. Comrs.,* 172 N. C., 429.

B. M. HALLYBURTON v. BURKE COUNTY FAIR ASSOCIATION.

Action for Damages—Injuries Caused by Unruly Animal—Liability of Owner—Negligence—Contributory Negligence.

1. In order that the owner of a domestic animal can be charged for injuries inflicted by it, it must be shown that he had knowledge of the fact that the animal was vicious and unruly.

2. The owner of a horse not known to be vicious, dangerous, or unruly, who enters him for a race in charge of a good and expert rider, is not responsible in damages for an injury to a spectator caused solely by the unforeseen unruliness of the horse, which, in the excitement of the race, bolts the track, especially when safe and suitable places are provided from which the race may be seen by spectators.

3. A fair association, under whose auspices and on whose grounds a horse race took place, is not negligent and therefore responsible for an injury caused to a spectator by a horse which bolted the track, when it appeared that such association had provided a building from which the race could be safely viewed, and had enclosed the race course on both sides by a substantial railing.

4. Plaintiff, with others, was sitting on the railing by the side of a race track, and heard but did not heed the warnings of a herald announcing to the crowd that it was dangerous to sit upon the railing and telling them to "stand back," as the race was about to take place. In consequence of his not changing his position he was hurt by a race horse, which bolted the track: *Held*, that, even if the managers of the race had been negligent, plaintiff was guilty of contributory negligence and cannot recover.

HALLYBURTON *v.* FAIR ASSOCIATION.

ACTION for damages, tried before *Brown, J.*, and a jury, at (527) May Special Term, 1896, of MCDOWELL. The facts are sufficiently stated in the opinion of *Associate Justice Montgomery.*

E. J. Justice for plaintiff (appellant).
S. J. Ervin, Edmund Jones, Avery & Ervin, and W. C. Newland for defendants.

MONTGOMERY, J. The plaintiff in his complaint alleged that Hinkle, Craig & Co. and T. L. Craig, at the fair held by defendant, the Burke County Fair Association, at Morganton, in October, 1891, were permitted and allowed by the fair association to enter and run a horse which they knew to be wild and dangerous and untrained, in a race upon the course of the defendant association; that the defendant association, knowing, when they permitted the other defendants to enter and run the horse, that he was wild and dangerous and untrained, had failed and neglected to have the race-course enclosed by a proper fence or guard so as to provide against accidents to persons who were witnesses of the race; and that, by reason of such negligence, the horse bolted the track, knocked down the railing and ran over and injured the plaintiff, who was a spectator (having paid his entrance fee) standing where visitors to the fair usually stood when witnessing the racing. The defendants, while admitting the serious injury of the plaintiff by the horse, which they admitted belonged to Wilson & Craig, denied the other material allegations of the complaint, and averred that the plaintiff, by his being drunk and standing where he ought not (528) to have been, contributed to and caused his own injury.

When the evidence was concluded, the Court intimated that the testimony did not show negligence on the part of any of the defendants, and that in no view was the plaintiff entitled to recover. There was judgment of nonsuit and the plaintiff appealed.

There was no error in the conclusion of the Court. We find no evidence tending to show that the horse was wild or dangerous, but on the contrary the witness Hinkle testified that he was gentle, and although it appeared that he had never entered a race before that, yet he had never been known to jump the track or swerve before. There was no evidence that either of the defendants, at the time the horse was entered, or at the time of permitting him to be entered or run, had any knowledge that he was wild, dangerous or untrained. Before the owner of a domestic animal can be charged for injuries inflicted by it, it must be shown that the owner had knowledge of the fact that the animal was vicious or unruly. *Harris v. Fisher,* 115 N. C., 318. In addition, the owner of the horse had him ridden by an excellent horse-

man. The plaintiff's witness Atkins testified that the rider Haney was "a good rider, no better in the State." We can not see how it can be reasonably intended that the owner of a gentle horse, or of a horse not known to be vicious or dangerous or unruly, who enters him for a race in charge of a good and expert rider, can be responsible in damages for an injury to a spectator, caused solely by the unforeseen unruliness of the horse, more especially where safe and suitable places are provided from which the race might have been seen. Such an injury must be regarded as an accident.

There is no testimony going to show negligence on the part of the defendant association. It seems that a building called the grand stand, from which the race could be viewed, had been erected on the (529) grounds. The race-course where necessary was enclosed on both sides by a good pine railing, 2 by 4 inches, nailed to posts planted in the ground and three and a half or four feet high. We think that these precautions taken and provisions made for the safety and comfort of its visitors by the association were reasonably safe and suitable. And that is the degree of care which the law requires of them. *Hart v. Park Club,* 157 Ill., 9.

It may be unnecessary to the decision of this case to consider the matter of contributory negligence on the part of the plaintiff, but it may be proper to observe that, if the defendants could possibly be considered negligent under any view of the case, the plaintiff could not recover, because it plainly appears by the undisputed testimony that he caused and contributed to his own injury. The plaintiff's witness, Campbell, who was policeman and marshal, testified that he announced to the crowd, standing where the plaintiff was, that the race was coming off and to get back from that point, to get off the rail. He told them that it was dangerous there, and that they might be hurt, and the plaintiff himself testified that he "heard the marshal halloo out, 'Stand back.'" But he did not change his position. Upon a review of the whole testimony we are of opinion that his Honor was correct in holding that the plaintiff could not recover.

NO ERROR.

AVERY AND FURCHES, JJ., did not sit on the hearing of this case.

Cited: Smith v. Agricultural Society, 163 N. C., 349.

(530)

W. A. CAMPBELL v. NANCY L. POTTS.

Action to Recover Land—Plea of Homestead Exemption—Dismissal of Action—Former Judgment—Res Judicata—Pendency of Another Action.

1. Where, in the trial of an action to recover land, the plaintiff relied upon a judgment rendered against defendant's husband prior to the Constitution of 1868, execution thereon and sheriff's deed to the purchaser under whom plaintiff claimed, and the defendant objected to the judgment because it contradicted the sheriff's deed, which showed that the land was sold subject to the homestead of defendant's husband: *Held*, that, inasmuch as the homestead right did not attach under the judgment rendered on a debt prior to 1868, the judgment was admissible in evidence.
2. In the trial of an action to recover land the pendency of a summary process of ejectment before a justice of the peace, under the Landlord and Tenant Act, between the same parties, cannot be pleaded in bar, since the question of title is not within the jurisdiction of the justice of the peace.
3. Where, in an action to recover land, the defendant pleaded in bar a former judgment in an action brought against her by plaintiff's grantor, in which defendant had denied the grantor's title, but it appeared that there had been no trial of such former action, but only a judgment of dismissal: *Held*, that such judgment of dismissal was not a bar to the existing action.

ACTION for the recovery of land, tried before *Brown, J.*, at Fall Term, 1896, of LINCOLN. There was a verdict for the plaintiff upon the usual issues in ejectment, and from the judgment thereon the defendant appealed. The facts and grounds assigned as error appear in the opinion of *Associate Justice Furches.*

L. B. Wetmore for plaintiff.
No counsel for defendant (appellant).

FURCHES, J. This is an action of ejectment, and the defend- (531) ants, except Nancy L. Potts, disclaim title. And besides denying the plaintiff's title, she pleads two judgments in actions brought by J. L. Carter, the grantor of plaintiff, against the defendant Nancy for the possession of the land in controversy, and the pendency of one of these actions at the commencement of this action.

Upon the trial the plaintiff introduced a judgment in favor of one Charles Beal against J. A. G. Potts, the then husband of the defendant Nancy, the execution issuing thereon, and the sheriff's deed to J. D. Campbell. The defendant objected to this judgment (which was before the Constitution of 1868) for the reason, as she alleged, that it contradicted the sheriff's deed, which showed that the land was sold subject to the homestead of J. A. G. Potts.

This exception can not be sustained. The judgment was certainly competent evidence, and as to what it proved or failed to prove was a matter for the Court and jury. The land being sold under a judgment taken before the Constitution of 1868, the defendant was not entitled to a homestead. *Edwards v. Kearzey,* 79 N. C., 664; *Long v. Walker,* 105 N. C., 90. The sheriff's deed to John D. Campbell, made under this judgment, is not set out, nor does it sufficiently appear from the statement of the case on appeal, to inform us whether it conveys the land subject to J. A. G. Potts' homestead right, or whether it conveys the land subject to a certain boundary called the homestead of said Potts. This would make a material difference. For, if it was conveyed subject to Potts' homestead or right to homestead, as we see that he was not entitled to a homestead, the deed conveyed the entire tract.

(532) But, if it conveyed the land subject to a described boundary, allotted or claimed by Potts as his homestead, it is manifest that this boundary did not pass by the sheriff's deed, for the reason that it was not sold, nor was it conveyed, as it was not included within the description of his deed. But it devolved on the defendant to show this, as she alleges error, and it devolves on her to show it before this Court will be justified in declaring error and reversing the judgment of the Court below.

But we do not see that this matter of homestead is a material question to be considered in the determination of this case, for the reason that if J. A. G. Potts, the husband of the defendant Nancy, had no homestead, she got none, and if the sheriff's deed was so drawn as to give him a homestead, the defendant Nancy did not get it, for the reason that her husband, J. A. G. Potts, left children living at his death. Constitution, Art. X, sec. 5; *Simpson v. Wallace,* 83 N. C., 477; *Hager v. Nixon,* 69 N. C., 108; *Wharton v. Leggett,* 80 N. C., 169. And the only title she had was under the deed to her and her children from John D. Campbell, and this title the plaintiff claims to have acquired. And for the purpose of showing this he introduced in evidence a deed from Carter to him, a deed from Cobb, commissioner to sell for partition, to Carter, and the proceedings and order of sale, a deed from the sheriff to Carter for the defendant Nancy's interest in the land, and the judgment of Campbell against the defendant Nancy for the purchase-money, it being so declared in the judgment, the execution sale thereunder and sheriff's deed to said Carter.

This deed of the sheriff to Carter for the defendant Nancy's one-eighth constituted Carter a tenant in common with the children of

(533) J. A. G. Potts, and authorized him to bring the proceedings for partition and sale; and the defendant could not claim the home-

stead against the judgment of Campbell, her vendor, as the judgment was for the purchase-money and was so declared in the judgment. Constitution, Article X, section 2.

So it is seen that plaintiff and defendant Nancy both claim under John D. Campbell; and plaintiff shows that by means of the judgment of John D. Campbell for the purchase-money, and the sale and deed of the sheriff, he has acquired and become the owner of defendant Nancy's interest in the land, and by the proceedings and sale for partition the owner of the entire tract.

This leaves the defendant Nancy to the defenses of estoppel and of actions pending at the commencement of this action, and neither of these defenses can be sustained.

One of these was a proceeding before a justice of the peace under the Landlord and Tenant Act. This defense can not be sustained for two reasons: First, for the reason that a justice's court had no jurisdiction of a question of title to land; and, secondly, because the plaintiff took a nonsuit.

This action, commenced before the justice of the peace, seems to have been pending, by appeal, at the commencement of this action. But the plea of another action pending can not be maintained in this action for the same reason. That is, that as a justice of the peace had no jurisdiction of a question of title to the land, no such issue could be tried by him. And the Superior Court upon appeal acquired no greater jurisdiction than the justice of the peace had. Neither is the plaintiff estopped by the other action of his grantor, Carter. There was no trial in that action, but simply a judgment dismissing the plaintiff's action. Therefore, upon a consideration of the whole case, we find no error, and the judgment is

AFFIRMED.

Cited: *Weeks v. McPhail,* 129 N. C., 75; *Corey v. Fowle,* 161 N. C., 189; *Grimes v. Andrews,* 170 N. C., 520.

---

(534)

V. MAUNEY, GUARDIAN OF NANCY FORREST, v. J. M. REDWINE ET AL.

Action to Cancel Deed—Undue Influence—Fiduciary Relations—Evidence.

Where, in the trial of an action to cancel and set aside a deed alleged to have been procured by undue influence, it appeared that the grantor was old and infirm, and was very fond of the grantee, her cousin, and placed

great confidence in him; that the consideration for the deed was an agreement on the part of the grantee to support the grantor for life, which, according to her life expectancy, was fair and adequate: *Held*, that the evidence was not sufficient to show the existence of a fiduciary relation between the parties so as to raise a presumption of unfair dealing or undue influence.

ACTION, to set aside and cancel a deed made by Nancy Forrest to Elizabeth L. Redwine for life, and at her death to the heirs of J. M. Redwine, on the alleged ground of fraud and undue influence practiced upon her by J. M. Redwine, tried before *Bryan, J.*, and a jury, at Spring Term, 1896, of STANLY. There was a verdict for the defendants, and plaintiff appealed from the judgment thereon. The facts sufficiently appear in the opinion of *Associate Justice Montgomery*.

Wm. J. Montgomery for plaintiff (appellant).
MacRae & Day for defendants.

MONTGOMERY, J. Upon an examination of the whole testimony in this case we can not say that the transaction is a suspicious one. It is true, that at the time of the execution of the deed from Mrs. Forrest (535) to the defendants, she was very old and weak of mind, was sick and under the care of a physician, and that the defendant J. M. Redwine was her cousin. It is also true that she was without a proper protector. Her son testified that "she had left his house; that he did not throw her out, but that he led her out; that she said she was going off to hunt a place, but that he did not know she was going to make the trade with Redwine." All of the testimony went to show that the consideration upon which the deed was executed was a valuable one, equal to the value of the land. Redwine's agreement was to support her in a comfortable manner during her life; the support included room, board and clothing. She was to employ her own physician and pay him for his services. Her life expectancy was five years, and the highest value of the land was not more than five hundred dollars. Her own witnesses testified that to support her for her life was worth the land conveyed in the deed. She lived with the defendants five months and then left, the defendants being willing always to keep her according to the agreement. The complaint is silent on this point. The jury found that at the time of the execution of the deed she had sufficient capacity for that purpose. The only evidence offered to show that Redwine fraudulently and unduly influenced the old lady in the execution of the deed was that of the witness Bennett, who said "she used to say she wanted to see Jimmy Redwine when she wanted to make a trade." William Forrest, her son, said "she seemed to put a great deal of confidence in Redwine." Dr. Anderson, her physician, said "Mr. Redwine and Mrs. Forrest were mighty

sweet and affectionate to each other, so much so they disgusted me." The evidence of the first two witnesses did not tend to show that there existed any fiduciary relation between the parties, which created a presumption of law that the deed was fraudulent, and it did not raise a presumption of fraud as a matter of fact. If the testimony had (536) tended to show that the relation between the parties was that of "friendly intercourse and habitual reliance for advice and assistance, and occasional employment in matters of business, as agent," then under *Lee v. Pearce,* 68 N. C., 76, there would have been raised a presumption of fraud as a matter of fact. But there was no evidence that he ever did any business for her or even acted as her agent in any way; and it appears, as we have said, that in the present transaction, the only one he ever had with her, so far as the testimony discloses, she got full value. In fact the testimony of her witness, Ivey, was that her son-in-law attended to her business.

We concur with his Honor that there was no sufficient evidence to support the issue, "Was the said land obtained by the fraudulent representation or undue influence of J. M. Redwine?" And his Honor properly withdrew that issue from the jury.

No ERROR.

T. H. PROCTOR, EXECUTOR OF J. B. SHELTON, v. S. G. FINLEY.

Action of Debt—Purchaser of Land at Auction Sale—Highest Bidder—Auctioneer—Agent—Statute of Frauds—Memorandum of Contract—Jurisdiction—Justice of Peace—Harmless Error on Trial.

1. An advertisement of sale of land at auction to the highest bidder is a proposition by the advertiser to sell at the highest bid, and the last and highest bidder accepts the offer and the contract is complete.

2. The auctioneer at a sale is the agent of the seller, and becomes the agent of the last and highest bidder to complete the sale by signing such contract or memorandum thereof as will meet the requirements of the statute of frauds.

3. The statute of frauds does not require that a memorandum of sale be *subscribed* but only *signed;* hence, the signing by the auctioneer of the name of the highest bidder at an auction sale on the side of the printed advertisement with an entry of the price bid, is a sufficient *signing* of the contract to bind the bidder.

4. A justice of the peace has jurisdiction of an action to recover the purchase price of land, if under two hundred dollars, where no foreclosure is sought.

5. Where a mortgagee advertised to sell the mortgagor's *interest* in a tract of land, the purchaser cannot evade payment on the ground that the mortgagee cannot convey a good title. (*Mayer v. Adrian*, 77 N. C., 83, distinguished.)

6. Where, in an action of debt to recover the purchase price of land, the court erroneously permitted the plaintiff to show by his own parol evidence that he sold the land to the defendant, such error was cured by the subsequent proof of the sale by competent and uncontradicted evidence.

(537) ACTION, begun before a justice of the peace and tried on appeal before *Bryan, J.*, and a jury, at Spring Term, 1896, of LINCOLN. There was a verdict for the plaintiff and the defendant appealed from the judgment thereon. The facts and the assignments of error appear in the opinion of *Associate Justice Furches.*

D. W. Robinson for plaintiff.
Justice & Finley and Jones & Tillett for defendant.

FURCHES, J. This is an action commenced before a justice of the peace for $50, due for the purchase of land. The defendant pleads the general issue and the Statute of Frauds. The case discloses these facts: That Shelton was the mortgagee of the land sold; that he is dead and the plaintiff is his executor, and as such executor he advertised and sold the land at public outcry, when the defendant became the last and highest bidder and purchaser, Nixon being the auctioneer. Before the land was offered Nixon read the advertisement, defendant being
(538) present, and immediately upon the land being knocked off to defendant, he wrote the name of the defendant on the paper containing the advertisement; this was done in the presence of the defendant. But, by inadvertence, he wrote the defendant's name on the side of the advertisement and not under it, as he intended to do.

The following is the advertisement and defendant's name and price bid, as written by the auctioneer Nixon:

SALE OF VALUABLE LAND.

A mortgage deed having been executed by L. A. H. Wilkinson and wife to Joseph B. Shelton, dated Dec. 10, 1889, which is duly registered in Lincoln County Registry, Book 61, p. 598, and default having been made in the payment of the debt secured by the said mortgage; Now, by virtue of the power vested in me by the said mortgage and my office as executor of Joseph B. Shelton, I will sell at public auction for cash, at the courthouse door in Lincoln County, on Monday, 2d day of March, 1896, the land described and conveyed in the said mortgage, to wit: Lying in Catawba Springs

S. G. FINLEY, $50.00.

Township, adjoining the lands of H. C. Barkley and others, beginning at a pine at Kid's corner and runs N. 31 E. 51 P. to a hickory and gum near branch; then N. 27 W. 32 P. to a pine; then E. 99 P. to a gate; then S. 15 E. 65 P. to a stone; then S. 48 W. 98 P. to a sassafras; then N. 62½ W. 62 P. to the beginning, containing by estimation 45 acres, more or less, being the interest of L. A. H. Wilkinson in said tract of land.

T. H. PROCTOR,
30 January, 1896. *Exr. of* JOS. B. SHELTON.

The defendant contended that this was not a compliance with (539) the Statute of Frauds, Code, sec. 1554.

The advertisement is a proposition by the plaintiff to sell what interest he had in the land, therein fully set forth and described, it is true, to the last and highest bidder—and as $50 is all that he was offered, it was an offer to sell for $50. And the defendant's bid of $50 was an acceptance of plaintiff's offer. This constituted a sale—an offer to sell at a certain price and an acceptance by the defendant, the meeting of the minds of plaintiff and defendant.

It can not be contended that this did not amount to a contract and a sale, unless the Statute of Frauds intervenes and prevents its enforcement, and this is the question in the case.

The auctioneer Nixon was the agent of the plaintiff to sell this land, and the law constituted him the defendant's agent, when he became the last and highest bidder, to complete the sale by meeting the requirements of the Statute of Frauds. And this he is authorized to do by *signing* the bidder's name to the contract, or to such memorandum of the contract as will satisfy the Statute of Frauds. This signing by the defendant's agent the law construes into an acceptance of the proposition of plaintiff to sell, and the signing of the purchaser's name to the contract as a compliance with the terms of the contract. 3 A. & E. Enc., 848 and 849; Brown on Statute of Frauds, sec. 369; *Gwathmey v. Cason,* 74 N. C., 5.

Mayor v. Adrian, 77 N. C., 83, relied on by defendant, does not conflict with the authorities cited above, but in our opinion supports the views we have here expressed. But it is contended by the defendant that his name must have been *subscribed*—written under the contract or offer of plaintiff to sell—and, as this was not done but was written on the side of the contract or proposition to sell, that he is not bound.

But this proposition can not be maintained. We have seen that (540) upon defendant's becoming the last and highest bidder and the property being knocked down to him, the auctioneer immediately became his agent to complete the sale and to *sign* (not to subscribe) his

name to the contract or memorandum, and the law implied an acceptance and a compliance with the requirements of the Statute of Frauds. Then the case stands as if the defendant had written on the side of this advertisement, which we have said was a proposition to sell, the word "accepted" and signed his name to it. And if he had done this could there have been any doubt but what the defendant would be bound? This we think aptly illustrates the position the defendant occupies and shows him to be bound by this contract.

It was contended for defendant that this action was in the nature of a foreclosure proceeding and a justice of the peace had no jurisdiction. And while we admit defendant's proposition of law that a justice of the peace would have no jurisdiction of a foreclosure proceeding, we fail to see its application to this case. This is simply an action for the recovery of fifty dollars, and there is no plea or answer that raises a question of jurisdiction.

It was also argued that it did not appear that plaintiff could make a good title for the land sold, and *Mayer v. Adrian, supra,* is relied on for this position. But there is nothing in the case that presents any such question. And if there was, this case differs very widely from *Mayer v. Adrian, supra.* In that case it was shown that the seller undertook to sell the absolute estate in the land, unencumbered, while in this case the plaintiff only proposed to sell the *interest* of J. A. H. Wilkinson in said land. And defendant has not shown or offered to show that plaintiff could not convey that to him.

(541) The plaintiff offered to show by his own parol evidence that he sold the land to defendant. This was objected to by defendant, and his objection was overruled, the evidence allowed and the defendant excepted.

In this ruling of the Court there was no error. But, as the sale was afterwards proved by competent evidence, and as there was no evidence offered by the defendant showing or tending to show that this evidence was not true, we can not see that this evidence, erroneously admitted, was or could have been injurious to the defendant. Had there been evidence contradicting this evidence, erroneously admitted or tending to show a different state of facts, which if true would have benefited the defendant, we would have awarded him a new trial. But as it does not the judgment is

AFFIRMED.

Cited: Patterson v. Freeman, 132 N. C., 359; *Dickerson v. Simmons,* 141 N. C., 327; *Love v. Harris,* 156 N. C., 92; *Woodruff v. Trust Co.,* 173 N. C., 548.

PERMELIA WITHROW v. GEORGE W. DEPRIEST.

Administrator—Appointment of Administrator—Right of Administration.

If the parties who have precedence in the right of administration on the estate of a decedent, under section 1376 of The Code, fail to apply within six months from the death of the decedent, as required by section 1394, an appointment by the clerk of a proper person after that period will not be revoked.

PETITION, filed by Permelia Withrow to remove George W. DePriest as administrator of John C. Withrow.

Upon investigation the following facts were found by the clerk of the Superior Court.

"I. That John C. Withrow died on the second or third day (542) of June, 1895.

"II. That Permelia Withrow is his widow and Minnie Withrow his only child, aged about eight years.

"III. That within thirty days from the death of J. C. Withrow, Permelia Withrow, by her attorney, filed a written application for letters of administration on said estate (which application was incomplete and which is hereto attached), and was directed to file bond and qualify, upon doing which letters would be issued to her; but that she did not offer to file bond or qualify at any time.

"IV. That on 5 December, 1895, Thomas B. DePriest, claiming to be a judgment-creditor of the estate, and whose judgment appears on the judgment docket of this county, and J. H. Withrow, who claims to hold notes against the deceased, procured Geo. W. DePriest to apply for letters of administration on said estate, which were granted to him on filing his bond as required by law and taking the oath prescribed, all of which he did, and letters were granted to him without further citation or notice to said Permelia Withrow.

"V. I find that said Geo. W. DePriest is a discreet business man, and that he resides in Cleveland County, about twenty miles from the courthouse in Rutherfordton, and in direct railroad communication with said town."

Upon the foregoing facts the clerk found that there had been shown no legal grounds for removing said administrator, and therefore declined to grant the prayer of the petitioner. From the ruling by the clerk the plaintiff appealed to the Superior Court in term, and at Spring Term, 1896, *Bryan, J.*, adjudged as follows:

"That this case be remanded to the clerk, to the end that he may revoke the letters of administration granted to the defendant, and allow the plaintiff to qualify as administrator of the said de- (543)

ceased John C. Withrow; and the clerk shall issue notice to the said Permelia Withrow, widow of John C. Withrow, requiring her to file her bond and qualify within thirty days from the service of such notice, and the notice shall state that if she fail to qualify within the thirty days allowed, or in her stead to procure some other suitable person to file bond and qualify, then she shall be deemed to have renounced her right to said administration, and that defendant pay the costs."

From this judgment the defendant appealed.

M. H. Justice for defendant (appellant.)
No counsel contra.

FAIRCLOTH, C. J. The only question presented is the right of the plaintiff to have the defendant removed from the administration of his intestate's estate.

Facts found by the clerk: (1) John C. Withrow died intestate 3 June, 1895, leaving the plaintiff, his widow, and one child, only eight years of age. (2) Within thirty days from said death, the plaintiff filed with the clerk an incomplete application for letters of administration but did not offer to file bond or to qualify at any time. (3) That on 5 December, 1895, more than six months after said death, the public administrator having made no application (Code, sec. 1394), the defendant, at the instance of judgment creditors, was appointed administrator, and filed his bond and was duly qualified, without any notice or citation to the plaintiff; that the defendant is a discreet business man of said county.

The clerk refused to remove the defendant, and his Honor reversed the ruling and remanded the cause, and directed the clerk to revoke the defendant's letters and grant letters of administration to the plaintiff upon complying with the statute, etc. Defendant appealed.

(544) The plaintiff's present application was made subsequent to 5 December, 1895. The subject of granting letters of administration, etc., is regulated by The Code, ch. 33. Preference is given to certain persons successively, provided they assert their rights within the time prescribed by law. Public policy and the rights of distributees and creditors require that the estates of deceased persons be settled within a due and reasonable time. If those that have the preference fail to act within six months (section 1394) they must be taken to have renounced or waived their rights. As the question has been fully considered and decided in this Court, we need not pursue it any further. *Hill v. Alspaugh,* 72 N. C., 402; *Garrison v. Cox,* 95 N. C., 353.

REVERSED.

Cited: In re Bailey Will, 141 N. C., 195.

W. J. HAUN v. W. R. BURRELL.

Statutes of Frauds—Pleading—Promise to Pay Debt of Another—Consideration.

1. When the answer denies the alleged promise the statute of frauds can be relied on without being pleaded.
2. The consideration of a new promise to pay a debt may be proven by parol.
3. A new parol contract to pay the debt of another, superadded to the original cause of action which remains in force and is not substituted for it, is void.
4. A promise by a vendee that if he purchase a certain tract of land he will pay a note of the vendor to a third person is void within the statute of frauds.

ACTION, tried before *Bryan, J.*, at Spring Term, 1896, of HENDERSON, on appeal from a judgment of a justice of the peace. (545)

The complaint was as follows:

"1. That on....day of September, 1893, for value received, one J. R. Burrell executed to the plaintiff a promissory note, in words and figures as follows:

"$63.00.

"On or before 25 December, A. D. 1894, I promise to pay William Haun sixty-three dollars without interest, value received. This...September, 1893. J. R. BURRELL."

"2. That on or about 23 February, 1894, the obligor in the above-mentioned note sold and conveyed to the defendant, W. R. Burrell, the following described piece or parcel of land lying and being on Hooper's Creek, in the county of Henderson and State of North Carolina adjoining the lands of J. D. Garren, Sarah Green, *et al.* (Here follows description).

"3. That at the time of the sale of said land to the said defendant the said note from the said J. R. Burrell was unpaid, and in full force, and at the request of the said J. R. Burrell, maker of the said note, the said W. R. Burrell at the time of the purchase of the said land agreed to and with the plaintiff, W. J. Haun, and J. R. Burrell, that he would pay off and discharge the said note for $63 as part of the purchase-money of and in payment for the land above described.

"4. That in consideration of the promise and agreement of the defendant, set forth in the preceding allegation and accepted by the plaintiff, the said J. R. Burrell conveyed to the defendant W. R. Burrell the land described above.

(546) "5. That the defendant has failed and refused to pay the note aforesaid.

"Wherefore the plaintiff prays judgment against the defendant for the sum of sixty-three dollars and interest on the same, together with the costs of this action, and that the debt sued on be declared to have been contracted for the purchase-money of the land described in this complaint."

The defendant filed a duly verified answer denying each allegation of the complaint, except that part which alleges the execution of the deed, and sets up as a defense to the plaintiff's cause of action the Statute of Frauds.

After the jury was empaneled the plaintiff called W. J. Haun as a witness, who testified as follows.

"Live on Clear Creek in Edneyville. Note of J. R. Burrell to W. J. Haun—nothing paid on it—J. R. and W. R. Burrell came to me at my mill—he said *'if'* I buy the land, and I am contracting for it, I will pay the note. He bought the land. It was agreed *'if'* he bought the land he was to pay. The contract had not been drawn up. The price was $100. It was some time in February, 1895. The note was given for a horse. He pretended to give me a mortgage on this same land."

On redirect examination he said that he had been looking to W. R. Burrell all the time to pay the note.

At the conclusion of the plaintiff's evidence as above, the Court intimated that the plaintiff was not entitled to recover, and in deference to the intimation of the Court, the plaintiff suffered a nonsuit and appealed.

R. C. Strong for plaintiff.
No counsel contra.

(547) CLARK, J. Section 10 of the Statute of Frauds, now Code, sec. 1552, provides that no one shall be liable upon a promise "to answer the debt, default or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith, or some other person thereunto by him lawfully authorized." When the promise is denied the Statute of Frauds can be relied on without being pleaded (*Morrison v. Baker,* 81 N. C., 76; *Browning v. Barry,* 107 N. C., 231), but in fact it is pleaded by the defendant and is a complete protection in this case. *Scott v. Bryan,* 73 N. C., 582.

It is true that if the promise is based upon a new and original consideration of benefit or harm moving between the creditor and the party promising to pay the debt, this is not "a promise to answer the debt or

default of another," and need not be in writing. *Whitehurst v. Hyman,* 90 N. C., 487; *Cooper v. Chambers,* 15 N. C., 261; *Ashford v. Robinson,* 30 N. C., 114; *Shaver v. Adams,* 32 N. C., 13. It is true also that the consideration of the new promise may be shown by parol. *Nichols v. Bell,* 46 N. C., 32.

But where the new parol contract is merely *superadded* to the original cause of action which remains in force and is not *substituted* for it, it is a promise to pay the debt of another and is void. *Draughan v. Bunting,* 31 N. C., 10; *Stanly v. Hendricks,* 35 N. C., 86; *Britton v. Thrailkill,* 50 N. C., 329. And this is true though there is a consideration for the new promise (*Combs v. Harshaw,* 63 N. C., 198; *Rogers v. Rogers,* 51 N. C., 300), it being well said and repeated in more than one case, "It required no statute to make void a promise not founded on a consideration. It is only in cases where there is a consideration to (548) support the promise that the Statute of Frauds must be called into action." In the present case the evidence shows no consideration but merely a conditional promise that "if he (the defendant) bought the land, he would pay the note (of J. R. Burrell) for the horse, and he did (afterwards) buy the land." The plaintiff proved the note, and that nothing had been paid on it, and to enable him to recover (if he relies on the new promise as being made to himself) he must have shown in addition that it was no longer in force against J. R. Burrell, the promise of the defendant having been substituted for it, and that there was a consideration therefor. Upon the evidence the promise was doubly invalid, being *nudum pactum,* and barred by the Statute of Frauds. If the plaintiff relies on the new promise as being made to J. R. Burrell, the interesting question raised by his learned counsel (and which has never been decided in this State) whether a stranger to a contract made for his benefit can maintain an action on it (3 A. & E. Enc., 863) does not arise in this case, for there is no evidence of the terms of the contract for the purchase of the land, between the defendant and J. R. Burrell, nor that as a part thereof the defendant was to pay J. R. Burrell's note to plaintiff. The conditional promise was before such purchase was made.

No ERROR.

Cited: Sams v. Price, post, 573; *Gorrell v. Water Co.,* 124 N. C., 334; *Gastonia v. Engineering Co.,* 131 N. C., 367; *Jenkins v. Holley,* 140 N. C., 380; *Anders v. Gardner,* 151 N. C., 606; *Miller v. Monazite Co.,* 152 N. C., 609; *Peele v. Powell,* 156 N. C., 557, 557; *Whitehurst v. Padgett,* 157 N. C., 427; *Parker v. Daniels,* 159 N. C., 521.

(549)

J. C. MALLONEE v. J. G. YOUNG.

Broker—Negotiating Sale—Commissions.

1. A broker is not entitled to commissions on a sale unless he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and vendor.

2. Defendant authorized plaintiff, a broker, to sell his property at a certain price, for certain commissions, reserving the right to withdraw the property from sale at any time, which he did. J., learning that the property was for sale, wrote to defendant inquiring the lowest price. Defendant enclosed the letter to plaintiff saying, "I want $5,500 net," whereupon plaintiff had several conferences with J. and showed him the property, but effected no sale. Defendant again withdrew the property from sale, and in reply to a question from the latter as to the price he should name to inquirers, if there should be any, said: "If you find any one willing to give $5,500 net, let it go." A few days afterwards defendant sold to J. at $5,250: *Held*, that plaintiff, not having performed his part of the agreement and not having been the efficient agent in making the sale, cannot recover commissions on the sale made by defendant to J.

ACTION, tried before *Brown, J.*, at October Term, 1896, of MECKLENBURG, for the recovery of commissions on the sale of real estate. Upon an intimation by his Honor that the plaintiff could not recover upon his own testimony, the latter submitted to a nonsuit and appealed. The opinion of *Chief Justice Faircloth* contains a full summary of the plaintiff's testimony.

Jones & Tillett and H. N. Pharr for plaintiff (appellant).
Osborne, Maxwell & Keerans for defendant.

(550) FAIRCLOTH, C. J. This action is brought to recover commissions for an alleged sale of defendant's land by contract with defendant. As the case did not go to the jury by reason of the Court's opinion that plaintiff could not recover according to his own evidence, the evidence must be taken as true. The original contract was that if plaintiff, a real estate agent, could sell at a specified price he was to receive usual commissions. Defendant stated: "I am to withdraw from your hands if I desire. If I sell the property myself when you have not worked up a sale, you are not entitled to any commissions. If I work up a purchaser and put in your hands, then I pay you one-half commissions." The plaintiff undertook to negotiate the sale, and kept the property advertised to sell at different prices, but made no sale. On 29 May, 1895, the defendant withdrew the property from plaintiff's hands and paid expenses of advertising. There was then no contract. On June 1st the plaintiff wrote to defendant proposing to negotiate a sale at a

less price. On 18 July the defendant asked plaintiff to see the very best net offer he could get. Plaintiff continued negotiating and advertising, but no sale was made. On 21 August C. W. Johnson, the final purchaser, wrote to defendant: "I understand you are offering your property on North Trade Street. If I am correct, please advise your lowest cash price." The defendant enclosed Johnson's letter to the plaintiff and wrote, "I want fifty-five hundred dollars net." Plaintiff saw Johnson several times, who offered $5,100. But defendant declined. On 12 September the defendant wrote to plaintiff, "I decide to withdraw my property from the market at once for a period, I don't know yet how long." On 16 September the plaintiff replied: "I will stop the advertising. If there should be inquiries as to price, what shall I say?" The defendant replied, "If you find a man or woman who is willing to give me net $5,500, then I say let it go." The plaintiff testified (551) further that he heard no more about the property until he heard that defendant had sold it to C. W. Johnson at $5,250, sale made 27 September; that he was never authorized to sell for less than $5,400 net, usual commission 5 per cent, and that he had no contract, except those in the letters.

The plaintiff then introduced C. W. Johnson, the purchaser, who testified: "I wrote the letter of 22 August to defendant. I had seen the property advertised for sale by Mallonee. I saw Mallonee going in to look at the property with another party as I was passing, and I wrote to Young the same day. Mallonee came to see me a few days after I had written to Young. He saw me several times in regard to buying the property."

Johnson received a letter from Young about buying, some two weeks before he bought, on 27 September at $5,250. The correspondence was reopened by Young. "I had a conversation with Walter Brem in regard to the property, and he offered it to me for sale. This was some time before I saw Mallonee in regard to the property and before I saw his advertisement. The negotiations with Brem had been abandoned. I was not acquainted with Mallonee when I wrote the letter to Young."

The plaintiff does not contend that he made any sale according to his contract, but insists that he worked up a purchaser and brought him in contact with the vendor, and that a sale was made in consequence of his communications and agency with the purchaser, and that he was entitled to pay for his services. He says that he was never authorized to sell for less than $5,450; and it appears from the evidence that he never found a purchaser who was able, ready, and willing to pay that price. To recover commissions, he must be the efficient agent or (552) the procuring cause of the contract of sale, from which cause or

agency the sale resulted. 2 A. & E. Enc., 584. "A broker who negotiates the sale of an estate is not entitled to his commissions until he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and the vendor." *McCavock v. Woodlief,* 20 How U. S., 221; *Lipe v. Ludwick,* 14 Ill. App., 372.

In *Martin v. Holly,* 104 N. C., 36, the evidence was conflicting, but upon proper issues submitted the jury found as a fact that the broker found a purchaser ready and willing to pay the price, at which the defendant sold to such purchaser, and it was held that the plaintiff had performed his part of the contract and was entitled to recover. In the case now before us, looking carefully at the evidence, we are unable to see that the plaintiff "procured" the purchaser, Johnson. He was first informed that the defendant desired to sell his lot, and promptly wrote to the defendant on the subject. This was, however, before he had met the plaintiff or had seen his advertisement. The purchaser and the plaintiff examined the property afterwards, and had several conversations about it, but they agreed on nothing. The purchaser afterwards conferred with the vendor and paid him $5,250 for the property. We can seee that the plaintiff rendered some service, but he did not perform his part of the agreement, and we can not see that he was the efficient agent in the sale. The sale was by the defendant to the purchaser, after the plaintiff had failed on his part and the property was out of his hands. As the plaintiff's evidence is taken as true, we see nothing in it so dubious as
(553) to require the intervention of a jury, and in such case the Court as a matter of law may so hold, and withhold the case from the jury and apply the law as the Court understands it. *S. v. Kiger,* 115 N. C., 746.

AFFIRMED.

Cited: Arrington v. Lumber Co., 120 N. C., 488; *Abbott v. Hunt,* 129 N. C., 405; *Trust Co. v. Adams,* 145 N. C., 164; *Clark v. Lumber Co.,* 158 N. C., 144; *Trust Co. v. Goode,* 164 N. C., 23.

FIRST NATIONAL BANK OF WINSTON v. WACHOVIA LOAN AND TRUST COMPANY, TRUSTEE OF H. H. REYNOLDS.

Purchaser of Accommodation Accepted Drafts—Right of Action Against Assignee of Drawer's Debt Against Acceptor.

S., for the accommodation of R., accepted the latter's time drafts, which plaintiff purchased before maturity. R. then made an assignment to defendant for benefit of creditors, making preferences which did not include plaintiff's debt. Among the assets assigned was an open account of R. against S., who executed a note for the same to the defendant as assignee of R., paid a part thereof and then became insolvent: *Held*, that plaintiff has no right of action against defendant to recover the amount collected by it on the debt assigned to it by R. against S.

CONTROVERSY without action, heard before *Hoke, J.*, at August Term, 1896, of FORSYTH. The facts appear in the opinion of *Associate Justice Furches*. Judgment was rendered in favor of the plaintiff for $794.20 and defendant appealed.

Watson & Buxton for plaintiff.
J. L. Patterson for defendant.

FURCHES, J. This is a submission without action upon the (554) facts agreed under section 567 of The Code. When the case was docketed in this Court it did not contain the affidavit required by the statute. But upon motion of plaintiff (the defendant being present and not objecting) the plaintiff was allowed to file the required affidavit and the Court proceeded to hear the case.

Upon the hearing below, the Court rendered judgment for the plaintiff. In this there is error.

Reynolds drew on Sterns & Ray, and they accepted these drafts, which the plaintiff discounted for Reynolds before they were due. After this Reynolds failed in business, made an assignment of all his assets to the defendant as trustees for the benefit of his creditors, in which some creditors were preferred to others.

At the date of the assignment Stevens & Ray were owing Reynolds, on account of tobacco shipped to them, the sum of $1,662.96, for which sum Stevens & Ray have, since the assignment, executed their notes to the defendant as trustee aforesaid, and have, since the execution of said notes, paid thereon the sum of $794.20. Plaintiff, being the assignee and owner of these accepted drafts, which were then and are now unpaid and unsecured in the deed of assignment, has brought suits against Stevens & Ray, upon a part of which it has recovered judgment. But Stevens & Ray being now insolvent, the plaintiff in this controversy

claims judgment against the defendant for the $794.20 which Stevens & Ray have paid to it. It is stated and admitted that these drafts were what is called accommodation drafts, drawn and accepted for the benefit of Reynolds and discounted by him at the plaintiff bank.

When Stevens & Ray accepted these drafts they became the principal debtors. And when they were discounted and assigned to plaintiff bank, Stevens & Ray became the debtors of the plaintiff. Daniel's Neg. (555) Inst., sec. 532. It is true that, as to Stevens & Ray and Reynolds, a different relation existed. But they had no right to charge Reynolds with these drafts until they paid them; nor had Stevens & Ray any right of action against Reynolds until they paid the drafts. Daniel, *supra,* sec. 532. The plaintiff took these drafts before they were due and free from all equities. And we are not to be understood by this as saying that, if they had been past due, the law would have been different. Daniel, *supra,* secs. 786, 790. These statements disclose the facts that Stevens & Ray were indebted to plaintiff on these accepted drafts and were also indebted to Reynolds, the defendant's assignor for tobacco shipped to them by Reynolds. This last debt for tobacco Reynolds has assigned to the defendant, and Stevens & Ray have paid a part of it to the defendant.

How the plaintiff can collect money out of the defendant that has been paid to it in part satisfaction of a debt due by Stevens & Ray, we are not able to see. The only way it could do this would be to show that there had been some legal appropriation by Reynolds of the debt against Stevens & Ray to the payment of the plaintiff's debt, so as to give the plaintiff a lien prior to the assignment to defendant. *Vaughan v. Jeffreys, ante,* 135. This plaintiff has not done or attempted to do.

The doctrine of counterclaim is not involved. There is error and the judgment is

REVERSED.

Cited: Grandy v. Gulley, 120 N. C., 177.

(556)

R. H. SIMMONS ET AL. v. ALEXANDER ALLISON ET AL.

Practice—Appeal—Notice and Entry of Appeal—Printing Record on Appeal.

1. Where notice of appeal and entry thereof on the docket were both made within ten days after adjournment of the court at which judgment was rendered, it is immaterial that the entry was made after notice given, the entry being required only as record proof of the notice.

2. Where the sole question involved in an appeal is whether the judgment appealed from is in conformity with the opinion of this Court in a former appeal in the same case, it is not necessary that the transcript should contain any part of the record other than the formal recitals showing that the Court was properly constituted and held, the proceedings had subsequent to the filing of the opinion of this Court, and the exceptions made to such subsequent proceedings.

3. S., for the accommodation of R., accepted the latter's time drafts, which has been adjudged by this Court to be paid over to the plaintiffs, it cannot concern the defendants in what manner the court below shall divide it among the plaintiffs.

4. An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in case of referee's fees.

5. Where, during the pendency of an equitable proceeding (not an action of ejectment) to determine which of two sets of trustees, representing different church organizations, is entitled to control church property, the possession has been placed by agreement in a receiver, it is error to direct the assessment of damages in the nature of *mesne* profits in ejectment in favor of the prevailing parties.

ACTION, heard before *Bryan, J.*, at June Term, 1896, of MECKLENBURG.

Upon the certification below of the opinion of the Supreme Court in the cases reported in 118 N. C., 763, his Honor, *Bryan, J.*, upon motion of plaintiffs' attorneys, rendered the following judgments (557) in the two cases between the parties:

"In this case it is ordered that Z. T. Smith, receiver, retain out of the rents collected by him from R. H. Simmons for the parsonage the sum of one hundred and twenty-five dollars, being the allowance made to him for his own compensation and attorneys' fees, and pay the balance of said fund to R. H. Simmons, it appearing to the Court that the said Simmons, as pastor of the church known as Clinton Chapel, was to occupy said parsonage free of rent, as a part of his compensation as pastor, and is therefore entitled to said balance. The judgment of this Court at this term in the above-entitled case will be amended so as to

embrace this order, and the sum so retained by the receiver, to wit, one hundred and twenty-five dollars, will be taxed in the costs by the clerk and paid to plaintiff, R. H. Simmons, when collected."

"This case coming on to be heard upon the certificate of the Supreme Court transmitted to this Court, and it appearing therefrom that the petition to rehear the former judgment of the Supreme Court in the appeal in this case has been dismissed, and the former judgment (558) of this Court rendered by this Court at March Term, 1895, Judge Graham presiding and affirmed by this Court upon certificate of the Supreme Court at June Term, 1895, Judge Robinson presiding, has been in all respects affirmed, and the injunction or restraining order of *Chief Justice Faircloth* having been dissolved by said decision:

"Now, on motion of Messrs. Geo. N. Wilson, Burwell, Walker & Cansler and J. S. Leary, attorneys for the plaintiffs, it is adjudgd that the said judgment of this Court be, and the same is in all respects affirmed, and the said judgment will stand as the judgment of this Court in this case.

"It is further adjudged that the plaintiffs recover of the defendants the land and premises described in the complaint, and that a writ of possession issue therefor, that the plaintiffs further recover of the defendants and their sureties to the bonds filed for costs and damages, to wit, J. H. Emery, Gray Toole, J. W. Gordon, George S. Hall and H. C. Irwin, the sum of fifty dollars, assessed as damages at March Term, 1895, and the costs of this action to be taxed by the clerk of this Court, but the sheriff will not collect from the said George S. Hall and H. C. Irwin more than the sum of two hundred dollars, and from the said Jos. H. Emery, J. W. Gordon and Gray Toole more than the sum of three hundred dollars, the said sums being the amount of the penalties of the bonds signed respectively by said sureties, and the clerk will state in the execution the limit of the liability of each set of sureties as is herein set forth.

"It is further adjudged that the plaintiff, R. H. Simmons, is the lawful pastor of the church described in the complaint and known as Clinton Chapel, and is entitled to be let into the possession and enjoy- (559) ment of the said office and pastorate, and to freely exercise the rights, privileges and functions thereof without let or hindrance from the defendants or any of them; and the defendants are enjoined and perpetually restrained from interfering with the plaintiffs in the possession and enjoyment of the said premises, and from interfering with the said R. H. Simmons in the incumbency of the said pastorate and in the exercise of the rights, privileges and functions of the same.

"It is further ordered and adjudged that Z. T. Smith, receiver, who now has possession of the property by appointment of this Court, turn over and deliver the same, that is, the said land and premises, including the church and parsonage, to the plaintiffs, and he will also pay to the plaintiff, R. H. Simmons the rent he has collected from the plaintiff R. H. Simmons, for the parsonage, less one hundred and twenty-five dollars, his allowance, which he will retain, and he will report to this Court the amount so collected by him, said report to be made at this term.

"It is further ordered that an inquiry be made before a jury at the next term as to the amount of damages plaintiffs have sustained since March Term, 1895, on account of the withholding of said land and premises from them, but the receiver will at once turn over the said land and premises to plaintiffs as above ordered."

The judgment referred to as above having been rendered at the March Term, 1895, in this cause, was as follows:

"R. H. SIMMONS, and others, Plaintiffs
v.
ALEXANDER ALLISON, and others, Defendants.

"This cause coming on to be heard upon the verdict of the jury, it is now, on motion of Burwell, Walker & Cansler, Geo. E. Wilson and J. S. Leary, attorneys for the plaintiffs, adjudged that the plaintiffs are the legal owners, and lawfully entitled to the possession of (560) the premises in dispute, and that R. H. Simmons is pastor of Clinton Chapel, A. M. E. Z. Church, and entitled to exercise the rights, privileges and functions of said office, and a writ of possession will issue to put plaintiffs in possession of said premises described in the pleadings, and defendants are enjoined and restrained from in any way interfering with plaintiffs' possession of said premises, and from interfering with said R. H. Simmons in the exercise of his said rights and privileges as pastor of said church. It is further adjudged that plaintiffs recover of the defendants the sum of fifty dollars as damages and the costs of this action; and it is further ordered that the motion of sheriff for an allowance of one hundred dollars for services as receiver be continued until June Term by consent. A. W. GRAHAM,
Judge Presiding."

The defendants excepted to the judgments rendered by Judge Bryan as follows:

"First Exception: In that the Court ordered 'that Z. T Smith, receiver, retain out of the rents collected by him from R. H. Simmons for the parsonage the sum of $125, being the allowance made to him for his

own compensation and attorneys' fees, and pay the balance of the said fund to R. H. Simmons, it appearing to the Court that the said Simmons, as pastor of the church known as Clinton Chapel, was to occupy said parsonage free of rent as part of his compensation as pastor, and is therefore entitled to said balance.'

"Second Exception: In that the Court ordered as follows: 'The judgment of this Court at this term in the above-entitled case will be amended so as to embrace this order and the sum so retained by the receiver, to wit, one hundred and twenty-five dollars will be taxed (561) in the costs by the clerk and paid to the plaintiff, R. H. Simmons, when collected.'

"Third Exception: That the Court ordered and adjudged as follows: 'This case coming on to be heard upon the certificate of the Supreme Court transmitted to this Court, and it appearing therefrom that the petition to rehear the former judgment of the Supreme Court in the appeal in this case has been dismissed, and the former judgment of this Court rendered by this Court at March Term, 1895, Judge Graham presiding, and affirmed by this Court upon certificate of the Supreme Court at June Term, 1895, Judge Robinson presiding, has been in all respects affirmed and the injunction or restraining order of *Chief Justice Faircloth* having been dissolved by said decision:'

"Now on motion of Messrs. Geo. E. Wilson, Burwell, Walker & Cansler and J. S. Leary, attorneys for the plaintiffs, it is adjudged that the said judgment of this Court be, and the same is in all respects affirmed, and the said judgment will stand as the judgment of this Court in this case.

"Fourth Exception: That the Court ordered and adjudged: 'That the plaintiffs recover of the defendants the land and premises described in the complaint, and that a writ of possession issue therefor.'

"Fifth Exception: That the Court ordered and adjudged: 'That the plaintiffs recover of the defendants and their sureties to the bonds filed for costs and damages, to wit, J. H. Emery, Gray J. Toole, J. W. Gordon, George S. Hall and H. C. Irwin, the sum of fifty dollars, assessed as damages at March Term, 1895, and the cost of this action to be taxed by the clerk of this Court.'

"Sixth Exception: That the Court ordered and adjudged as follows: 'It is further adjudged that the plaintiff, R. H. Simmons, is the lawful pastor of the church described in the complaint and known as (562) Clinton Chapel, and is entitled to be let into the possession and enjoyment of the said office and pastorate, and to freely exercise the rights, privileges and functions thereof, without let or hindrance from the defendants or any of them, and the defendants are enjoined and

perpetually restrained from interfering with the plaintiffs in the possession and enjoyment of the said premises, and from interfering with the said R. H. Simmons in the incumbency of the said pastorate and in the exercise of the rights, privileges and functions of the same.'

"Seventh Exception: That the Court ordered and adjudged as follows: 'That Z. T. Smith, receiver, who now has possession of the property by appointment of this Court, turn over and deliver the same, that is the said land and premises, including the church and parsonage, to the plaintiffs, and he will also pay to the plaintiff, R. H. Simmons, the rent he has collected from plaintiff, R. H. Simmons, for the parsonage, less one hundred and twenty-five dollars, his allowance, which he will retain, and he will report to this Court the amount so collected by him, said report to be made at this term.'

"Eighth Exception: That the Court ordered and adjudged as follows: 'It is further ordered that an inquiry be made before a jury at the next term as to the amount of damages plaintiffs have sustained since March Term, 1895, on account of the withholding of said land and premises from them, but the receiver will at once turn over the said land and premises to plaintiffs as above ordered.' "

In this Court the plaintiffs moved to dismiss the appeal on the (563) ground that entry of appeal on the docket below was not made until after notice of appeal was given, and on the further ground that the full transcript of the records in the two cases in which judgments were rendered were not sent up.

Burwell, Walker & Cansler for plaintiffs.

Maxwell & Keerans and Clarkson & Duls for defendants (appellants).

CLARK, J. The motion of the apellee to dismiss must be denied as to both grounds. The notice of appeal and entry thereof on the docket having both been made within the ten days after adjournment, it is immaterial that the entry was made after notice given. Indeed, if the notice of the appeal is admitted, or shown to have been given in time, it would avail nothing if the *entry* was not made at all, for it is only made as record proof. *Fore v. R. R.*, 101 N. C., 526; *Atkinson v. R. R.*, 113 N. C., 581. The Code system exacts business-like diligence, that the rights of the opposite party may be respected, but it did not destroy the former system, based largely on mere technicalities, merely to substitute another set of technicalities and fine distinctions. *McDaniel v. Scurlock*, 115 N. C., 295. The object of the new system is, as far as possible, to conform to the common sense rules of business life, by requiring diligence in the trial of causes, trying them on their merits and disregarding mere technical objections.

As to the second ground of the motion, the sole question being whether the judgment entered below, since our decision in *Simmon v. Allison,* 118 N. C., 763, was in conformity with that opinion, it was eminently proper that the transcript on this appeal should not be encumbered with any part of the record other than the formal recitals usual and necessary to show that the Court was properly constituted and held,
(564) adding thereto the proceeding had subsequent to our opinion being filed below, and the exceptions made to such subsequent proceedings. *Durham v. R. R.,* 108 N. C., 399; *Mining Co. v. Smelting Co., ante,* 415. Indeed, the appellant, out of abundant caution, sent up and also printed the opinion of this Court (118 N. C., 763), which was an entirely unnecessary expense.

The first exception is overruled, for, as the fund in the hands of the receiver is to be paid over to the plaintiffs, it can not concern the defendants in what manner it should be divided among the plaintiffs. The Code provides (section 424 (1) that the judgment "may determine the ultimate rights of the parties on each side among themselves."

The second exception is overruled: The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. The defendant contends, however, that, being an equitable proceeding, the receiver's fees should be divided. But, if so, that is a matter in the discretion of the presiding judge, as is now the case also with referee's fees. Laws 1889, ch. 37. This was not a matter affecting the merits, and was not passed on in the former appeal.

The Court in the former appeal, passing upon the merits of the case, pointed out that this was not an action of ejectment, but an equitable proceeding to determine whether the defendants or the plaintiffs should be enjoined from interfering with the other in the control of the church property, that the possession was in the stake holder (the receiver) by agreement, for the benefit of the true *cestuis que trustent,* when determined by this litigation. We affirmed the judgment and verdict that the property belonged to the African Methodist Episcopal Zion Church, represented by the plaintiff board of trustees, and that the defendants, claiming as a board of trustees to represent an independent sep-
(565) arate body, should be enjoined. Therefore, so much of the present judgment as is set out in the appellants' sixth and seventh exceptions is now affirmed, but the third, fourth, fifth and eighth exceptions are sustained, so far as the Court below attempted to affirm the damages heretofore assessed, and directed an inquiry to assess further damages against the defendants, in the nature of *mesne* profits in ejectment. The defendants were not in possession, and, as declared in the former opinion, the title in issue and determined by the verdict and judgment was not between the plaintiffs and defendants as such, but whether the prop-

erty belonged to the connectional system known as the "African Methodist Episcopal Zion Church," or belonged to an independent congregation. That was the gist of the action and was fully investigated, ably and elaborately contested, and finally decided in favor of the former. But, though the plaintiffs were adjudged the proper board to represent the title, the possession was during the litigation in the receiver to be awarded on the result of the trial, and it is a misconception of the former opinion to understand it as affirming any right to collect or assess damages for *mesne* profits. The former opinion should have been construed on its tenor, as above stated. Though it said "affirmed," it did not declare "no error." It was meant to affirm on the main point as to the property belonging to the African Methodist Episcopal Zion Church, and directing it to be turned over to the plaintiffs as its board of trustees, and enjoining the representatives of those claiming to hold it for an independent body or congregation. The purport of the opinion negatived any affirmation of the incidental feature of a recovery of *mesne* profits. Each party will pay his own costs on appeal. Code, section 527 (2).

ERROR. MODIFIED.

Cited: Davison v. Land Co., 120 N. C., 260; *Barden v. Stickney*, 130 N. C., 63.

(566)

W. H. GARDNER v. H. B. EDWARDS.

Contract—Trial—Instruction.

Where, in the trial of an action for the contract price of sawing lumber, the testimony was conflicting as to whether the price was agreed to be paid upon the completion of the sawing or upon the receipt by the defendant of the money on a sale of the lumber, it was error to charge the jury that if they should find the contract to be that the lumber was to be shipped and sold before the saw bill was to be due and payable, and defendant had instructed a broker to sell it, it would be placing the lumber beyond the control or reach of the plaintiff, thereby making the saw bill all due and payable, and that they should so find that it was due.

ACTION, tried before *Robinson, J.*, and a jury, at July Term, 1896, of MADISON. The material facts and the principal assignment of error on appeal are stated in the opinion of *Associate Justice Montgomery*. There was verdict for the plaintiff, and defendant appealed from the judgment thereon.

Moore & Moore for plaintiff.

J. M. Gudger, Jr., for defendant (appellant).

MONTGOMERY, J. The plaintiff was employed at a fixed price per 1,000 feet to saw logs into lumber for the defendants. A nonsuit was submitted to as to the defendant Fox, and the other defendant answered. He averred that, by the contract between him and the plaintiff, the lumber was not to be paid for by the defendant until it was shipped and sold by the defendant and the money derived from the sale. The testimony on this point was conflicting and contradictory. His Honor
(567) charged the jury "that, if they should find the contract to be that the lumber was to be shipped and sold before the saw bill was to be due and payable, then, if Edwards had instructed Fox to sell the lumber, it would be placing the lumber beyond the control or reach of the plaintiff, thereby making the saw bill all due and payable, and that they should so find that it was due."

In this instruction there was error. The effect of the contract, if the jury should have found it to be that the lumber was not to be paid for until the defendant had shipped and sold it, might be as his Honor said it would be, but still the parties had the right to make such a contract if they chose, and if they had made such a one the plaintiff was bound by his own failure to protect his interests.

NEW TRIAL.

H. T. RUMBOUGH v. J. YOUNG.

Practice—Counterclaim—Demand for Relief—Right of Plaintiff to Enter Nonsuit.

1. Where a counterclaim is properly pleaded in an action, the opposing party cannot deprive the pleader of his right to a trial thereon by entering a nonsuit.

2. While one who, on a verbal contract of purchase and sale of land, has paid the whole or part of the purchase money, gone into possession and made improvements, has good grounds for relief, he nevertheless has no independent cause of action, and his demand in his answer to an action for possession, for an account for the purchase money paid and for betterments does not amount to a counterclaim so as to prevent the plaintiff from entering a nonsuit.

(568) ACTION, tried at Fall Term, 1895, of MADISON, before *Robinson, J.* The facts appear in the opinion of *Chief Justice Faircloth.* From a refusal of plaintiff's motion to be allowed to enter a nonsuit plaintiff appealed.

J. M. Gudger, Jr., for plaintiff.
Moore & Moore for defendant.

FAIRCLOTH, C. J. We were not favored with an argument, and upon examination of the record we find the only question was whether the plaintiff had a right to a judgment of nonsuit on his own motion, after his Honor had intimated that he could not recover, at the close of his evidence. The defendant objected to a nonsuit on the ground that the parties had prayed for affirmative relief. The court refused the motion of nonsuit and proceeded to try the case. His Honor fell into the error of treating the affirmative relief demanded by the defendant as a counterclaim. It appears that the plaintiff agreed verbally to sell and convey to defendant a small lot of land. The defendant paid the purchase-price, or a part of it, and entered into possession and made some improvements on the lot. The plaintiff sued for possession, and defendant demanded the repayment of the purchase-money and compensation for the improvements made. Plaintiff excepted and appealed from the Court's refusal to allow his motion of nonsuit.

A counterclaim is a cross action, and is intended, when the relation of the two causes of action is such as The Code prescribes, to enable the parties to dispose of both actions at one trial. The counterclaim is an independent and distinct cause of action, and must be alleged as fully in form and substance, and capable of proof in the same manner, as if it was a complaint. When so pleaded the opposing party can not deprive the pleader of his right to try by entering a nonsuit. If he (569) withdraws his complaint, the counterclaim may proceed to trial and final judgment; and hence in such a case the Court will not allow a nonsuit to be entered. Several decisions on this matter will be found in Clark's Code, sections 243 and 244.

While the defendant has good grounds for relief when the occasion arises, he has no cause of action, either legal or equitable. He is in possession of all that he purchased and paid for. His answer is not that of an actor but a defender. He could not maintain an action for specific performance, the contract being void by force of the Statute of Frauds relied upon by the plaintiff.

This principle was uniformly observed by the courts of equity, under our former system, and was clearly stated in *Albea v. Griffin,* 22 N. C., 9. In *Baker v. Carson,* 21 N. C., 381, the Court exercised its restraining power to prevent an ouster until the betterments were paid for, although the contract was void under the statute. This was done, not upon any principle of contract or damages for the breach of the same, but to prevent fraud and to enforce equity and good conscience.

These cases have been approved in a series of decisions, both before and since our present Code system. The motion for a nonsuit should have been allowed.

ERROR.

Cited: Well Co. v. Ice Co., 125 N. C., 82; *Wood v. Tinsley*, 138 N. C., 514.

(570)

RACHEL FRISBY v. TOWN OF MARSHALL.

Practice—Demurrer—Action for Damages Against Municipality—Presentation of Claim to Town Authorities for Audit and Payment—Code, Section 757.

1. When a demurrer to a complaint is interposed the approved practice is that it be followed by a judgment sustaining or overruling it, with an appeal from the judgment if it sustains the demurrer.
2. A claim for damages against a municipality is not such a claim as must, under the provisions of sec. 757 of The Code, be presented to the municipal authorities to be audited and allowed or refused before action can be brought thereon.

ACTION, for damages, tried before *Timberlake, J.*, at February Term, 1896, of MADISON. The plaintiff filed, by her counsel, a complaint and defendant answered. When the case was called for trial the defendant demurred *ore tenus* to the complaint, and moved to dismiss the action on the ground that the complaint is not verified, and that it does not allege that the plaintiff presented her claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it or had disallowed it, which motion was sustained by the Court, and plaintiff submitted to a judgment of nonsuit and appealed.

No counsel for appellant.
J. M. Gudger, Jr., for defendant.

FURCHES, J. This case comes to us on plaintiff's appeal and was submitted upon the record without brief or argument. We find upon examining the record that when the case was called for trial the defendant demurred *ore tenus* to the plaintiff's complaint, and upon an intima-
(571) tion from the Court sustaining the demurrer the plaintiff submitted to a judgment of nonsuit and appealed.

This seems to us to be a new practice and a new way of getting the opinion of the Court reviewed. The usual practice is, a judgment sus-

taining or overruling the demurrer, and an appeal from that judgment if it sustained the demurrer. But taking into consideration the whole record and the case on appeal, we suppose we should treat the case as if this course had been pursued. And we find from the case that but one question is presented for our consideration, and that is "that the plaintiff's complaint is not verified, and that it does not allege that plaintiff presented her claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it or had disallowed it," and that the demurrer was sustained upon this ground. This ruling of the Court was erroneous. *Shields v. Durham,* 118 N. C., 450; *Sheldon v. Asheville, post,* 606. But we think it proper to say that both these cases (of Shields and Sheldon, *supra*) have been decided since this case was decided by the Court below.

NEW TRIAL.

Cited: Nicholson v. Comrs., 121 N. C., 28; *Neal v. Marion,* 126 N. C., 415; *Shelby v. R. R.,* 147 N. C., 538; *Sugg v. Greenville,* 169 N. C., 617; *Chambers v. R. R.,* 172 N. C., 557, 561.

---

(572)

W. R. SAMS v. PRICE, WELCH & CO.

Practice—Trial—Change of Front—Promise to Pay the Debt of Another.

1. A plaintiff cannot abandon his cause of action and recover upon an entirely different cause of action without amendment unless the defendant enters no objection and permits the case to be tried in the changed aspect.
2. Where the complaint in an action alleged a contract between plaintiff and defendant, it was error in the trial of the action to admit testimony of an alleged contract between the defendant and another person for the plaintiff's benefit.
3. Where in the trial of an action the plaintiff abandons the cause of action set up in the complaint and endeavors to recover upon another, upon objection by the defendant the court should either exclude the evidence or permit an amendment of complaint and answer, and, if necessary, grant defendant a continuance.

ACTION, tried before *Timberlake, J.,* and a jury, at February Term, 1896, of MADISON. The nature of the action and the facts connected with the trial appear in the opinion of *Associate Justice Clark.* There was a verdict for the plaintiff and defendant appealed from the judgment thereon.

J. M. Gudger, Jr., for plaintiff.
George A. Shuford and W. W. Zachary for defendants (appellants).

CLARK, J. The complaint alleges that the defendants are indebted to the plaintiff for lumber sold in the sum of $401.54, which is denied in the answer. On the trial it was in evidence for plaintiff that other persons, not parties to this action, were indebted to the plaintiff for $401.54 for advances furnished in the lumber business, and that (573) they sold the lumber to the defendants, the plaintiff not being the owner and having no lien thereon. There was evidence, admitted over defendants' objection, that after such purchase, the defendants promised to pay out of the purchase-money this debt of the vendor to the plaintiff, but the judge having charged the jury that this, being a promise to pay a debt of another and not being in writing, it would be within the Statute of Frauds and not binding on the defendants, we need not consider it. If there was error it was harmless to the defendants. It was, however, further in evidence over defendants' objections that at the time of the contract of sale of the lumber to the defendants, which was in writing, they further agreed verbally (*Nissen v. Mining Company,* 104 N. C., 309) with the vendors to pay the latter's debt ($401.54) to the plaintiff. And the Court charged that, if the jury found this to be true, they should find the issue that the defendants were indebted to the plaintiffs $401.54. The defendants excepted to this evidence and charge on the ground that they were not applicable to the issue raised on the pleadings, and that the plaintiff could not recover on a promise made by the defendants to another party, the plaintiff not being a party to the contract.

The interesting question whether a stranger to a contract for his benefit can maintain an action on it has been diversely decided in other jurisdictions (3 A. & E. Enc., 863 and notes), but as stated in *Haun v. Burrell, ante* 544, it has not been—directly, at least—passed upon in this State. The exception, however, that the evidence and charge did not apply to the issues raised by the pleadings is well taken. The plaintiff sued upon a sale of lumber by him to the defendants. If the complaint is so worded that under the liberal procedure of The Code it could (574) have been construed to be either an action or an express or implied contract (*Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601; *Holden v. Warren,* 118 N. C., 326), or either *in tort* or contract (*Brittain v. Payne,* 118 N. C., 989; *Schulhofer v. R. R.,* 118 N. C., 1096; *Timber Company v. Brooks,* 109 N. C., 698; *Bowers v. R. R.,* 107 N. C., 394), or as common-law action or one under the statute (*Roberson v. Morgan,* 118 N. C., 991), the Court will sustain the jurisdiction. The Court will, regardless of the prayer for relief, grant such

relief as the complaint and proof entitle the plaintiff to receive. *Simmons v. Allison,* 118 N. C., 763; *Harris v. Sneeden,* 104 N. C., 369; *Jones v. Mial,* 82 N. C., 252. But the plaintiff can not abandon his cause of action and recover upon an entirely different cause of action without amendment. It is true, if the defendant makes no objection and tries the case in the changed aspect, he will be taken as assenting thereto, and the amendment of the pleadings can be made after verdict to conform them to the case as tried. The Code, 273, and cases cited thereunder in Clark's Code. But here, the objection being made in apt time, the judge either should have ruled out the evidence or (as is the spirit of The Code) permitted an amendment of the complaint and answer on such terms as he deemed proper, and if the defendant was put to a disadvantage should have granted also a continuance. But the complaint being upon a contract alleged between the defendant and plaintiff, it was clearly error, after objection, to permit the plaintiff to prove and recover upon an alleged contract between the defendant and another person for the plaintiff's benefit. Whether he can recover at all upon such contract does not arise upon the present state of the pleadings, and we express no opinion.

ERROR.

Cited: Beach v. R. R., 120 N. C., 507; *Gilliam v. Ins. Co.,* 121 N. C., 372; *Bizzell v. McKinnon, ib.,* 188; *Gorrell v. Water Co.,* 124 N. C., 334; *Mfg. Co. v. Blythe,* 127 N. C., 327; *Dobson v. R. R.,* 129 N. C., 291; *Martin v. Bank,* 131 N. C., 123; *Gastonia v. Engineering Co., ib.,* 367; *Parker v. Express Co.,* 132 N. C., 130; *Williams v. R. R.,* 144 N. C., 505; *White v. Eley,* 145 N. C., 36; *McFarland v. Cornwell,* 151 N. C., 431; *Palmer v. Lowder,* 167 N. C., 333; *Mitchem v. Pasour,* 173 N. C., 488.

(575)

J. J. REDMOND ET AL. v. B. T. CHANDLEY AND N. M. CHANDLEY.

Action to Set Aside Deed as Fraudulent—Fraudulent Conveyance—Issues—Husband and Wife—Conveyance by Insolvent Husband to Wife —Presumption of Fraud—Consideration in Deed.

1. It is in the sound discretion of the trial judge to determine what issues shall be submitted in a trial, and to frame them subject to the restrictions (1) that they must be raised by the pleadings; (2) that the verdict thereon shall be a sufficient basis for a judgment, and (3) that neither party shall be debarred for want of an additional issue or issues from presenting to the jury some view of the law arising out of the evidence.

2. In the trial of an action to set aside a deed as fraudulent, where the question involved was whether or not the deed was executed by a husband to his wife with the intent to hinder, delay, and defraud his creditors, it was sufficient to submit only two issues, one as to the fraudulent intent of the husband, and the other as to the wife's knowledge of such fruadulent intent when she accepted the deed.

3. If fraud appears plainly on the face of an impeached instrument the presumption of fraud is conclusive, and the court will pronounce it void in law without the intervention of a jury.

4. If fraud does not appear on the face of an impeached instrument the facts are to be developed on the trial before a jury, and if the plaintiff shows certain facts and circumstances strongly tending to show fraud, a presumption of fraud is raised which may be rebutted by evidence of *bona fides*, the intent of the parties being a matter for the jury to determine, but when the facts and circumstances are such as to excite a suspicion merely as to the *bona fides* of the transaction they are to be considered as "badges of fraud" and closely scrutinized as such, but they do not raise a presumption of fraud, and the burden of proving fraud is upon the party alleging it.

5. The mere fact that a deed is made by an insolvent and embarrassed husband to his wife raises a presumption of fraud in law which must be rebutted by evidence.

6. The recital of a valuable consideration in a deed from an insolvent husband to his wife does not rebut the presumption of fraud which the law raises in the case of such a conveyance.

ACTION, to set aside a deed as fraudulent, tried before *Robinson, J.*, and a jury, at July Term, 1895, of MADISON. The impeached deed was executed by the defendant, B. T. Chandley, to his wife, the defendant, N. M. Chandley. It recited a consideration of $1,500 paid in money, and was made subject to mortgages aggregating $860. There was evidence that the land was worth $4,000, that the husband was insolvent and much embarrassed by debt at the time of the conveyance, and that he owned no other property, real or personal.

The defendants excepted to the refusal of the Court to submit the issues tendered by them, and also excepted to the issues submitted.

Defendants demurred to the sufficiency of plaintiff's evidence, and asked the Court to charge the jury that there was no evidence to warrant a finding in favor of the plaintiffs. His Honor stated that there was no evidence of fraud, but that he would charge the jury that the mere fact that the deed was made by the husband to his wife raised a presumption of fraud in law and must be rebutted by evidence.

(577) Defendants insisted that the presumption of fraud was rebutted by the proved adequacy of the consideration for the deed to N. M. Chandley of $1,500 as stated in the deed and the assumption of the payment of a one thousand dollar deed of trust on the land held by the

Western Carolina Bank of the city of Asheville, which was on the land at the date of the deed to N. M. Chandley, by her husband. Defendants also insisted that plaintiffs must show that B. T. Chandley was largely indebted at the time of taking the deed from her husband, B. T. Chandley had any knowledge of plaintiffs' debt or of any indebtedness by her said husband.

His Honor held that the presumption of fraud had not been rebutted, and directed the jury to answer the issues in favor of plaintiffs. Defendants excepted, and appealed from the judgment rendered for the plaintiffs.

Moore & Moore and W. W. Zachary for plaintiffs.
J. M. Gudger, Jr., for defendants (appellants).

MONTGOMERY, J. Both plaintiffs and defendants tendered issues but the Court refused them and substituted the following: (1) Did the defendant, B. T. Chandley, execute and deliver the deed set out in the complaint to hinder, delay, defeat and defraud creditors? (2) Did defendant, N. M. Chandley, accept said deed with knowledge of the intent of B. T. Chandley to hinder, delay, defeat, and defraud creditors?

These issues were sufficient to try the question raised by the pleadings—the question whether or not the deed which was executed by the husband Chandley to his wife was done with intent to hinder, delay, defeat and defraud creditors. It is within the sound dis- (578) cretion of the trial judge to determine what issues shall be submitted, and to frame them subject to the restrictions, first, that only issues of fact raised by the pleadings are submitted; secondly, that the verdict constitutes a sufficient basis for a judgment; and, thirdly, 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 application of the law concerning the burden of proof in cases involving issues of fraud has been greatly simplified by the discussions of the matter in our own reports. A reiteration of the learning, however, may not be out of place here.

If fraud appears plainly upon the face of the instrument impeached, there is no need for the intervention of the jury; the presumption that fraud was intended is conclusive, and the Court will pronounce the paper void in law. *Hodges v. Lassiter,* 96 N. C., 351; *Brown v. Mitchell,* 102 N. C., 347. If the fraud does not appear upon the face of the deed, the facts are to be developed on the trial before the jury. If the plaintiff shows certain facts and circumstances, as for instance that the grantor, insolvent or much embarrassed, has conveyed property of much value to a near relative, and the transaction is secret, and no one is

present to witness the trade but these near relatives, and the defendant offers no evidence of good faith in the transaction, or if that which he does offer is not sufficient to be submitted to the jury, the law raises the presumption that the deed is fraudulent, and the jury should be instructed that if they believe the plaintiff's testimony they should answer the issue of fraud in favor of the plaintiff. If, however, these relatives, as witnesses, give evidence in rebuttal of the presumption of law,
(579) the jury should be instructed that if the defendant's testimony satisfies them that there was no purpose of secrecy and that the transaction was fair and the consideration honest and adequate, then the presumption raised by the plaintiff's testimony that the deed was fraudulent is rebutted, and the intent of the parties is a matter for the jury to determine, as the evidence may satisfy them. *Bank v. Gilmer,* 116 N. C., 684; *Stoneburger v. Jeffreys, ib.,* 86; *Brown v. Mitchell, supra; Woodruff v. Bowles,* 104 N. C., 197. Then, again, if in a case where the facts and circumstances are such as to excite suspicion about the *bona fides* connected with the deed, such as, for instance, an unusual delay in its registration, inadequacy of price, long credit if the grantor is pressed for money, and the like, the matter should be submitted to the jury and they should be instructed that such circumstances are suspicious, are what the law calls *badges* of fraud, to be closely scrutinized, but that they do not constitute a presumption of fraud in law, and that the burden of proof is on the party alleging fraud. *Bank v. Gilmer, supra.*

In *Reiger v. Davis,* 67 N. C., 185, it is said: "It is a rule of law to be laid down by the Court that where a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret, and no one is present to witness the trade but these near relatives, it is to be regarded as fraudulent; but when these relatives are made witnesses in the cause and depose to the fairness and *bona fides* of the transaction, and that there was in fact no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence might satisfy them." And that is the law now, notwithstanding there may be some unguarded expressions on the subject in our Reports since
(580) that case was decided. *Helms v. Green,* 105 N. C., 251.

In the case before us, the deed alleged to be fraudulent was made by a husband to his wife, the defendant. Does the same rule laid down in *Reiger v. Davis, supra,* apply to this case? It would seem not. It has been decided in numerous cases that where creditors attack as fraudulent a deed made apparently upon valuable consideration by an insolvent or much embarrassed husband to his wife, without any other badge of fraud or suspicious circumstance, the *onus* is upon the wife to

show that the transaction is honest, that the consideration named in the deed has been paid in money or something else of value. *Brown v. Mitchell* and *Woodruff v. Bowles, supra; Stephenson v. Felton,* 106 N. C., 114; *Peeler v. Peeler,* 109 N. C., 628; *Bank v. Gilmer, supra.*

According to these decisions his Honor was correct in instructing the jury that the mere fact that the deed was made by the (insolvent) husband to his wife raised a presumption of fraud in law and must be rebutted by evidence. The defendants offered no evidence. The recital of a consideration in the deed was not evidence against the plaintiff, who was a creditor. It was merely a declaration or admission, of no effect except between grantor and grantee; Waitt on Fraudulent Conveyances, sec. 220; *Bank v. Beakman,* 36 N. J. Eq., 83.

NO ERROR.

Cited: Webb v. Atkinson, 124 N. C., 453; *Mitchell v. Eure,* 126 N. C., 79; *Jordan v. Newsome, ib.,* 556; *Wittkowsky v. Baruch, ib.,* 749; *Austin v. Staten, ib.,* 789; *Strauss v. Wilmington,* 129 N. C., 100; *Sanford v. Eubanks,* 152 N. C., 701; *Eddleman v. Lentz,* 158 N. C., 73.

(581)

R. N. ARCHER v. S. S. HOOPER.

Action to Recover Personal Property—Best Evidence—Parol Evidence.

The rule that the best evidence as to the contents, meaning and effect of a written contract is the instrument itself applies only when the contest concerning the same is between the parties thereto; where the controversy over personal property is between persons not parties to written contract under which a party claims title, and it is collaterally attacked, parol evidence as to its contents and meaning is admissible.

ACTION, to recover possession of personal property, tried before *Robinson, J.,* and a jury, at Fall Term, 1895, of GRAHAM. The facts appear in the opinion of *Associate Justice Montgomery.* The plaintiff appealed.

J. W. Cooper for plaintiff.
F. A. Sondley for defendant.

MONTGOMERY, J. This action was brought to recover possession of certain personal property of the defendant. The case in part states that "the plaintiff claimed the property under a bill of sale from Milo

M. Belding to R. N. Archer, and offered to prove title to same in plaintiff by parol evidence, that of Frank K. Rodman, by his deposition. Defendant objected to this evidence on the ground that the bill of sale was the best evidence. Objection sustained and the plaintiff excepted." In a contest over the contents and meaning of the bill of sale between the plaintiff and his vendor, Belding, the bill of sale must be the best evidence, and would have to be produced or its absence accounted for. But this rule only obtains between parties to the written evidence of (582) the contract, and where its enforcement is the substantial cause of action. Here, the parties to this suit are not the parties to the bill of sale, and the same is a collateral matter. *Carden v. McConnell,* 116 N. C., 875. On the trial of a case where the title to personal property is in issue between parties other than those to the contract, we can see no objection to the plaintiff's proving his title by parol testimony, even after he has failed to establish title by written bill of sale through inability to prove its execution. Such contracts are not required to be in writing, and they can be proved just as well by parol as by a writing. There was error.

NEW TRIAL.

Cited: *S. v. Sharp,* 125 N. C., 631.

A. T. DAVIDSON v. W. T. SCHULER'S HEIRS.

Action to Recover Land—Survey—Beginning Corner, Location of—Parol Evidence.

While parol evidence is not competent to contradict and change the calls in a grant or deed, it may be used and marked lines proved to locate the corner called for or to show that, by a "slip of the pen" a course different from that intended was written in making out the survey and grant, as "south" instead of "north."

ACTION, tried before *Robinson, J.,* and a jury, at Fall Term, 1895, of GRAHAM, on the usual issues in ejectment.

His Honor charged the jury among other things: That the location of the beginning corner of the land in controversy is a question (584) submitted to them under all the evidence in the case; and notwithstanding it was described as being a chestnut tree, the S. E. corner of George William's lot, if it was in fact located at some other point than the S. E. corner, and the plaintiff had satisfied them of its location by a preponderance of the evidence, and had satisfied them by

a preponderance of the evidence that the beginning corner was at the chestnut tree described by the witness Williams and others, and running from that point according to the calls in plaintiff's grant covered the land in controversy and in possession of defendants, that they would answer the first issue "Yes," and the second issue "No." (585)

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

Battle & Mordecai and Ben Posey for plaintiff.
Dillard & King and Shepherd & Busbee for defendants (appellants).

FURCHES, J. This is an action of ejectment, and the only question presented by the appeal is the location of a grant from the State, dated 3 February, 1868. This grant calls for a chestnut, S. E. corner of George William's lot, as the beginning corner. To locate the beginning corner at the S. E. corner of George William's lot, the grant does not cover the *locus in quo* But to locate it on a chestnut near the N. E. corner of the George Williams lot, and then run with the calls of the grant, it does cover the *locus in quo*. At the S. E. corner of the George Williams lot there is no chestnut to be found marked as a corner, but near the N. E. corner of the George Williams lot is found a chestnut tree marked as a corner, of a date, from appearances, suited to the date of the grant. From this chestnut tree are found marked lines corresponding with the calls of the grant. The corner called for is a *chestnut tree* which is said to be near the S. E. corner of the George Williams lot. This description leads the parties wishing to locate this grant to expect to find the "chestnut" called for as the beginning corner at or near the S. E. corner of the George Williams lot. But no such tree can be found there, nor is there any evidence tending to show that there ever was such a tree at that point. But parol evidence may be used, (586) and marked lines proved, to locate the corner *called for* in the grant, or to show a slip of the pen in writing "south" instead of "north" which the plaintiff contends was the case in making out the survey and grant in this case. This doctrine of allowing the use of parol evidence and the proof of marked lines to locate and establish the lines and corners called for in a grant or deed is held in a number of the decisions of this Court. Indeed, it is common learning, fully recognized by the courts and the profession. But it is never allowed to contradict and change the calls in a grant or deed.

The difficulty in this case is to locate the chestnut tree called for as the beginning corner. To do this it was competent to receive the evidence of the witness Williams, who testified that he was one of the chain-carriers when the survey was made, and that the chestnut tree in the forks of Yellow Creek was then run and marked as the corner, also to

receive evidence of the marked lines running from and to this chestnut, agreeing with the calls in the grant, for the purpose of showing that this chestnut was the commencing corner of the grant; and to show that the pointer called for in the grant, "S. E. corner of George Williams' lot," was, as *Pearson, C. J.*, says in *Graybeal v. Powers,* 76 N. C., 66, "a slip of the pen." This evidence was competent because it was introduced and tended to *establish* the call in the grant—the chestnut tree—and not to *contradict* the call and establish a corner or line not called for in the grant.

It is the duty of the Court to tell the jury what the corner is, and it is the duty of the jury to say from the evidence where it is. *Jones v. Bunker,* 83 N. C., 324; *Burnett v. Thompson,* 35 N. C., 379. The Court should have told the jury that the beginning corner was a chestnut tree,

(587) and that it was their duty to find from the evidence where this tree is, and then locate the grant by the call and distance, unless there were other marked lines called for in the grant, or some other natural boundary called for and established of greater certainty than course and distance; that, in ascertaining the beginning corner, they should take into consideration that, while the call was a *chestnut,* it is also said to be at or near the S. E. corner of George Williams' lot; that if this description was a mistake, "a slip of the pen," as said in *Graybeal v. Powers, supra,* and this is shown to their satisfaction, they would not be controlled by this description in establishing the corner; that the evidence of William Williams, who testifies that he was one of the chain-carriers and that the chestnut found in the forks of Yellow Creek marked as a corner is the tree there marked as the commencing corner and called for in the grant and the evidence of Patton and others corroborating him, is competent evidence. Also the marked lines, apparently about the age of the grant running with the calls of the grant, are all competent evidence for them to consider in establishing the beginning corner. And if from all the evidence they should find the chestnut marked as a corner in the forks of Yellow Creek to be the tree called for in the grant as the beginning corner, they should find the issues in favor of the plaintiff—it being admitted that, if this is the beginning corner of plaintiff's deed and grant, they cover the *locus in quo.* It must be kept in mind that the call in the grant is a chestnut tree and not the S. E. corner of George Williams' land. This we understand to have been substantially the charge of the Court upon which the jury found for the plaintiff, and the judgment must be

AFFIRMED.

Cited: Tucker v. Satterthwaite, 126 N. C., 959; *Wiseman v. Green,* 127 N. C., 290; *Gudger v. White,* 141 N. C., 519; *Ipock v. Gaskins,* 161 N. C., 679.

(588)

J. W. WILSON ET AL. V. S. C. WILSON ET AL.

Trust Deed—Construction.

Where a trust deed provided that the trustee should hold the property for the use of the wife of the grantor and her two children, the income and profits to be used for the support of the said wife and children, and that at the death of the wife, the property should be held for the use of said children until they arrived at full age: *Held*, that the wife and children were tenants in common in the trust estate from the date of the deed.

ACTION, tried before *Hoke, J.*, and a jury, at April Special Term, 1896, of BUNCOMBE. The principal point involved in the case was the construction of a deed of trust, the material parts of which are set out in the opinion of *Chief Justice Faircloth*. There was judgment for the defendants and plaintiffs appealed.

The plaintiff asked his Honor to hold, as a matter of law, and so charge the jury, that the legal effect of the deed in trust was to vest one-third interest for life as *cestui que trust* in Samantha C. Wilson as tenant in common with the plaintiff, Clara M. Featherstone, and a two-thirds interest in fee as *cestui que trust* in the plaintiff, Clara M. Featherstone, who is admittedly the sole heir at law of her sister, Delia Hardy, mentioned in the deed of trust, and that the plaintiff Clara was equitable owner in fee of two-thirds of the property, with present right to the rents and profits.

The defendant contended, and asked the Court so to hold as a matter of law and so instruct the jury, that defendant Samantha C., was entitled to a life estate as *cestui que trust* in the entire property; and also contended, and asked the Court to hold, that the defendant, Samantha C., by virtue of the terms of said deed in trust, was (589) owner in fee simple as *cestui que trust* of the entire property.

His Honor held, and so instructed the jury, that the defendant, Samantha C., was entitled to a life estate as *cestui que trust* in the entire property, and that the plaintiff Clara was entitled to a remainder in fee simple, after the expiration of the life estate of defendant Samantha C. as *cestui que trust.*

Judgment upon the verdict, from which plaintiffs appealed.

Jones & Barnard for plaintiffs (appellants).
Merrimon & Merrimon for defendants.

FAIRCLOTH, C. J. The question here is the construction of a deed made by John Wilson and others to G. W. Neely, trustee, conveying certain property in Asheville in 1861. The deed provides that the trustee and his heirs shall hold the property "for the sole and separate

use and benefit of the said Samantha C. Wilson (wife of one of the grantors) and her two children, Delia Hardy and Clara Mock," "and any others thereafter born," and after the death of Samantha C. Wilson then to hold the property on the same trust for the children aforesaid, allowing the boys to receive their interest at the age of 21 years. And the said trustee shall have power to rent or hire said property to the best advantage at his own discretion, "and shall use the profits and proceeds thereof for the support and maintenance of said Samantha C. Wilson and her children as aforesaid, not going beyond the current profits nor anticipating the principal, until by the coming of said age of 21 years or marriage of said children the property is to be held and disposed of as hereinbefore set forth, the trust as to the boys to cease, and they to have their legal interest at the age of twenty-one years,
(590) and the proportion of said profits and income to be expended for the support and maintenance and education of the said *cestui que trust,* to be according to their several needs and the ages and necessities of said children."

It is admitted that the plaintiff Clara is the sole heir at law of her sister, Delia Hardy.

His Honor held that Samantha C. Wilson was entitled to a life estate as *cestui que trust* in the entire property, and that plaintiff Clara was entitled to a remainder in fee after the death of Samantha.

The question, then, is whether Samantha takes a life estate in the whole property, or were she and the children tenants in common in the trust estate? According to the natural import of the language and the authorities, they were tenants in common in the trust estate from the date of the deed. *Moore v. Leach,* 50 N. C., 88; *Hunt v. Satterwhite,* 85 N. C., 73; *Chestnut v. Meares,* 56 N. C., 416; *Gay v. Baker,* 58 N. C., 344. The result would be otherwise if anything in the instrument indicated reasonably a different intention. We find nothing of that in the deed; but, on the contrary, it appears to have been the purpose to provide for the comfort of the children as well as the wife. The defendants' contention would strip the children of their maintenance and education at that period of life when such assistance was more needed than at any other time. We can not impute such a purpose in the mind of the father in the absence of any language to justify it. He might be improvident and reckless, but when moved by a generous impulse to provide and secure something for his family it would be a most unnatural act to disinherit the most helpless members of it. As all the other questions are more or less governed by the main one now here decided, we refrain from any further review of the case.

ERROR.

Cited: Featherston v. Wilson, 123 N. C., 625.

(591)

NATIONAL BANK OF ASHEVILLE v. F. A. SUMNER ET AL.

Action on Note—Appeal—Exceptions to Charge—Practice—Instructions—Release of Surety—Indulgence to Principal Debtor.

1. While the better practice in entering exceptions to a charge is to make them on motion for a new trial in order that the trial judge may, if he sees proper, grant a new trial without appeal, yet the appellant has the right to assign errors for the first time in his case on appeal.

2. Exceptions to errors (other than those to the charge) that might be cured by the judge if made during the trial cannot be made for the first time in the case on appeal.

3. The charge of the trial judge need not recapitulate the evidence but may call the attention of the jury to the contentions of the parties and the principal evidence relating thereto.

4. An omission to state evidence favorable to a party is not assignable as error unless pointed out at the time.

5. *It would seem* that the doctrine by which a surety is released by indulgence given to the principle debtor is based upon a strict construction of the contract for the benefit of such sureties as sign notes for the benefit of the principal, and without consideration or benefit for themselves, and hence, that it would not apply to a case where the payee of a note becomes a surety on a note by endorsing it to another in payment of his own debt or otherwise obtaining full value for it.

6. Where the only evidence of indulgence given to a principal debtor was that the creditor, in compliance with his request to be allowed time to sell some land in order to pay the debt, gave him 30 days, but there was no consideration for such extension and no contract not to sue; and suit was brought to the next ensuing term of Court: *Held*, that there was no such indulgence as would release the surety.

ACTION on a note, tried before *Hoke, J.*, and a jury, at April (592) Special Term, 1896, of BUNCOMBE. The essential facts appear in the opinion of *Associate Justice Furches*. Defendant appealed from the judgment rendered against him.

Jones & Barnard for plaintiff.
Merrimon & Merrimon for defendants.

FURCHES, J. The defendant Sumner was owing the plaintiff bank some $1,600 or more. The defendant held a note on Bostic & Cobb for about $1,000. The defendant, in satisfaction of his note, transferred and endorsed the Bostic-Cobb note to the plaintiff, and paid the plaintiff the balance of his indebtedness in currency. Bostic & Cobb are

badly insolvent, and this action is brought on the Bostic-Cobb note and the defendant's endorsement thereon. There was a judgment for the plaintiff and appeal by defendant Sumner.

There were no exceptions taken on the trial, nor on a motion for a new trial, but the errors assigned were made for the first time in the defendant's statement of the case on appeal.

The defendant had the right to pursue this course as to the assignment of errors of law in the charge of the Court, though it is said to be the better practice to make them on a motion for a new trial, as the Court might upon consideration grant a new trial without appeal. *Lowe v. Elliott,* 107 N. C., 718; *Taylor v. Plummer,* 105 N. C., 56; *Smith v. Smith,* 108 N. C., 365.

But all other exceptions that might be cured by the judge, if the exception had been made during the trial, can not be made for the first time in the statement of the case on appeal. *State v. Grady,* 83 N. C., 643.

The judge says the case had been fully argued to the jury, and he did not undertake to recapitulate all the evidence; but to call the (593) attention of the jury to the contention of the parties and the principal evidence in the case bearing upon these contentions. This mode of conducting the trial is sustained by *S. v. Jones,* 87 N. C., 547, and *S. v. Jones,* 97 N. C., 469. An omission to state evidence favorable to a party is not assignable as error unless pointed out at the time. *S. v. Grady, supra.*

The defendant Sumner sets up two grounds of defense: First, that the endorsement was made upon a special verbal agreement between him and the plaintiff, through its cashier Barnard, that he was not to be looked to for payment until the plaintiff should fail to collect the note out of Bostic & Cobb, and they were to exercise diligence to do this, and to exhaust all means of collecting against them, which he alleged they had not done. The other is that he is only the surety of Bostic & Cobb, and the plaintiff by indulging them—giving them time—released him from all obligation to pay the note by reason of his endorsement.

Issues were submitted to the jury without objection, presenting both these grounds of defense, and the case was tried upon this conception.

It may be questioned whether the defendant Sumner, who owed the plaintiff bank and endorsed the Cobb-Bostic note and delivered it to the bank in payment of his own note, is such a surety as could insist on the defense of time given to Bostic & Cobb—whether he is not the real debtor of the bank, and Bostic & Cobb additional and collateral security for his debt.

This doctrine, as we understand it, is put upon a strict construction of the contract for the benefit of sureties who sign notes for the benefit

of the principal without consideration or benefit to them. This being so, they are only bound by force of the contract, and the same must be strictly complied with on the part of the payee or they (594) are discharged. But none of these reasons applies to the defendant Sumner. He got a full consideration for this endorsement—his own note. He did not endorse it for the benefit of Bostic & Cobb. It was of no interest to them that he endorsed it to the plaintiff.

But, as the case was presented and tried under the conception that he was such a surety as might have the benefit of that defense, we will give no opinion upon the point above suggested. But we will consider the appeal upon the case as tried and the defendant's exceptions thereto.

The defendant Sumner's grounds of appeal are all contained in one exception, covering about four pages of printed matter, cut up into paragraphs, and is said to be to the judge's charge. But the larger portion of it is as to the manner of the Court in reciting the evidence or the failure to repeat the evidence. And, though the exception is made to the charge, it is upon such matters as should have been called to the attention of the Court, and can not be presented for the first time in the statement of the case on appeal, under the authorities we have cited above. There are many criticisms contained in defendant's exception to the manner in which the judge submitted the case to the jury—such as these: That he stated in his charge that the defendant Sumner was being pressed for his debt, and that he went to the bank and had this transaction with the cashier Barnard, which the defendant Sumner says was not as he stated. The Court had said "There is evidence before the jury that the character of Sumner and Bostic is good," and further down he said, "Barnard's character is also good, according to the evidence." These statements are objected to by the defendant Sumner, and also some other expressions of the judge, but hardly so pointed as these. We know how careful a judge should be in guarding his language in making his charge to the jury, as (595) the jury often takes an unguarded expression for much more than it really means. But here the issue was as to whether there was a special verbal contract between the plaintiff and defendant Sumner that the plaintiff was not to call upon him to pay this debt until the plaintiff had exhausted all means to make it out of Bostic & Cobb.

We can not see that there is anything prejudicial to defendant Sumner in the manner in which the judge spoke of his and Bostic's and Barnard's character. Nor can we see how it could affect the jury prejudicially to him whether the plaintiff was pressing him for his debt or not, or whether he went to the bank first about the matter, or whether Barnard went to him. None of them was as to any material fact or

issue before the Court, but only to incidental matters that the most of triers of the case would not have been likely to consider of importance.

As to the other ground of exception, that the plaintiff gave such indulgence to the defendants, Bostic & Cobb, as to release the defendant, Sumner, from any liability on account of his endorsement, we think it is without merit. The defendant makes this point in his exceptions and also in his brief. But he cites us to no authority to sustain his contention, and we know of none.

The farthest the evidence goes is that Bostic asked the plaintiff to give him time to sell some land, and thirty days was spoken of, and he thinks the plaintiff said he might have thirty days. But there was no contract, no consideration mentioned, and there was nothing to prevent the plaintiff from suing at any time, and he did sue to the first court after the note was due.

This case falls far short of the facts in *Forbes v. Sheppard,* 98 N. C., 111; and *Chemical Co. v. Pegram,* 112 N. C., 614. While we (596) wish to enforce this doctrine, as far as it is sustained upon principle, we can not carry it to that extent that it would be dangerous for a creditor to allow his neighbor debtor to ask him if he could not hold up a little until he could "sell some land" or make other arrangements to pay, without having his property sold. We agree with his Honor that there is no evidence to support this defense, and that he did right in telling the jury so.

Upon a full examination of the whole record and the judge's charge, which is set out at length, we are of the opinion that the defendant has had a fair trial and that the judgment below should be

AFFIRMED.

Cited: Jenkins v. Daniels, 125 N. C., 168; *Fleming v. Barden,* 126 N. C., 455; *Rouss v. Krauss, ib.,* 669; *Fleming v. Barden,* 127 N. C., 217; *Bank v. Swink,* 129 N. C., 261; *Phillips v. R. R.,* 130 N. C., 583; *Cameron v. Power Co.,* 137 N. C., 102; *Sawyer v. Lumber Co.,* 142 N. C., 162.

C. T. RAWLES, ADMINISTRATOR OF M. E. CARTER, *v.* S. E. CARTER ET AL.

Judgment—Motion to Set Aside—Proceeding to Sell Land of Decedent for Assets—Parties.

1. Where, in a proceeding to sell lands of a decedent for assets, there is an order of sale followed by a sale and decree of confirmation, the judgment can only be set aside by an independent action for that purpose.
2. In a proceeding by an administrator to sell land of a decedent for assets a creditor has no right to become a party plaintiff.

MOTION of Joseph L. Caven, a judgment creditor of M. E. Carter, deceased, to be made a party plaintiff in a proceeding for the sale of land for assets and to set aside a judgment previously rendered therein, heard before *Byran, J.,* at Fall Term, 1896, of BUNCOMBE, on appeal from an order of the Superior Court clerk. The facts are stated in the opinion of *Chief Justice Faircloth.* (597)

Merrimon & Merrimon for plaintiff.
W. R. Whitson for J. L. Caven (appellant).

FAIRCLOTH, C. J. The plaintiff administrator *c. t. a.* of M. E. Carter filed a petition before the clerk against the widow and heirs at law of said Carter to sell land for assets; sale was ordered, sale made and confirmed and deed made by order of the Court to the purchaser. After this, the only appellant, Jos. L. Caven, a judgment creditor of said Carter, claiming a lien on the land sold, petitioned the clerk to be made a party to said proceeding and to have the judgment and sale set aside. The clerk denied the petition, and on appeal the judge confirmed the order of the clerk and Caven only appealed to this Court.

It has been decided many times in this Court that when an action proceeds to final judgment, and in a proceeding like the present, the judgment can only be set aside in a direct proceeding for that purpose, that is, by an independent action. Nor has a creditor in a case like this a right to be made a party before judgment. *Dickey v. Dickey,* 118 N. C., 956; *Smith v. Gray,* 116 N. C., 311; *Carter v. Rountree,* 109 N. C., 29; *Uzzle v. Vinson,* 111 N. C., 138.

This is the only question presented.

AFFIRMED.

(598)

R. M. DEAVER v. HARVEY JONES.

Action to Recover Land—Boundaries—Survey—Parol Evidence.

1. When a grant is located by contemporaneously marked lines, those lines govern and control its boundary and fix the location so as to supersede other descriptions.
2. Where there is conflicting testimony as to the true location of a corner forming a boundary of tract of land, the highest evidence is proof of the consent of the parties to the deed that certain marked lines or corners should constitute the boundary, and the identity of the corner is a question for the jury.
3. Where the identity of a corner of a boundary is in question, if the jury find from the evidence that an object, such as a stone or tree, called for as a corner, was actually agreed upon by the parties at the time of the execution of the deed, though it may be reached before the distance gives out or before intersecting with another line, which is also called for, such tree or stone must be declared the true corner.
4. But where the identity of a corner called for can not be established, course and distance will control.

ACTION to recover land, tried before *Boykin, J.*, and a jury, at December Term, 1895, of BUNCOMBE. There was verdict for the plaintiff and defendant appealed from the judgment thereon.

J. H. Merrimon for plaintiff.
Moore & Moore for defendant (appellant).

AVERY, J. The Court instructed the jury that when a grant is located by contemporaneous marked lines those contemporaneous marked lines govern and control its boundary and fix the location so as to supersede other descriptions. We see no merit in the exception to this as a legal proposition. A deed is a contract, and the highest evidence (599) of the identity of the subject-matter of it, where there is conflicting testimony as to its true location, is proof of the consent of two minds that certain marked lines or corners should constitute the boundary. *Shaffer v. Gaynor,* 117 N. C., 15; *Shultz v. Young,* 25 N. C., at pp. 385, 388; *Baxter v. Wilson,* 95 N. C., 137, at pp. 143, 144; *Cooper v. White,* 46 N. C., 389; *Manufacturing Co. v. Hendricks,* 106 N. C., 485; *Bonaparte v. Carter, ibid.,* 534. Whenever it can be proved that there was a line already run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly. *Cherry v. Slade,* 7 N. C., at p. 82. While it is the rule that a call for a natural object, such as a stream or a line of another tract of land located by extrinsic testimony, will control course and dis-

tance so as to prolong a line till it reaches the object (*Buckner v. Anderson, supra; Corn v. McCrary,* 48 N. C., 496), it is equally true that if the jury find from the evidence that an object, such as a stone or tree called for as a corner, was actually agreed upon by the parties at the time of the execution of the deed, though it may be reached before the distance gives out, or before intersecting with another line which is also called for, such tree or stone must be declared the true corner. *Bonaparte v. Carter* and *Buckner v. Anderson, supra; Murray v. Spencer,* 88 N. C., 357. Where common reputation has pointed to an object for years as a corner, that of itself is some evidence to identify it; and if there had been no other testimony tending to locate the corner, according to the contention of the plaintiff, except hearsay and common reputation, it would have been the duty of the judge to have left the jury to determine, as he did, whether the disputed line should be prolonged to its intersection with the line which defendant claimed but plaintiff denied to be Tate's corner, or whether its terminus was (600) satisfactorily fixed by the testimony eight poles further south.

A tree is a natural boundary and controls course and distance, just as a stream, a lake, or a line of another tract of land does, either by prolonging the line or stopping it short of the full distance called for. *Cherry v. Slade, supra; Johnson v. House,* 3 N. C., 301; *Patton v. Alexander,* 52 N. C., 603. In addition to the hearsay evidence and that by reputation, there was corroborative testimony as to the running of adjacent tracts calling for the corner contended for by the plaintiff, and also of the correspondence of the growth of the corner tree with the date of the deed under which the plaintiff claimed.

The location of Tate's line, as contended for by the defendant, was not admitted by the plaintiff. On the contrary, it was insisted that the deed the calls of which the surveyor ran were those of Benson and Tate, not a Tate grant, and further that the corner claimed by the defendant to be a post oak was in fact not in but south of the east and west line of the Benson and Tate grant.

The Court did not err in leaving the jury, upon the conflicting testimony, to determine which was the true post oak corner, and thus to settle, as it was their province to do, the first question of fact upon which the whole testimony hinged. The plaintiff introduced grants and connected himself with them by *mesne* conveyances, and also testimony tending to show that his grants and conveyances embraced the land in controversy, which is indicated on the plot by the letters and figures h. g, 3, 4, 5, j, i, h. The Court committed no error in instructing the jury that if these grants and deeds covered the land in dispute they were *prima facie* evidence of title in the plaintiff. *Mobley v. Griffin,* 104 N. C., 112.

But the defendant introduced a grant known as the Rogers grant, issued in 1817, which he contended covered the land occupied by
(601) him; and, it being older than plaintiff's grant, the Court properly told the jury that if he made good his contention the plaintiff could not recover. The calls of that grant which gave rise to the controversy were, first, that from the pine, the admitted beginning corner indicated by the index finger at e, and running "north crossing a branch to a post oak on Tate's line, and thence with the same, etc." The defendant offered testimony tending to fix the location of a Benson and Tate grant, beginning at a, and running to b, c, d, and back to a, so as to include most of the *locus in quo*. The defendant contended that the Benson and Tate line was that called for as the Tate line, and that if the jury found that the post oak was at h, or between h and g, still the next call would extend that line to the nearest point on the line a, d, if they should find that to be the Tate line. The Court instructed the jury that the line must be so located, if they should first find a, d to be the Tate line, and in this there was no error.

Guided by the instruction given, the jury must have found upon the evidence that the Benson and Tate line was not that known as the Tate line, and if not, the call would not control distance so as to prolong the first line till its intersection with the line a, d, and then run with it to d. We must infer that they reached the conclusion of fact that the evidence by reputation, the calls of adjacent tracts, and the marks discovered by blocking, fixed the location of the post oak at h, and on failure to establish the boundary, a, d, so as to intersect it, that the next
(602) call would be run by course and distance to i, and the whole of the land in dispute would be left outside of the Rogers grant and inside of the plaintiff's grant and deed. This finding was decisive of the whole controversy. Upon a review of the instruction asked and that given, we find no error of which the defendant can justly complain. The judgment is

AFFIRMED.

Cited: Bowen v. Gaylord, 122 N. C., 820; *McKenzie v. Houston,* 130 N. C., 573; *Westfelt v. Adams,* 131 N. C., 384; *Clarke v. Aldridge,* 162 N. C., 331; *Allison v. Kenion,* 163 N. C., 585; *S. v. Jenkins,* 164 N. C., 529.

D. K. COLLINS v. A. C. PATTERSON.

Petition for Cartway—Highways—Public Roads.

1. A public road is one that is dedicated to the public and worked by an overseer appointed according to law.

2. A neighborhood road not dedicated to the public, but used by the public under permission or license of the owner of the land, is not a public road within the meaning of sec. 2056 of The Code, which provides that the owner of land in cultivation to which there is no road may maintain a petition for a cartway over the land of any other person connecting petitioners land with a public road.

PETITION for cartway, tried on appeal from an order of the Board of Supervisors of Charlestown Township, in Swain County, before *Timberlake, J.*, and a jury, at Fall Term, 1895, of SWAIN. There was a verdict for the plaintiff, and defendant appealed from the judgment thereon. The facts appear in the opinion of *Associate Justice Furches.*

F. C. Fisher and W. L. Watson for defendant (appellant).
No counsel contra.

FURCHES, J. This is a petition for a cartway over the land (603) of the defendant.

To entitle the plaintiff to the relief demanded, he must allege and show (if denied) that he is the owner of and resides upon, or has in cultivation, the land to which there is leading no public road, and that it is reasonable and just that he should have the road prayed for. Code, sec. 2056. In this case the plaintiff makes all these necessary allegations, but they are denied by the defendant. This raised the issues and, among them, one as to whether the cartway prayed for by the petitioner leads from his land to a *public road.* This was a material issue that should have been submitted to the jury upon the evidence and proper instructions from the Court, and in this is involved the question as to what is *a public road.*

A public road is a road dedicated to the public use and kept up by the public; that is, worked by an overseer appointed according to law, with hands assigned to him for that purpose. A road may be traveled by the public for fifty years by the permission of the owner of the land without becoming a public road. *Boyden v. Achenbach,* 79 N. C., 539, cited with approval in *S. v. Fisher,* 117 N. C., 733, and many other cases.

Then, if this road, with which the plaintiff asked to have his road intersect, was not a public road, that is, had not been dedicated to the

public use and kept up by the public as above indicated, it was not such a *public* road as entitled the plaintiff to a cartway as demanded. Code, sec. 2056; *Warlick v. Lowman,* 103 N. C., 122.

It seems the plaintiff made no effort on the trial to show that this road, with which he wished to intersect his cartway, was a public road. But it seems that it was conceded to be only a public neighborhood road over which the plaintiff and others traveled by permission of the (604) defendant, and if this was so it should have ended the case. Code, sec. 2056; *Lee v. Johnson,* 31 N. C., 15. If it was not conceded, then it should have been submitted to the jury and found by them.

Therefore, in either view, there was error and a new trial is awarded.

Finding the error above pointed out, we have not considered the other points made in the case.

NEW TRIAL.

Cited: S. v. Combs, 120 N. C., 608; *Wiseman v. Greene,* 123 N. C., 396.

F. M. McDONALD v. J. F. TEAGUE.

Injunction—Sales for Taxes—Tax Collector.

Plaintiff sought to have the defendant tax collector enjoined from selling his property for the nonpayment of taxes for the years 1895 and 1896, upon the ground that the defendant had no authority to collect the taxes for 1896 because the commissioners had, in violation of law, turned over to him the tax list for 1896 for collection without his having settled the taxes of 1895 and produced a receipt therefor: *Held,* that the injunction was properly refused, the taxes not being illegal or the assessment illegal or invalid.

ACTION to restrain the defendant, as tax collector of Swain County, from selling certain personal property of plaintiff for nonpayment of taxes, heard before *Bryan J.,* at chambers, in BRYSON CITY, on 21 November, 1896. The grounds of the application are stated in the opinion of *Associate Justice Montgomery.* The injunction was refused and plaintiff appealed.

F. C. Fisher and W. L. Watson for plaintiff (appellant).

No counsel contra.

(605) MONTGOMERY, J. The plaintiff seeks by injunction to prevent the tax collector of SWAIN from selling certain personal prop-

erty which he has levied upon for the taxes due by the plaintiff for the years 1895 and 1896. The plaintiff admits that the taxes for 1896 are due, and in his complaint which is confused and obscure, he does not allege that he has paid the taxes due for 1895, except by *innuendo*, which, when examined closely, means nothing. There is no allegation that the taxes were assessed and levied for an illegal or unauthorized purpose, or that the taxes were illegal or invalid, or that the assessment itself was illegal. The plaintiff alleges that the defendant is not the lawful tax collector for the year 1896, and that he has no right to collect the taxes for that year because the county commissioners have allowed him to receive from them the tax lists for 1896 for collection without his having settled the taxes for 1895, and produced a receipt therefor, which he says the commissioners had no jurisdiction, right or power to do. The motions for a restraining order and injunction were refused by *Judge Bryan* upon the hearing and the plaintiff appealed.

There was no error in the ruling of his Honor. By section 76, chapter 119, Laws 1895, injunctions are prohibited for the purposes of restraining the collection of any tax, or restraining the sale of any property for the nonpayment of any tax, except such tax as has been levied or assessed for an illegal or unauthorized purpose, or except the tax be illegal or invalid, or the assessment be illegal and invalid. The plaintiff can raise no objection to the collection of the taxes due by him for 1896. The commissioners have the right and power, and they are re- (606) quired by law, to refuse to deliver the tax list for any year to a former tax collector until he has paid in the taxes for the preceding year and produced a receipt therefor; and they ought to conform to this requirement of the law. But if they do not it is a matter with which the taxpayer has no right to interfere in an action of the nature of this.

NO ERROR.

Cited: *Wilson v. Green*, 135 N. C., 352.

JANET R. SHELDON v. CITY OF ASHEVILLE.

Action for Damages—Municipal Corporations—Negligence—Trial—Instructions—Claim Against a Municipality—Demand—Code, Section 757.

1. Where in an action for damages, the gravamen of plaintiff's complaint was that a plank "seemed" safe when in fact it was in such bad condition that it would not sustain her weight but gave way so as to cause

her to fall and receive injuries, her testimony to that effect was not contradicted by the testimony of defendant's witness that the sidewalk was "in pretty fair condition," that he "did not see any defective stringers or planks there" and that "the stringers were good and the planks seemed good."

2. Where, in the trial of an action for damages alleged to have been caused by the negligence of the defendant, contributory negligence is set up as a defense, and there is but one inference deducible from the testimony, 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 parties, and it is only where more than one inference can be drawn from the testimony by reasonable minds that the jury are at liberty to apply, as a test of the conduct of the injured party, the "rule of the prudent man."

3. Where, in the trial of an action against a city for damages for an injury alleged to have been received by plaintiff by reason of the defective condition of a sidewalk, there was no material conflict in the evidence as to the condition of the sidewalk, it was proper to instruct the jury that if they believed the sidewalk was in the condition testified to by the witnesses and was allowed to remain so for any considerable time so as to raise a presumption of notice on the part of the city, or that the authorities actually had notice of its condition, then the jury should find the issue as to defendant's negligence in the affirmative.

4. The requirement of The Code, sec. 757, that no action shall be maintained against any city, town or county on any debt or demand unless the claimant shall have made a demand on the proper authorities, applies only to actions *ex contractu.*

ACTION for damages, tried at March Term, 1895, of BUNCOMBE, before *Graham, J.*, and a jury. There was a verdict for the plaintiff and judgment thereon for $1,100 and the plaintiff appealed, the principal error assigned being that discussed in the opinion of *Associate Justice Avery.*

Moore & Moore for plaintiff.
Davidson & Jones and J. C. Martin for defendant (appellant).

AVERY, J. The plaintiff testified that she had already passed over a portion of the plank sidewalk that was obviously bad, and over a portion of the street where it was entirely gone, when at a point directly in front of West's front door, where the sidewalk, "as far as she could see," was good, a strip gave way and let her foot between the boards, so as to throw her down. In this fall she received the injury complained of. The Court charged the jury that if the sidewalk was in the condition testified to by the witnesses, and was allowed to remain so for any considerable length of time, which would raise a presumption of
(608) notice on the part of the city, or if the authorities had actual notice of its state, the first issue (involving the question whether

the injury was caused by the defendant's negligence) should be answered in the affirmative. This instruction was excepted to as a misdirection. The plaintiff had also testified that the plank which gave way and caused her to fall was in the proper place and apparently nailed down. The defendant contended that the testimony of one Henderson, a witness for the city, was in conflict with that of the plaintiff as to the condition of the sidewalk in front of West's house, and that the jury was therefore misdirected, in that it was their province to pass upon the conflicting evidence under proper instruction. It is conceded to be the general rule that the judge is not at liberty to single out a particular witness and predicate his charge to the jury upon the theory that the testimony of that witness is to be taken as true when it is in conflict with that of another witness. Did the witness Henderson contradict the plaintiff as to that particular question? After stating that in some places not far from West's gate the plank sidewalk was entirely gone, and in other places its condition was bad, Henderson testified, in response to one question, that the sidewalk "right in front of Mr. West's house" was "in pretty fair condition," and in answer to other questions, that he *"did not see any defective stringer or planks there,"* and that the stringers were good and the planks *"seemed good."* The gravamen of the plaintiff's complaint was that the plank "seemed" safe, when in fact it was in such bad condition that it would not sustain her weight. The defendant seems, from the questions asked, to have embarked upon the examination of this witness, and to have conducted the defense in other respects, upon a theory widely different from that adopted in the argument here, though the exceptions raise the question discussed. Hender- (609) son testified that much of the sidewalk over which the plaintiff passed on the occasion when she sustained the injury complained of was in obviously unsafe condition, but when his attention was directed to the precise locality where she fell he admitted that the plank "seemed good" at that point. The statement that it was the best part of the plank sidewalk, some of which had been worn out and removed and other portions of which were obviously unsafe, was not a contradiction of the plaintiff's statement, which tended to show that, while apparently in good condition, the plank was left unfastened, and was therefore in fact unsafe by reason of the neglect of the defendant's servants to secure it by nails driven into the end of it.

If there was anything in the testimony of either of the witnesses, from which the jury could have inferred that there was contributory negligence on the part of the plaintiff, the question was properly left to the jury under the rule of "the prudent man." She had a right to assume that the municipal authorities had done their duty, and it was not obvious

in any aspect presented by the testimony of either witness that she could not safely proceed on that assumption in relying upon the soundness of the portion of the sidewalk that seemed secure. *Willis v. New Bern,* 118 N. C., 132; *Nathan v. R. R.,* 118 N. C., 1066; *Thompson v. Winston,* 118 N. C., 662; *Russell v. Monroe,* 116 N. C., 720; *Tankard v. R. R.,* 117 N. C., 558. She was not contradicted as to the statement that, though it appeared to one passing to be secure, the plank was not in fact fastened to the stringer. That statement went to the jury uncontradicted. Where, as in this case, but a single inference is deducible from the testimony, "it is the exclusive duty of the Court to determine whether an injury has been caused by the negligence of one or the concurrent
(610) negligence of both of the parties. *Russell v. R. R.,* 118 N. C., 1098; *Hinshaw v. R. R.,* 118 N. C., 1047; *Styles v. R. R.,* 118 N. C., 1084; *Ellerbe v. R. R.,* 118 N. C., 1024; *Lloyd v. R. R.,* 118 N. C., 1010. It will appear from authorities cited above that it is only where more than one inference may be drawn from the testimony by reasonable minds that the jury are at liberty to apply as a test the question whether the injured party exercised such care as a prudent man placed in the same situation would have exercised. If, then, there was no material conflict in the testimony of the two witnesses as to the condition of the sidewalk at the place where the injury was sustained, it was not error for the Court to tell the jury what legal conclusions would necessarily follow if they believed what the witnesses had said.

The question whether the provisions of section 757 of The Code apply to actions arising *ex delicto* was settled upon a full discussion of the authorities by the well-considered opinion of *Justice Furches* in *Shields v Durham,* 118 N. C., 450, where it was held to apply only to actions arising out of contract. The other questions raised by the exceptions were either not strenuously insisted upon or have not sufficient merit to make it incumbent on the Court to discuss them. There was no error of which the defendant could justly complain.

AFFIRMED.

Cited: Frisby v. Marshall, ante, 571; *Nicholson v. Comrs.,* 121 N. C., 28; *Neal v. Marion,* 126 N. C., 415; *Bessent v. R. R.,* 132 N. C., 941; *Brewster v. Elizabeth City,* 137 N. C., 394; *Beach v. R. R.,* 148 N. C., 160; *Talley v. R. R.,* 163 N. C., 577; *Abernathy v. R. R.,* 164 N. C., 95; *Ward v. R. R.,* 167 N. C., 151; *Sugg v. Greenville,* 169 N. C., 617; *Davis v. R. R.,* 170 N. C., 587.

(611)

ASHEVILLE WOODWORKING COMPANY v. C. H. SOUTHWICK ET AL.

Appeal—Service of Case on Appeal—Waiver of Objections to Improper Mode of Service—Entry on Docket of Extension of Time to Serve Case on Appeal—Consent of Parties—Truth of Record—Lease of Real Estate for Five Years Subject to Mechanic's Lien—Fixtures.

1. The improper service of a case on appeal is cured by the appellee's acceptance of the case and filing exceptions thereto, without objection to the mode of service.

2. The rule that a party is bound by orders made in a pending cause during the session of court, whether actually present or not, applies only to such orders as the court has a right to make in the course or progress of the case without the consent of the parties, but not to such as it has no right to make or enter upon the docket except by the consent of both parties, such as an entry of additional time to make and serve case on appeal.

3. Where an entry upon the minute docket of the Superior Court at the close of a trial, as shown by the transcript of the record on appeal, shows an order as follows: "Thirty days to defendant to serve case on appeal," this Court will presume that such order was made by consent of the parties.

4. The court below having control of its record to pass upon and make it speak the truth, this Court will not review the refusal by the lower court of an application for the correction of its record as to the circumstances under which an entry was made thereon.

5. A lease of real estate for five years is such an estate or interest as may be subjected to a mechanic's lien.

6. Fixtures put up by the lessee of land are not a part of the realty and do not pass with the land so as to survive to the owner in fee on the termination of the lease.

ACTION, tried before *Hoke, J.,* and a jury, at April, 1896, (612) Special Term of BUNCOMBE. The nature and purposes of the action and the matters involved in the appeal appear in the opinion of *Associate Justice Furches.* There was a verdict for the plaintiff, and the defendant McLoud alone appealed from the judgment thereon.

Merrimon & Merrimon for plaintiff.
F. A. Sondley for defendant McLoud (appellant).

FURCHES, J. This is an action for the recovery of money and to declare a mechanic's lien, and the first thing we meet with is a motion by plaintiff to dismiss defendant's appeal upon two grounds.

First. That plaintiff's case on appeal was not served according to law; and

Second. That it was not served within ten days, the time required by law, and that the entry upon the docket allowing defendants thirty days to make their case on appeal was made without their knowledge or consent; that the judge had no right to make such an order and the same is void.

While we agree with plaintiff upon both propositions of law, we must refuse the motion to dismiss.

The first ground is cured by plaintiff accepting defendant's case on appeal, and filing exceptions thereto without objecting to the manner in which it was served.

It was contended by defendants that whether plaintiff or its attorney were actually present in court and assented to the order extending the time to make up the case on appeal or not, it was made in open court, while the court was in session and the law presumed the presence of plaintiff, and plaintiff is bound by the order.

We do not think so. This rule only applies to such orders as the Court has the right to make in the course or progress of the case, (613) without the consent of the parties, but not to such an order as this, *that it had no right to make,* and no right to have entered upon the record, except by the consent of both parties. The proper entry would be "by consent of both parties (or all the parties), appellant has thirty days to make and serve case on appeal, and appellee has thirty days to file exceptions." This is often abbreviated by simply entering, "Plaintiff has thirty days to serve case on appeal and defendant thirty to reply." This the Court construes to be an order made by consent of the parties, as it could be made in no other way. And if it has been put on record through mistake, and in fact does not speak the truth, the Court having control of the record when it was made is the proper Court to pass upon and correct its own records, "so they shall speak the truth." This application, as we understand from the record and from this motion and accompanying affidavits, has been made and refused. This action of the Judge must stand, and we can not review him upon this motion, nor have we any right to dispute the correctness of the record of the Court below, nor have we the power to correct the same if it does not in fact speak the truth.

We find two entries on the record as to the extension of time to make and tender case on appeal. The first seems to be in the record proper, and is as follows: "Thirty days to defendant to serve case on appeal." The other is found in the Judge's statement of case on appeal, and is as follows: "Defendants Southwick & McLeod appealed to the Supreme Court." Notice of appeal given in open court. Appeal bond fixed at $25. Said defendants, Southwick & McLeod, then in open court, in the

presence of plaintiff, asked the Court to be allowed thirty days (614) after court in which to serve case on appeal. To this plaintiff offered no objection, and the Court consequently, then and there made the following order, to wit: Thirty days to defendants to serve case on appeal."

This finding of the judge goes very much to sustain the presumption that plaintiff was present when the entry was made, and assented to the same. The Judge, at the close of the case, says: "The Court has no recollection as to whether the defendants' counsel were present or not when the time was given to tender the case." By this we understand the Judge to say that at this time (which was some considerable time after the adjournment of the court) he had no personal recollection as to whether plaintiffs' attorneys were present or not. It can mean no more than this, as he allowed his statement as to how the order was made to remain in and a part of his statement of the case on appeal. The motion to dismiss is denied; and this brings us to a consideration of the matters involved in the appeal. The plaintiff took a nonsuit as to the Chidisters before commencing the trial.

The defendant Southwick is the lessee of defendant Chidister of a hotel property in the city of Asheville for a term of five years, and the defendant McLeod is the assignee of Southwick of this term. The plaintiff is a manufacturing and furnishing establishment in the city of Asheville. The defendant Southwick, before his assignment to McLeod, ordered and purchased of the plaintiff a bill amounting to $1,176.47. A part of this bill is a "counter and bar fixtures." The counter is charged at the price of $128, and the bar fixtures (that is, back bar, safe, and refrigerator) are charged at the price of $450.

The bill is admitted to be correct, and that the defendant Southwick owes the plaintiff the amount claimed, $1,176.47. It is admitted that all the articles named in plaintiff's bill were used in repairing and improving the hotel property, except the articles above named. And it is admitted by defendant that plaintiff is entitled to a me- (615) chanic's lien for all its bill, except the articles mentioned above (counter and bar fixtures), if defendants' leasehold term of five years is the subject of such lien. And it was also admitted that, if said term is subject to a mechanic's lien for a part or for the whole of the plaintiff's debt, this lien is prior to all other liens.

These admissions bring us to the consideration of two questions: First, is a leasehold estate for the term of five years on real estate the subject of a mechanic's lien? And, secondly, is the counter, and what are called bar fixtures, a part of the realty which will belong to the lessors at the expiration of the lease, or are they personal property and such as will not belong to the landlord at the termination of the

lease? The whole case hinges upon these two questions, and a consideration of both may become necessary to a correct determination of the matter.

We will first consider whether this estate in the defendant Southwick as a lessee for five years is such an estate or interest as may be the subject of, or in other words may be subjected to, a mechanic's lien. If it is not, this ends the matter, and it is not necessary to consider the other question.

We can see no reason why it should not be liable to the attachment upon it of a mechanic's lien. It can be levied upon and sold under execution. The mechanic's lien is executionary in its nature, operation and effect, and like other attaching liens it gives cause of action. It only gives an additional means of securing the debt. If there is no debt, there can be no lien. *Clark v. Edwards, ante,* 115. Besides the reason of the thing, which seems to us to be sufficient, that such an estate or interest as this is subject to the attachment of a mechanic's lien, it is so held in Phillips Mechanics Lien, secs. 89 and 1791. (616) And we so hold.

What are fixtures and what are not has become to be a very important question. It is presented in so many ways and under so many different circumstances that it is not always easy to determine what are and what are not such fixtures as become a part of the realty and pass as a part thereof under a conveyance or a transmission of the real estate.

This doctrine is very fully discussed in the recent case of *Overman v. Sasser,* 107 N. C., 432, where the subjects are classified and distinguished and the rules applied to the different classes. In the discussion in *Overman v Sasser,* the leading case of *Moore v. Valentine* is cited, where *Pearson, C. J.,* tersely draws the distinction between fixtures attached to realty by the lessee (say for five years) and by an owner of the fee; that fixtures put up by the owner in fee become a part of the realty and pass with the land, while fixtures put up by a lessee do not become a part of the realty and do not pass with the land.

These authorities would seem to determine the question as to whether this "counter and bar fixtures" are a part of the real estate of the Chidisters and will survive to them at the termination of the lease. This is the question in the case. And it seems to us so clear that they will not that it is hardly necessary to pursue the inquiry further.

But, to put this matter beyond question, it is expressly agreed in the 7th article of the contract between the Chidisters and the defendant Southwick that they shall not be considered fixtures, which is as follows: "That if the said party of the second part, his executors, administrators or assigns, put any bar, bar fixtures or billiard tables on

said hotel premises, they shall always be considered his or their (617) property, and shall not be treated as furniture or fixtures when the premises are surrendered." This to our minds puts the question beyond controversy that they are not such fixtures as become a part of the realty and would survive at the termination of the lease to the lessors.

Nothing is the subject of a mechanic's lien that does not become a part of the real estate. 2 Jones Liens, section 1335 and 1384.

We therefore hold that what is called "counter and bar fixtures" are not the subject of a mechanic's lien, and under all the evidence in the case it was the duty of the judge to have given defendant's prayer for this instruction. Under this instruction, the jury would have found that plaintiff's claim for these articles, amounting to $578, was not such a claim as entitled it to a mechanic's lien, and the judgment of the Court should have been in accordance with such finding; but, as the case comes to us upon error on the part of the Court, all we can do is to award a

NEW TRIAL.

Cited: Henry v. Hilliard, 120 N. C., 484; *Pipkin v. McArtan,* 122 N. C., 194; *Belvin v. Paper Co.,* 123 N. C., 144; *Gardiner v. May,* 172 N. C., 198.

MAGGIE McCRACKEN, BY HER NEXT FRIEND, v. H. A. SMATHERS.

Action for Damages—Malpractice—Negligence—Contributory Negligence—Trial—Instructions.

1. Where no requests for instruction are made by counsel as to the application of the law to the testimony bearing upon an issue involving negligence or contributory negligence, it is not only the province but the duty of the trial judge to give the general definition of ordinary care.

2. The test of what constitutes ordinary care being what is commonly called "the rule of the prudent man," a trial judge will be deemed to have declared and explained the law in the trial of a case involving the issue of contributory negligence when he has submitted that rule to the jury for their guidance.

3. In an action against a dentist for malpractice, whereby plaintiff was injured, the defendant set up as a defense the contributory negligence of the plaintiff. On the trial the plaintiff made no request for special instruction as to what constituted contributory negligence: *Held*, that an instruction that if plaintiff was guilty of contributory negligence which was

the proximate cause of her injury, she could not recover, was erroneous without an accompanying explanation as to what constituted contributory negligence.

(618) ACTION, for damages for malpractice in denistry, tried before *Bryan, J.*, and a jury, at Fall Term, 1896, of HAYWOOD. The essential facts and the principal assignment of error by the plaintiff, who appealed from the judgment rendered on verdict for the defendant, are stated in the opinion of *Associate Justice Avery.*

Smathers & Crawford for plaintiff (appellant).
Ferguson & Ferguson for defendant.

AVERY, J. The plaintiff brought the action against the defendant, who is a dentist, for malpractice in the treatment of a tooth. The defendant set up contributory negligence as a defense. The Court instructed the jury that, if they should find from the evidence the plaintiff was guilty of contributory negligence, and such negligence was the proximate cause of her injury, she could not recover. The plaintiff assigned as error that the Court improperly instructed the jury upon the question of contributory negligence.

It is not the duty of the judge, of his own motion or without special request, to instruct the jury upon every possible aspect of the (619) evidence or as to every conceivable deduction of fact which may be drawn from it. *Russell v. R. R.*, 118 N. C., 1098. In response to prayers for instruction, the trial judge is required to tell the jury whether in any given phase of contradictory evidence, or upon the deduction by them from the testimony of any inference that they may fairly draw from it, either of the parties would be culpable. But, even where such special instruction is asked and given, the trial judge must upon request properly made, and may of his own motion, lay down the rule of the prudent man as the test of culpability on the part of either party who may be charged with carelessness. Where no requests for instruction are made by counsel as to the application of the law to the testimony bearing upon an issue involving negligence or contributory negligence, it is not simply the province but it is the duty of the Court to give the general definition of ordinary care. The testimony as to the conduct of the plaintiff was somewhat conflicting. In applying the law, the jury should have been told in substance that their response to the second issue depended upon the question whether the plaintiff exercised ordinary care, or such care as a prudent person similarly situated would have shown in looking to her own protection, and if the injury she sustained was due to her own want of care as the concurrent or proximate cause intervening after the negligence of the defendant, they should respond to the second issue 'Yes,' otherwise 'No.'

Pickett v. R. R., 117 N. C., 616. To make the rule comprehensible to the jury, the converse of the last proposition might also have been submitted in the same connection. Where a trial judge undertakes to enlighten the jury upon the testimony offered to prove a defendant guilty of assault and battery, in the absence of special requests, he meets the requirements of law and prevents his charge from becoming liable to exception, where he defines the offense and leaves the jury to determine whether the testimony brings the conduct of a defendant (620) within the meaning of the definition. But if he simply tells the jury that the defendant is charged with assault and battery and it is their province to determine from the evidence whether he is guilty, the charge is clearly subject to exception. The rule laid down in *Hinshaw v. R. R.*, 118 N. C., 1047, and *Russell v. R. R., supra,* is to a certain extent that applicable to all trials by jury.

The judge is required by statute (Code, sec. 413) to "state in a plain and concise manner the evidence given in the case" and to "declare and explain the law arising thereon." In the absence of a request for special instructions, he may in submitting an issue involving a want of care declare and explain the law applicable to particular phases of the testimony, just as he may apply the law of homicide to given aspects of the evidence, where the issue is guilty or not guilty of murder. But in the one case he *must* at least define want of ordinary care, as in the other he *must* define the offense, if he would avoid subjecting his charge to liability to exception made in apt time, as in the case at bar. *S. v. Thomas,* 118 N. C., 1113.

When this Court in *Hinshaw v. R. R., supra,* overruled *Emry v. R. R.*, 109 N. C., 589, and modified the broad rule laid down in *S. v. Boyle,* 104 N. C., 800, in a series of adjudications that followed it, it was not intended that the jury should be left to grope in utter darkness, unless counsel were sufficiently diligent to draw fire from the Court by prayers for instruction. The test of what constitutes ordinary care is what is commonly called the rule of the prudent man, hence a judge is deemed to have declared and explained the law when he has submitted that rule as a touchstone. *Russell v. R. R., supra.*

When an issue involves both questions of law and fact, as did that to which the instruction was addressed, it is the duty of the Court to enlighten the jury by stating at least the general proposition or (621) definition which it is essential they should understand in order to apply the law to the facts and reach an intelligent conclusion. Contributory negligence is the want of ordinary care on the part of a complainant, and the general definition of ordinary care, whether applied to a complainant or a respondent, is the degree of diligence which a prudent person would exercise under circumstances similar to those surrounding the

person in question. The Court was not justified in assuming that the jury knew what contributory negligence was, and it was therefore error to tell them to determine from the evidence whether the plaintiff had been guilty of an omission of duty, the nature of which they were not presumed to understand. The judge is required to submit at least the abstract proposition or definition, when it is necessary that the jury should know what it is in order to fit the law to the facts in passing upon an issue involving mixed questions of law and fact. Whether he will go further and present the law applicable to varying aspects of the facts, is, in the absence of requests for instruction, addressed solely to his discretion. For the reasons given the plaintiff is entitled to a

NEW TRIAL.

Cited: *S. c.*, 122 N. C., 799; *Graves v. R. R.*, 136 N. C., 10; *Simmons v. Davenport,* 140 N. C., 411, 412; *Ruffin v. R. R.*, 142 N. C., 127.

---

(622)

VAN BROWN v. JOHN HOUSE ET AL.

Appeal—Record—Certioari.

1. A petitioner for a *certiorari* must show himself free from laches by doing all in his power towards having the appeal perfected and docketed in time.

2. The fact that the clerk below charged exorbitant fees for making the transcript of "the case on appeal," signed by the judge, is no excuse for appellant's failure to send up the record. If the fees were exorbitant, the appellant's remedy was to pay the fees, send up the transcript, and move to have the clerk's charges retaxed.

PETITION for *certiorari.*

PER CURIAM. The appellee makes the objection to the petition for *certiorari* that the appellant has not filed a transcript of the record proper (or shown why he could not do so) as a basis for the motion for a *certiorari* for the "case on appeal." The objection is fatal. *Pittman v. Kimberly,* 92 N. C., 562; *Owens v. Phelps,* 91 N. C., 253; *S. v. Freeman,* 114 N. C., 872; *Shober v. Wheeler, ante,* 471. The petitioner for *certiorari* must show himself free from laches by doing all in his power towards having the appeal perfected and docketed in time.

It also appears that the case on appeal has been settled by the judge and is in the clerk's office below, and it is averred by the appellee, and not denied by the appellant, that the judge has endorsed thereon that it was settled "upon disagreement of counsel"; but if appellant's contention is

correct, that no exception was filed and that he did not consent to settlement of the case by the judge, his condition is no better, for neither his own statement of the case nor the record proper has been sent up, and no excuse is shown. The appellant pleads as his excuse why the "case on appeal," signed by the judge, has not been sent up, that the clerk charged exorbitant fees for making out the transcript of the same for this Court. If so, the appellant's remedy was to pay the fees, and (623) send up the transcript, and move to have the clerk's charges retaxed. It is the duty of the appellant to pay the costs of the transcript even in a pauper appeal. *Bailey v. Brown,* 105 N. C., 127; *Speller v. Speller, ante,* 356.

CERTIORARI DENIED.

Cited: Guano Co. v. Hicks, 120 N. C., 30; *Burrell v. Hughes, ib.,* 279; *Parker v. R. R.,* 121 N. C., 504; *Critz v. Sparger, ib.,* 283; *Rothschild v. McNichol, ib.,* 284; *Norwood v. Pratt,* 124 N. C., 747; *Stroud v. Tel. Co.,* 133 N. C., 254; *Comrs. v. Chapman,* 151 N. C., 328; *Walsh v. Burleson,* 154 N. C., 175.

W. H. HIGDON ET AL. V. A. F. RICE ET AL.

Trespass Quare Clausum Fregit—Survey—Description in Grant—Mistake in Calls for Course and Distance—Parol Evidence—Plot of Original Survey.

1. It is a rule of law that deeds and grants shall be so run as to include the land actually surveyed with a view to its execution, and parol evidence is admissible to show that, by mistake of surveyor or draughtsman, the calls for course and distance incorporated in a deed or grant are different from those established by a previous or contemporary running by the parties or their agents.

2. Whenever it can be proved that there was a line actually run by the surveyor and was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in such patent or deed.

3. While the plot annexed to a survey, as provided in sec. 2769 of The Code, and made a part of the grant for the purpose of indicating the shape and location of the boundary, is not conclusive and cannot, of itself, control the words of the body of the grant, yet it is competent, in connection with other testimony, as evidence of the location by an original survey different from that ascertained by running the calls of the grant.

4. In an action to recover land a certified copy or the original certificate of survey attached to a land grant in the office of the Secretary of State is admissible in evidence to prove, in connection with other testimony, a mistake in a line of boundary in the original grant itself.

(624) ACTION, for trespass, tried before *Starbuck, J.*, and a jury, at Spring Term, 1895, of SWAIN. There was a verdict for the plaintiffs and from the judgment thereon the defendants appealed. The necessary facts are stated in the opinion of the Court and in the dissenting opinion of *Chief Justice Faircloth.*

Shepherd & Busbee for plaintiffs.
A. M. Fry for defendants (appellants).

AVERY, J. The questions raised by this appeal are:

1st. Whether it is competent to show by parol testimony that, by mistake of surveyor or draughtsman, the calls for course and distance incorporated in a deed or grant are different from those established by a previous or cotemporary running by the parties or their agents.

2d. Whether, if in any case parol proof is competent and sufficient to be submitted to the jury to show a location different from that determined by following course and distance, the testimony in the case at bar raised a question as to mistake in the calls that it was the province of the jury to pass upon.

Deeds are executed contracts, but do not belong to that class that must be interpreted solely by a consideration of the language of the instrument or what occurs upon its face. On the contrary, every deed is so far ambiguous as to require extrinsic evidence to "fit the description to the thing." *Safret v. Hartman,* 52 N. C., 199. A defective de-
(625) scription can not be aided by parol testimony, because that would be both to contradict the terms of the deed and to substitute by parol an essential portion of a contract required by the statute (The Code, sec. 1554) to be in writing. But it is nevertheless competent to correct a mistake in a description by oral testimony tending to show what the parties consented to at the time of executing a deed, for the reason that it is in explanation of what is always so far ambiguous as to require evidence *dehors* the deed to establish it. What was the actual cotemporaneous location of the land? An ordinary deed of bargain and sale is an executed contract between bargainor and bargainee. A grant is of the same nature, differing in the fact that the State is grantor instead of an individual. But no matter which of the two is to be located, we must address ourselves to the consideration of the question what the parties intended by a description, which, *ex necessitate,* requires parol proof to identify the subject-matter of the contract. The object in such investigations is to *identify,* by actual location, the land which it was intended by the parties should pass by the conveyance. *Shaffer v. Gaynor,* 117 N. C., 15.

The mission of the courts is to enforce the contract embodied in the instrument, and the first step in giving effect to the ambiguous agree-

ment is to ascertain under established rules of evidence what the minds of grantor and grantee assented to at the time. To identify in the sense in which the term has been used by the Court (*Safret v. Hartman, supra*) is to show it to be the same subject-matter that was agreed upon by the parties.

In *Redmond v. Stepp,* 100 N. C., 212, 217, *Chief Justice Smith,* for the Court, said, in reference to the location of a grant: "Our inquiry is, What lands were covered by the grant *when it was made?* If, guided by the instruction given, the jury shall ascertain the recog- (626) nized line between the States at the period of its issue, and that it was the *intent* of the parties to run to and stop at that line, then such must be the effect, but this intent must be ascertained from the provisions of the instrument and the place of the natural objects, marked trees or adjoining tracts, *as they then existed.*"

It seems to have been conceded that, subject to some not very clearly defined restrictions, it is a rule of law that deeds and patents shall be so run as to include the land actually shown to have been surveyed with a view to its execution. This general rule is supported by a long and uninterrupted line of authorities extending back to the early history of the State. *Person v. Roundtree,* 1 N. C., 69; *S. c.,* 2 N. C., 375; *Bradford v. Hill, ib.,* 22; *Reed v. Schenck,* 13 N. C., 415; *Hurley v. Morgan,* 18 N. C., 425, 431; *Hough v. Horne,* 20 N. C., 369; *Houser v. Belton,* 32 N. C., 358; *Baxter v. Wilson,* 95 N. C., 143; *Cherry v. Slade,* 7 N. C., 82; *Shaffer v. Gaynor, supra.* In order to show the uniformity and consistency of the rulings of this Court on this subject, it is perhaps well to quote and compare the language of its decisions from the earliest period of its history down to the present:

In *Bradford v. Hill, supra,* the Court laid down the rule that course and distance must be followed except where a natural boundary is called for and shown, or "when marked lines and corners can be *proved* to have been made at the *original* survey." *Person v. Roundtree* was cited with approval by *Chief Justice Taylor,* in *Cherry v. Slade,* 7 N. C., 882; and by *Chief Justice Ruffin,* in *Hurley v. Morgan,* 18 N. C., 425; and by *Chief Justice Pearson,* in *Houser v. Belton,* 32 N. C., 358.

In *Cherry v. Slade, supra, Chief Justice Taylor* said: "When- (627) ever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, *notwithstanding a mistaken description of the land in the patent or deed.*" In the same opinion the learned Chief Justice, on page 87, sets forth at length the facts in the case of *Pearson v. Rountree,* as they appear in a note, 3 N. C., 32, italicizing the statement, *that the grant did not cover any of the land*

surveyed, and approving of the ruling that nevertheless his land should be located by contemporaneous survey entirely off the land covered by the grant.

In *Houser v. Belton, supra, Chief Justice Pearson* said: "In the leading case, *Person v. Rountree,* 2 N. C., 378, the course of the first line was north from a creek so as to put the whole tract on the north side. The marked line ran 'south' from the creek so as to put the whole tract on the south side. It was held that the course of the first line had been written north instead of south, by mistake, and the marked lines control. There is the same reason for holding in this case that east had been written instead of west."

In the leading case of *Reid v. Schenck,* 13 N. C., 415, *Judge Henderson* for the Court stated the doctrine to be: "The course and distance in a deed can not be altered by parol evidence of any *ex post facto* transaction, *unless these transactions tend to prove the erection of monuments of boundary contemporaneous with the execution of the deed.*" This is precisely the doctrine laid down in *Shaffer v. Gaynor,* 117 N. C., at p. 15, which it is now contended should be overruled.

In *Hough v. Horne,* 20 N. C., 369, *Judge Daniel* for the Court, upon the same principle where a call was running "along a public road" from one known corner to another, approved the instruction to
(628) the jury to adopt and locate the line with that one of two branches of a road that was the road in 1892 *when the deed was made.*

In *Baxter v. Wilson,* 95 N. C., 137, *Justice Ashe* said: "As a general rule the position contended for by the defendant is correct (viz, that the call for running with a creek must be preferred to course). But this is not an inflexible rule. It has its exceptions. For instance, where there has been a practical *location* of the land, or where it can be proved that there was a line *actually run and marked and a corner made,* such a boundary will be upheld notwithstanding a mistaken description. *Cherry v. Slade,* 7 N. C., 82."

In order to avoid falling into error in a comparison of the authorities on this subject, it must be borne in mind that this is not a case, like *Graybeal v. Powers,* 76 N. C., 66, where there were two descriptions of a line, one by course and distance and another by a call for a natural object, and the question raised was whether a natural object has been so identified by the testimony as to make it higher evidence than course and distance, and to show that the conflict can be only remedied by supposing a mistake in copying the calls. The principle that applies here is the much broader one laid down in *Person v. Rountree,* 1 N. C., 69, and the cases that have followed it, that, upon satisfactory proof that the original survey was so made as to embrace a totally different tract of land from that included in the boundaries set forth in the deed, it is

the province of the jury to find that the calls for course and distance were inserted in the deed by mistake, and that the true location is that which they find was made at the original survey. It is always competent to show by admissible evidence the location of a contemporaneous, not of a subsequent survey, as was held in *Person v. Roundtree, Houser v. Belton* and *Shaffer v. Gaynor, supra. Chief Justice* (629) *Pearson* did not mean in *Graybeal v. Powers* to correct what he had said in *Houser v. Belton,* nor to withdraw his aproval of *Person v. Roundtree,* where the grant did not embrace one foot of the land surveyed originally, and he approved the ruling that the survey would be allowed to correct the grant *in toto* because the survey actually made at the time showed a mistake. In *Graybeal v. Powers,* the learned Chief Justice said on page 71: "To allow it (a correction to be made) in this instance would be not to *correct a mistake* but to supersede a line fixed by the rules of law *by putting in its place a line marked by one of the parties, but which for some reason best known to himself he chose not to have set out in the deed.*" *Non constat* but what if this had been the line of a deed marked by the consent of parties contemporaneously with the sale, or of a grant marked by the county surveyor when locating the warrant instead of the secret mark of a single party, *Judge Pearson* would not have followed *Person v. Roundtree.* A line marked secretly by one of the parties in no sense tends to show what two minds concurred in buying and selling, and therefore what land was embraced by the original contract. A line marked by a single party falls under like condemnation with one which it is attempted to locate, as in *Shaffer v. Gaynor,* by a subsequent declaration of one of the parties only. It is incompetent because the deed can not be corrected or contradicted by such *ex post facto* testimony, though it can by the highest evidence of the nature of the original contract, to wit, testimony that the parties originally surveyed the line to a particular marked corner.

It would seem to be settled, if authority can put a question at rest, that a jury may depart from the words of a grant in fixing its location. The principle seemed to *Chief Justice Taylor* to have (630) been a rule of property when he said, in the opinion in *Loftin v. Heath,* 3 N. C., 532: "I can not say whether it was wise in the first instance to depart from the words of a grant. But many decisions of our Court have allowed of the departure in order to fix the *location* where it *really was made originally.*" The headnote to the last named case is in the following language: "Any mistake or wrong description of a plat or patent may be rectified by parol testimony, and the true location of the land be proved by testimony *dehors the patent.*" Of course this syllabus, taken from the opinion, was qualified by the previous proposition that the proof must tend to show where the location

"really was made originally." It is scarcely conceivable that the learned Chief Justice, in an opinion rendered a few years later, should have intended, without saying so, to overrule his earlier opinion in *Loftin's case* by laying down the test rule, not for the location of a grant as a whole but for determining whether course and distance or a call for natural boundaries should prevail in the location of a single line. Such a construction of language, obviously referring to a different principle, seems still more strained when the fact is recalled that *Person v. Roundtree* and the cases that have followed it were expressly approved in the opinion.

But it was insisted that there was no evidence tending to show that the original location was different from that indicated by the courses and distances laid down in the grant, and especially that the plat attached to the grant, in connection with other testimony, was not competent as evidence of the location by an original survey different from that ascertained by running the calls of the grant. In *Hurley v. Morgan, supra, Chief Justice Ruffin* said (at page 432): "It is true (631) that the plat *can not control of itself* the words of the body of the grant, but it is by law annexed to the grant and always referred to therein as being annexed. When, therefore, it appears from it that the land surveyed is on the east side of the first line, *it is a circumstance, with others, from which it may be inferred that in the certificate of courses the surveyor reversed them by mistake so as to transpose the land and place it on the west side of that line.*"

In *Redmond v. Mullenax,* 113 N. C., 505, the Court said: "The surveyor is required by the statute (Code, sec. 2769), upon receiving the entry and surveying its boundaries, to make two fair plats, one of which is to be attached to the grant when issued and the other filed in the office of the Secretary of State. The original plat is thus made *a part of the grant* for the purpose of indicating the shape and location of the boundary, and is of course *evidence,* though not conclusive, to be submitted to the jury as to the true shape and location of the land."

The controversy hinges upon the question whether a call of "west 985 poles," indicated by the line 51—52 on the plat, used on the trial, was omitted from the grant by mistake. That call did not appear in the original grant, and on the diagram attached to the grant a line corresponding to that call was laid down and was followed by one corresponding to the next call, "south 544 poles." "A certified copy purporting to be a copy of the original survey on file in the Secretary's office" was introduced by the plaintiff, in which appeared the line, "west 985 poles." The statute (Code, sec. 2769) requires that the county surveyor, upon receiving the entry and order of survey, shall make the survey as soon as may be, "and make thereof two fair plats,

and shall set down in words the beginning, angles, distances, marks and water courses and other remarkable places crossed or touched by or near to the lines of such lands, and also the quantity of (632) acres . . . and he shall transmit the plats to the office of the Secretary of State or deliver them to the claimant within one year, together with the warrant of survey, one of which, with the warrant, shall be filed by the Secretary, and the other annexed to the grant." This is the only means provided by statute for informing the Secretary of State as to what are the calls of the survey to be incorporated in the grant, and it is difficult to conceive how the surveyor could record upon the plat the "angles, distances, marks and water courses and other remarkable places crossed or touched by or near to the lines of such lands" unless it was contemplated by the law that on the side or foot of the paper containing the diagram should be written the more minute description mentioned in the statute, together with the courses and distances, all of which is to be embodied in the grant. That such is a common custom among surveyors is a matter of universal knowledge on the part of all whose business it is to be conversant with the practice in issuing grants. It must be admitted, at all events, that whether the certificate of calls for course and distance, which is the basis of the grant, be located or made by the statute a portion of the plat or not, it is certainly evidence filed with the Secretary to show what land was surveyed and intended by law to be covered by the grant issued in pursuance of the survey, and, being documentary evidence, a copy certified by the legal custodian was admissible in place of the original. Code, sec. 1342. The certificate of courses and distances, being properly before the Court, was certainly evidence, if it was not proof conclusive, that the Secretary made a mistake to the prejudice of the plaintiffs, and which they had a right to correct when he failed to follow the certificate of the proper officer authorized to make the original survey, and embrace in the grant the land covered by the courses (633) and distances set forth in his certificate, made of the original location in pursuance of the warrant. *Cooper v. White,* 46 N. C., 389. The purpose of the Secretary was doubtless to include the land actually surveyed, according to the certificate, as the law intended he should do. Had he done so, the place where the trespass was committed would have been embraced within the boundaries of the plaintiff's land.

The Court instructed the jury, among other things excepted to, in substance that the leading object in determining the location of deeds and grants was to ascertain the intent of the parties, which must ordinarily be determined by the description; but that where it is alleged that the description fails to express the intent of the parties on account of some mistake of the draughtsman, evidence in the shape of writings

or circumstances may be considered by the jury as tending to show the mistake; and if they show it clearly, then the deed must be so construed as to express the intent of the parties by correcting it; otherwise, they would not so construe it.

The judge then called the attention of the jury to the testimony of the surveyor, Slagle, that, run according to the courses and distances laid down in the grant, the lines would cross themselves, and the last call would give out beyond the beginning corner and fail to reach Connely's Creek, on which a portion of the land is said in the grant to lie, and which is indicated in the diagram introduced in evidence. On the other hand, he called the attention of the jury, as bearing upon the question of mistake, to the fact that, by running the courses and distances contained in the certified copy of the original survey, the land would be located on the waters of Connely's Creek; that 10,000
(634) acres, the number paid for, instead of 640 acres, would be embraced in the boundary, and the survey would also conform to the shape of the diagram.

While the judge did not tell the jury that "the plat of itself could control the words of the body of the grant where no alteration was made or proposed in the grant," he did follow the doctrine laid down by *Chief Justice Ruffin,* in *Hurley v. Morgan, supra,* that "the form of the plat" was a "circumstance, with others, from which it may be inferred that there was a mistake made by the Secretary," and did not go so far as did *Judge Battle* in his opinion in *Coper v. White, supra,* 389.

But this case is much stronger than that contemplated in *Hurley v. Morgan,* as making a bare diagram competent, because it tends to show by reason of its shape that the Secretary might have been led into a mistake by the certificate of the surveyor. For here it appears as an affirmative fact that the surveyor certified the courses and distances so as to conform to the shape of the plat; and the certificate and shape of the plat, as in the case of *Cooper v. White, supra,* are each corroborative of the correctness of the other. The principle is in no wise affected by the dictum in *Literary Fund v. Clark,* 31 N. C., 58, though that case was overruled by *Campbell v. Branch,* 49 N. C., 313. But in the ruling in that case the language used, if understood, in no way modifies the principle stated in *Hurley v. Morgan* and relied upon by the plaintiffs in the case at bar, since it only reiterates the principle decided in *Hurley v. Morgan* that a diagram of itself can not control the courses and distances in the body of a grant when their correctness is not questioned, but does not overrule the doctrine that its shape is a circumstance tending to show, what appears here by direct proof, that there was a mistake made in incorporating courses and distances into the

grant differing from those indicated by the survey and intended (635) by law to be embodied therein. *Cooper v. White, supra.* His Honor properly told the jury that the plaintiffs must recover, if at all, upon the original grant, with satisfactory evidence that the mistake was made in omitting the call, "west 985 poles," as contended. For the reasons given, the judgment is

AFFIRMED.

NOTE.—AVERY, J. Since the foregoing was written, on inspection, the original surveyor's certificate in the Secretary's office shows that it was written in the usual way, on the same paper, with and at the side and bottom of the diagram, and contains the course, "west 985 poles," which he intended the Secretary to insert in the grant, and which the Secretary by mistake failed to embody in the calls.

MONTGOMERY, J., concurring. The point on which this case turned was whether between the parties to the suit a certified copy of the original certificate of survey attached to a land grant in the office of the Secretary of State was admissible in evidence to go to prove a mistake in a line of boundary in the original grant itself.

I concur in the opinion delivered by *Justice Avery* for the Court that it was admissible for that purpose, and in the conclusion arrived at in the opinion I also concur. The learning on other points in the opinion of *Justice Avery* and in that of *Chief Justice Faircloth* in dissent I have not felt that I was called upon to decide in this case.

FAIRCLOTH, C. J., dissenting. I can not agree with the majority. In this case the original grant, under which the plaintiff claims, contains over 55 lines and corners, on the waters of Savannah Creek, Green's Creek and Connely's Creek, beginning in the county line and returning to said county line at a hickory which can not be found, (636) and thence to the beginning. The grant gives the course and distance of each line, except the last one, which calls for the county line to the first corner.

The controversy arises on the course to be followed from corner No. 51, that is to say between 51 and 52 corners. Corner 51 is admitted to be a true corner. Starting thence, the call in the grant is south 544 poles to a stake, thence 873 east 840 poles to a hickory in the county line, thence along said line to the beginning.

According to the record before us the surveyor's certificate agrees with the grant, but the plat on which the certificate is written marks a line which when run is found to be "west 985 poles" to a stake, starting from the agreed corner No. 51, that is to say from 51 to 52.

The question is, Does the grant control, or can parol evidence be heard to show that the line, "west 985 poles," drawn on the plat is the true line? It is admitted that if the former controls the defendant is not a trespasser as alleged, but if the latter controls then he is a trespasser. The defendant excepted to the admission of evidence tending to establish the line "west 985 poles" on the ground that such line was not called for in the original grant to Allison and Rogers, under whom the plaintiff claimed, and because it contradicted the express calls of the grant.

Slagle, the surveyor, testified that following the calls of the grant would not reach the waters of Connely's Creek and that the lines would cross each other, and that the line "west 985" would cross Connely's Creek; also that he could not find any hickory in the county line, and that he "did not find any marked line or corners after leaving dogwood and poplar at 47"; that the calls 48 to 53 inclusive were for stakes, and that 54 called for a hickory in the county line which he could not find. The plat has no letters or figures to indicate
(637) course and distance. There was other evidence not necessary to recite. Judgment for plaintiff and appeal by defendant.

In the early history of our State many embarrassing questions of boundary arose, and in their consideration this Court laid down some rules which have been since followed, the general rule observed being that a grant or deed can not be contradicted by parol testimony, to which there are some carefully guarded exceptions.

In *Person v. Roundtree,* 1 N. C., 69, better reported in 2 N. C., 375, the defendant entered the land beginning at a point on Shocco Creek, and the actual survey proved on trial, and the lines run "south," etc., putting the entire lot entered on the south side of the creek, and he showed his actual possession of the same for some time. The grant, starting at the first station on Shocco Creek, owing to some mistake called the first line "north," etc., putting the lands on the north side of the creek, so that the grant did not cover any of the land surveyed. The Court said the mistake should not prejudice the defendant, and that he was entitled to the land intended to be granted, which had been surveyed. And the same principle has been followed in other cases, and in *Houser v. Belton,* 32 N. C., 358, "west" was substituted for "east" upon competent testimony. In many ways the course and distance in the grant are controlled; as, if a natural object is called for, the distance called for in the grant or deed, whether it falls short or goes beyond the natural object, must yield; and when a corner is some marked monument or tree well marked at the time of the grant, and can be shown by competent proof, the line must go to it, varying the course called for in the grant as little as practicable. In such cases the

natural objects, as a stream, another's established line, county line and the like, are allowed to control because they are less liable to mislead than the calls of the deed, in which mistakes are more likely, owing to careless writing or copying by the surveyor or Secretary (638) in filling up the grant from the plat or surveyor's report.

Without attempting to refer to the many cases on this question, we refer to the well-considered case of *Cherry v. Slade,* 7 N. C., 82, where some rules applicable here are laid down. The fourth rule was: "Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood can be ascertained and identified by evidence, or where no lines or corners of an adjacent tract are called for, in all such cases we are of necessity confined to the courses and distances described in the patent or deed; for, however fallacious such guides may be, there are none others left for the location. P. 91. This rule is decisive of the present case. There is no call in the original grant for such a line as "west 985" from corner 51, nor for any corner. There is no proof of such line or corner. In fact, the witness who surveyed the line says, "I did not find any marked line or corners." The plaintiff relies upon the fact that the plat attached to the grant shows such a line as "west 985." As we have said, the plat shows nothing but bare lines on the paper, with no letters or figures indicating either course or distance. However the plat annexed to a grant may in some cases aid in the interpretation of ambiguous calls, it can have no effect in this case, since it does not purport to lay down any natural course or natural object at its terminus on said line. *Literary Fund v. Clark,* 31 N. C., 58.

In *Graybeal v. Powers,* 76 N. C., 66, the Court said: "Marked line trees and corners, not called for, have been allowed to control an obvious mistake in regard to course; for instance, a mere slip of the pen in writing 'north' instead of 'south' and the like, but you must in the language 'go by the distance' unless it be controlled by a call for a (639) natural boundary, whether it fall short of or go beyond a tree, marked as a common tree, but which is not called for. To allow the terms of a written instrument to be varied by parol evidence is a proposition for which no lawyer will contend. The only exception is made by our courts in questions of boundary, when, there being no natural boundary called for, parol evidence corroborated by natural evidence of trees marked at the time, although not called for, is allowed to correct or explain a mistake in the courses of the grant; to allow it in this instance would be not to correct a mistake but supersede a line fixed by the rules of law by putting in its place a line marked by one of the parties, but which, for some reason best known to himself, he chose not to have set out in the grant." In that case his Honor authorized the

jury to follow a line marked by one of the parties when he took out his grant, which line was inserted in the grant, and this Court held that there was error.

In *Mizell v. Simmons,* 79 N. C., 182, it was said: "Course and distance is a certain description in itself, and to make it yield to a 'supposed line' supported by neither deed, possesssion nor marked boundaries would be to make the more certain yield to the less certain and fallacious when the rule is that course and distance give way only to something which is more certain." *Redmond v. Stepp,* 100 N. C., 212.

Ordinarily quantity is not description, but where the boundaries are *doubtful* it may become important. There is no doubt about the boundary, according to the terms of the grant, and we have said there is no other competent evidence to show any other lines.

In *Reddick v. Leggett,* 7 N. C., 539, it is thus stated: "I grant to J. S. one thousand acres of land and no more, bounded as fol-
(640) lows, etc., and two thousand acres are included in the lines. The two thousand acres pass, as the buts and bounds are more certain than quantity, which depends on admeasurement and calculation; and the quantity is in no way material, except in lands where the boundaries are doubtful, and then it may be thrown into the one scale or the other as a circumstance."

Our conclusion then is that the bare line on the plat, with no letters or figures to indicate course and distance, unsupported by any marked trees, corner or natural boundary, and no places where they once stood can be ascertained by evidence, is not sufficient evidence to be submitted to a jury to contradict or control course and distance set out in the grant. *Young v. R. R.,* 116 N. C., 932. As the case turns upon this question, it is unnecessary to consider other exceptions.

FURCHES, J. I concur in the dissenting opinon.

Cited: Johnston v. Case, 131 N. C., 497; *McNeely v. Laxton,* 149 N. C., 334; *Lumber Co. v. Hutton,* 152 N. C., 541; *Powers v. Baker, ib.,* 720; *Clarke v. Aldridge,* 162 N. C., 331; *Allison v. Kenion,* 163 N. C., 585; *S. v. Jenkins,* 164 N. C., 529; *Belk v. Vance,* 165 N. C., 675; *Gunter v. Mfg. Co.,* 166 N. C., 167; *Lee v. Rowe,* 172 N. C., 846.

(641)

IN RE E. L. REID AND E. O. CURTIS.

Election Law—Registration—Duty of Registrars.

1. Under chapter 159, Acts of 1895 (election law), registrars may ask the elector his age and residence, the township or county from whence he removed, in case of such removal since the last election, and (under the authority of sec. 1, Art. VI of the Constitution) whether he has resided in the State twelve months, and in the county in which he proposes to vote ninety days preceding the election.

2. If, in reply to such questions, the elector answers that he is twenty-one years old, and has resided in the State twelve months and in the county ninety days preceding the election, it is the duty of the registrars, upon his taking the prescribed oath, to record his name as a voter; but by-standers may require him to be sworn as to his residence.

3. Challenges must be made at the time and in the manner specified in the election law of 1895.

(AVERY and CLARK, JJ., concur, but are of the opinion that the additional question, to wit, whether the applicant for registration "has been convicted of an infamous crime," should be allowed to be asked.)

This matter came up to this Court on the appeal of E. L. Reid and E. O. Curtis, registrars of the 5th ward of Winston, Forsyth County, from an order made by *Walter A. Montgomery*, one of the justices of the Supreme Court, in chambers in Raleigh, on 13 October, 1896. The order was made upon proceedings instituted under section 7 of the Election Law of 1895. The petition, accompanied with affidavits to support it, alleged that Curtis and Reid, registrars, had unlawfully and corruptly combined to prevent lawful registration in their ward and were carrying the plan into effect; and there was a prayer for an order to compel the registrars to proceed with the registration of all lawful voters. Counter-affidavits were filed in which the facts stated in the petition were denied, and especially the charge of a corrupt (642) combination on the part of the registrars to prevent registration. Upon the hearing by *Justice Montgomery* it was found as a fact that the registrars had not combined to prevent legal registration, but that they were violating the election law as to the registration of voters; and it was ordered that they should proceed with registration according to law as prescribed in the order. The rules prescribed in the order are set out in the opinion of the Court.

J. W. Graham for plaintiff.
E. B. Jones and Shepherd & Busbee for defendants.

FAIRCLOTH, C. J. This matter comes before us by appeal from an order and judgment made by *W. A. Montgomery,* one of the justices

of this Court. After argument by counsel, we are of opinion that said order is in accordance with the true intent of the Act of Assembly of 1895, ch. 159, and the same is affirmed. In consideration of the importance of the matter, it is proper to say that we think the registrars under said act may ask the elector his age and residence, as well as the township or county from whence he removed, in the case of a removal since the last election, and the name by which he is commonly known, and that by authority of the Constitution, Art. VI, sec. 1, the registrars may ask the elector if he has resided in the State twelve months next preceding the election and ninety days in the county in which he offers to vote, and that no more questions can be asked by the registrars under said act. If the elector answers that he is 21 years old, and has resided in the State twelve months and in the
(643) county ninety days previous to the election at which he proposes to vote, it is the duty of the registrars, upon his taking the oath prescribed by section 16, to record his name as a voter. Upon the request of any bystander he can be sworn as to his residence. Challenges, if made at all, must be made at the time and in the manner specified in the act.

AFFIRMED.

FURCHES, J. (concurring): Concurring in the opinion of the Court, I wish to express my reasons for doing so upon one question considered but not discussed in the opinion.

It was contended by one member of the Court that there should be added to the questions to be asked the party proposing to register one other question, to wit, "Whether he has been convicted of any infamous crime." And it was claimed that this was not only necessary to preserve the purity of the ballot box but was required by section 1, Article VI of the Constitution, and that it was also required by section 13, chapter 159, Laws 1895.

I do not think so. Both the Constitution, Article VI, section 1, and Laws 1895, chapter 159, section 13, contain much more than this simple proposition—whether the elector has been convicted of any infamous crime. To this sentence the Constitution adds, "Unless such person shall be restored to the rights of citizenship in a manner prescribed by law." And section 13, chapter 159, Laws 1895, adds, "Unless they shall have been legally restored to the rights of citizenship." This, to my mind, presents a very different proposition to that contained in the sentence, "Whether he has been convicted of any infamous crime." If that alone had been a disqualification of the elector, I would have agreed that it was a proper question to be asked by the registrar.

It is conceded that the registrar while registering the vote of electors is not a judge—trier of the elector's qualifications. It is his duty to

register the names of those claiming to be qualified electors. (644) Their names being on the registration books gives them a standing in Court, but if their right to vote is disputed, if they are challenged, their right is to be determined by the judges. But unless their names are put on the registration books they can not have the question tried, no matter how just their claims are, and they are not allowed to vote. If upon the trial it is found that they are not qualified voters their names are stricken off, and they stand as if their names had never been put on the books. It is true that the registrars are allowed to ask certain questions, and this may seem inconsistent with what I have said, but it is not.

A simple answer to either one of the questions allowed determines the question as to the right to register; for instance: "Are you 21 years old?" Answer: "No." This ends the matter. Suppose the answer should be "Yes" instead of "No" and a bystander says he is not. It will not be contended that the registrars could proceed to try this question. But it would be their duty to register his name and let the party that disputes his age make the challenge. And at the proper time and in the proper way the judges will try the question. And so it is with the other questions allowed by the Court; a plain, simple answer from the party proposing to register determines his right to do so.

But this is not the case with regard to the question proposed to be asked—"Whether he has been convicted of any infamous offense." Suppose he answers "Yes"; this answer does not determine his right to vote. It may be that he was convicted before 1877, and if so he is still entitled to vote; or, suppose that since his conviction "he has been legally restored to the rights of citizenship," then both the Constitution and the Act of 1895 allow him to vote. So it is seen that, if he should (645) answer "that he had been convicted of an infamous offense," this does not determine his right to vote, but leads to an investigation as to whether it was before 1877, or if since then, whether he has been *legally* restored to the rights of citizenship. And this is an investigation that the registrars are not authorized to make or determine.

I am therefore of the opinion that this question should not be allowed.

CLARK, J. (dissenting in part). To the questions held by the Court allowable for the registrars to ask I think should be added, in any case the registrars think proper, this, "Whether he has been convicted of any infamous offense." The same clause of the Constitution (Art. VI, sec. 1) which the Court holds authorizes the inquiries as to his age and residence contains the express provision that no one shall be an elector if he has been adjudged guilty of an infamous offense. If that clause authorizes the inquiries as to age and residence, it also necessarily au-

thorizes this inquiry, if the registrars think proper. The election law (Laws 1895, ch. 159) so provides also, for in section 13 it provides that no person shall be *allowed to register* or vote if he has been adjudged guilty of an infamous offense since 1 January, 1877. How can the registrars discharge that imperative command of the law not to allow any such person to register unless, if they have any doubt, they are permitted to ask the question before he does register?

It is as much a crime against the elective franchise to permit disqualified persons to vote as to reject those who are qualified. In avoiding one evil we must not run into the other. *Evitata Charybdi in Scyllam incidere.* The act of the Legislature evidently (as I think) intends to guard against both evils alike.

(646) AVERY, J. (dissenting). The Election Law (ch. 159, Laws 1895, sec. 13) provides "that the following classes of persons shall not be allowed to register and vote in this State, to wit, persons under 21 years of age, idiots, lunatics and *persons* who upon conviction or confession in open court shall have been adjudged guilty of felony or other crime infamous by the laws of this State, and committed after 1 January, 1877, unless they shall have been legally restored to the rights of citizenship." It is concluded by the majority of the Court that it is the right and duty of the registrar to ask every person who offers to register what is his age and residence, and to refuse to register any whose answers show that they are disqualified because they have not attained the age of 21 years or have not resided for the requisite period in the State and county, or are not residents of the townships in which they purpose to vote. In this ruling I fully concur. But the Constitution, Article VI, sec. 1, provides, in the very same language used in section 13 of the act, for the disfranchisement of those adjudged guilty after conviction or confession in open court, "unless restored to citizenship in a manner prescribed by law." The whole Court concurred in *Harris v. Scarborough,* 110 N. C., 232, in sustaining the power of the Legislature to enact reasonable regulations, and this holding is supported by the highest authorities upon constitutional law. Cooley Const. Lim., pages 757, 758. The Legislature has declared that these infamous persons "shall not be allowed to register." By whom shall they be denied that privilege? Manifestly, by the only officers who have the opportunity to allow or disallow the registration. I think that section 13 is imperative in its mandate that neither infants nor infamous persons shall be permitted by the registrars to have their names enrolled on the list of voters. The majority of the Court concede the power of the registrar to ask one offer-
(647) ing to register what is his age, and if he answers that he is 18 to refuse to record his name. Upon what reasonable principle is he

denied the right to ask such persons whether they have, since 1 January, 1877, been adjudged guilty on conviction or confession in open court of a felony or other infamous crime? I confess I do not understand. It is immaterial whether the registrar be required to add to this question the further interrogation, "And have you since been restored to citizenship?" or whether he permits the proposed voter to add to his answer the statement that he has been restored.

I see no reason why the merciful provision that a felon might be allowed restoration to citizenship, which is generally conditioned by statute upon proof of a reformation in his life for a certain period, should be placed in a more favorable plight before the law than a boy of 20 years of age or a nonresident who has never been accused of previous dishonesty? The fact that the infant, in response to the usual question, says he is 21 years of age will usually fix upon him the *scienter* in case of subsequent indictment for perjury in corruptly taking the oath, under section 36 of the act. But the felon, being asked no questions, may well contend, when arraigned for the same offense, that no one had explained to him that he was disqualified; and that, on the contrary, some unauthorized persons had informed him that he was a qualified voter, and he so honestly believed. If the construction placed upon the act by the majority of the Court be correct, then the law leaves a loophole for convicts to escape the consequences of a false oath, while careful provision is made under that same section of the Constitution, and in the provisions of the same section of the act, to punish any inexperienced youth who may attempt to perpetrate the same fraud and resort to perjury to effect his object. If such is the proper interpretation of the law, it is neither fair nor just. If nonresidents and infants (648) are to be interrogated and subjected to the perils of conviction and punishment for perjury, much more must the Legislature have intended that safeguards should be interposed to prevent the lowest class of our people from exercising the highest and most important duty and privilege of a citizen.

Where one is charged with the misdemeanor of retailing spirits, the law makes it incumbent on him to show on the trial that he was licensed by the proper authorities of the Government to sell, if he would avail himself of that defense. So, where one enters upon land after being forbidden to do so, it is made incumbent on him when indicted to show if he can, as a defense, that he acted in good faith or under a license from the owner. *S. v. Glenn,* 118 N. C., 1194. A similar rule applies in all cases where the matter of excuse or defense is peculiarly within the knowledge of the defendants. *S. v. Rogers, post,* 793. I can not see how it imposes any peculiar hardship on a felon to throw upon him the burden of explaining that for good behavior he has been restored to the

full enjoyment of the rights of citizenship. I think that every good citizen of the State, who is interested in the common welfare and desires to see elections conducted fairly and honestly, ought to prefer and would prefer to answer with head erect that there is no brand of infamy upon him rather than have his vote and power as a citizen neutralized by a convict, who is one of the vilest of the vile, because of the failure to subject the felon to the same sort of interrogation. No man ought to be ashamed to swear that he has never been convicted of a felony or infamous crime, and it is inconceivable that good men should be so extremely and foolishly sensitive as to object to such interrogation. But the fact that there may be such persons is no excuse for allow-
(649) ing the Constitution to be evaded and the purpose of the Legislature to be thwarted.

To the foregoing dissent upon the merits I must add that the opinion which I have filed in *Harkins v. Cathey, post,* 658, sets forth my views as to the jurisdiction in this as well as in that case, with the difference that in Cathey's case the justice who heard the case was called upon to pass on the title to an office.

---

(650)

H. S. HARKINS v. J. L. CATHEY, CLERK OF THE SUPERIOR COURT OF BUNCOMBE COUNTY.

Election Law — Judges of Election — Appointment — Qualifications — Mandamus — Supreme Court — Justices of Supreme Court — Jurisdiction.

1. The election law of 1895 (chapter 159, Laws 1895), conferring upon the judges of the Supreme and Superior Courts general supervisory jurisdiction over clerks of the Superior Courts in the performance of their duties under the election law, with power to issue rules on such clerks, and on the hearing thereof to make summary orders and directions for their proper enforcement, is constitutional.

2. Upon failure of a chairman of the State executive committee of a political party to designate judges of election on behalf of such party, as provided in sec. 7, ch. 159, Laws 1895, the persons appointed by the clerk of the Superior Court of a county must belong to the political party for which they are appointed.

3. Where the chairman of the State executive committee of one political party fails to designate the judges of election for a particular county for and on behalf of such party, and the clerk of the Superior Court, under the exercise of the power of appointment given in sec. 7 of ch. 159, Laws

1895, appoints persons not having the requisite qualifications, the chairman of the executive committee of another political party in such county may bring *mandamus* to compel the clerk to appoint proper persons.

4. Under sec. 7, ch. 159, Laws 1895, giving to the judges of the Supreme and Superior Courts supervisory power over the clerks of the Superior Courts in the performance of all the requirements of said act, a single Justice of the Supreme Court has jurisdiction to remove judges of election appointed by a clerk, if they have not the requisite qualifications, and to order other and suitable persons to be appointed.

AVERY, J., dissenting.

MANDAMUS, brought by H. S. Harkins, Chairman of the Republican Executive Committee of Buncombe County, to compel J. L. Cathey, Clerk of the Superior Court of Buncombe County, to comply with the election law of 1895 in the appointment of judges of election, heard by Hon. D. M. FURCHES, one of the Associate Justices of the Supreme Court, on 24 October, 1896. The opinion and order of his Honor are as follows:

This proceeding is brought under chapter 159, Laws 1895, being "An act to revise, amend and consolidate the Election Laws of North Carolina," to compel the Clerk of Buncombe County to comply with the provisions of the act in appointing judges of election.

It is alleged and admitted that the plaintiff is a resident and qualified voter in Buncombe County, and that the defendant is the Clerk of the Superior Court of said county. It is alleged and admitted that Hal W. Ayer is the chairman of the People's Party, which party voted more than thirty thousand votes in 1892, and that as such Chairman he had the right to designate to the defendant the names of persons to be appointed judges of the election to be held in (651) November, 1896. And it is alleged and admitted that he failed to make this designation on or before the first Monday in October, 1896, which was 5 October, but did so on or about 13th of said month. And it was alleged by the defendant that, receiving no list from said Ayer, Chairman as aforesaid, he proceeded to make said appointments, as it was his duty under said act to do.

Upon the hearing of this case the defendant's counsel contended that, defendant having received no list from said Ayer on 5 October, it was his duty to proceed to make said appointments without such list, and without regard to what party the appointees should belong, so that he observed the other qualifications contained in said act. And Mr. Davidson stated that, being called upon for his opinion by the clerk, he so advised him. But it was contended that, notwithstanding the opinion of Mr. Davidson, the clerk (the defendant) had in fact observed the distinctions between the different political parties; and as he had re-

ceived lists from the chairmen of the Democratic and Republican parties, which he observed, that he did appoint one Populist from each precinct except four, namely, 1st and 2d precincts of Reem's Creek, Avery's Creek and Black Mountain precincts.

It was also contended that, these parties having been lawfully appointed, the Court had no right to remove the incumbents and to fill or cause their places to be filled by other persons. It was further insisted that the plaintiff Harkins, was a Republican and Chairman of the Republican Executive Committee of Buncombe County, and therefore he had no right to bring and maintain this proceeding.

This statement of facts presents the questions of law arising (652) thereon and the contention of the parties.

This act, ch. 159, sec. 7, Laws 1895, gave to Mr. Ayer, as Chairman of the People's party, the right to designate to the defendant the names of the persons to be appointed judges of election for his party in Buncombe County. Had this been done on or before the first Monday in October the defendant would have had no discretion, and it would have been his duty to make the appointments as designated. He would then have been but the agent provided by law to carry out the will of Mr. Ayer.

But, as he received no such list from Mr. Ayer on or before the first Monday in October, it then became his duty to make such appointments, observing the requirements of the law for such judges, one of which is that they must be members of the People's Party, if there are such in the township. This is clearly shown to be the spirit and intention of the law, and is clearly manifested by the language used in giving the clerks this power, to wit, that if "the chairmen of the State Executive Committees or either of them, shall have failed to recommend persons so qualified for said appointments, then the clerk shall appoint suitable persons, *having all the requisite qualifications herein described,* without such recommendations."

It seems to me that there can be no doubt but that this language includes the requirement that the person appointed shall belong to the political party for which he may be appointed. But this does not prevent the clerk from selecting from the persons otherwise qualified of the political party for which he is making the appointment.

This is a public law, intended for the whole people, and the whole people are interested in the correct interpretation and enforcement of the same. I therefore fail to see anything in the objection to Mr.

Harkins bringing and prosecuting this proceeding. I am in- (653) formed that *Judge Hoke* took the same view of this law that

I have taken in the Salem case, which was recently before him. There, as I understand, the Clerk, not having received the list from

Mr. Ayer, appointed a Republican registrar for the People's Party. The Chairman of the Democratic County Committee applied for and obtained a rule on the Clerk; the Republican was removed and a member of the People's Party appointed. I may not be entirely correct in stating the facts of the case before *Judge Hoke,* but I state them as I have heard them. If I have stated the facts correctly and his ruling, I agree with him. If it should be that I am mistaken as to the facts and ruling in the case referred to, it will not affect my own decided opinion of the law as above expressed.

This act (sec. 7) provides "that the Judges of the Supreme and Superior Courts shall exercise general supervisory power over the Clerks in the execution and performance of all the powers, duties, directions and requirements of this act." This I construe to give me the power to inquire into the manner in which the Clerk has discharged his duty, and, if I find that he has not discharged it according to law, to overrule and correct him, and if I find that he has made appointments in violation of the law, to declare them void, and to require appointments to be made in accordance with the law, and to sustain his appointments where they have been made according to law.

I have now declared the law bearing on the case as I understand it. And this brings me to a consideration of disputed facts, which have given me much more trouble than the questions of law involved. And it seems strange to me that a man possessing the other requisite qualifications for a judge of an election should not have sufficient prominence among his neighbors for them to determine to what political party he belonged. But such seems to be the case (654) here.

While there are reasons for me to suppose that the defendant acted under a misapprehension of his rights in making these appointments (Mr. Davidson's advice), I shall give him the benefit of the presumption that he did right in making these appointments, unless it appears otherwise from the evidence or from his admissions, and that the burden (outside of admissions) is upon the plaintiff; that, acting under this rule, I find that C. B. Leonard, appointed for the first precinct, town of Asheville, W. W. Owensby for the second precinct, W. D. Justice for the fourth precinct, and G. W. Freeman are Populists; they so swear; and I give them credit for knowing to what party they belong and for swearing the truth, although there is evidence before me tending to show that W. D. Justice is now Chairman of the Democratic Club in Asheville. I also find under this presumption that W. M. Jones is a Populist, although there is evidence showing that he is now one of the city Aldermen of Asheville and was elected

as a Democrat. At this time when there are so many changes, I do not think this proves that he is not a Populist now; and I find upon the direct testimony of W. H. Wilson, corroborated by that of H. S. Harkins and not contradicted by any evidence, that W. P. Brown, J. M. Ingles, C. C. McCathey, W. P. Kilpatrick, N. A. Miller, R. V. Wolfe, Jas. Reese, W. C. Penland, James Patton (or Jos. Patton, whichever it may be), C. C. Murray, G. W. Curtin, Jesse Williams, H. C. Blankenship, H. J. Miller, George Harris, R. P. Lewellyn, J. W. Bowling, Jas. Foster, W. E. Pounder and William Gaddy are not Populists; that finding, as I do, that C. B. Leonard, W. M. Owensby,

W. D. Justice, J. N. Jones and G. W. Freeman are Populists,
(655) and holding, as I do, that where the defendant (the clerk) complied with the law in making the appointments, the parties so appointed are rightfully in and entitled to hold their offices, the same are by me affirmed.

But as to W. P. Brown, J. M. Ingles, C. C. McCathey, W. P. Kilpatrick, N. A. Miller, R. V. Wolfe, James Reese, W. P. Penland, James or Joseph Patton, C. C. Murray, G. W. Justice, Jesse Williams, H. C. Blankenship, J. W. Bowling, R. J. Miller, Geo Harris, R. P. Lewellyn, Jas. Foster, W. E. Pounder and W. Gaddy not being members of the People's Party, I hold and declare they were not lawfully appointed and are not entitled to hold and exercise the functions and to perform the duties of said offices to which they were so wrongfully and unlawfully appointed, and that they are hereby removed from said offices to which they have been wrongfully and unlawfully appointed; and said offices, to which they have been so appointed, are declared to be now vacant.

It is admitted in defendant's answer that he has made no appointment of judges for the Populist Party for the first and second precincts of Reem's Creek, and none for Avery's Creek and Black Mountain precincts. So, the offices of judges for the Populists for these four precincts are, by the admission of defendant's answer, found and declared to be vacant as to the People's Party.

There has been some evidence before me intended to show that the People's Party of Buncombe County are satisfied with defendant's appointments. I can not consider such evidence. I have no right or power to consider such evidence as this. My duty is to find what the Clerk did and declare the law arising thereon. When this is done, my duty is done.

There is some evidence introduced intended to show that
(656) some of the parties designated by Hal W. Ayer, as State Chairman of the Populist Party, are Republicans. But I have nothing to do with this matter; it is not before me. I do not say

but that, under proper proceedings against a State Chairman, this matter might be inquired into. Neither do I say that it could. I give no opinion as to that. But what I am deciding and what I do decide is that when the State Chairman makes his designation, within the time provided by the statute for him to do so, then the Clerk has no discretion, and it is his duty to make the appointments as designated; that, if there are any appointments made by the clerk, not especially noticed herein, they are affirmed.

ORDER: It is therefore considered, adjudged and ordered that the defendant, J. L. Cathey, as Clerk of the Superior Court of Buncombe County, proceed at once to fill the vacancies now existing in the offices of judges of election on the part of the People's Party, for precincts No. 3, No. 6, No. 7 and No. 8 in the city of Asheville, these offices being declared by me to be now vacant, and that he proceed at once to fill the places for which the following persons were appointed by him, and whose offices are now declared vacant, and for the respective precincts for which they were appointed, to wit: W. P. Brown, J. M. Ingles, C. C. McCathey, W. P. Kilpatrick, N. A. Miller, R. V. Wolfe, James Reese, W. C. Penland, James or Joseph Patton, C. C. (or J. C.) Murray, G. W. Justice, Jesse Williams, H. C. Blankenship, A. J. Miller, J. W. Bowling, George Harris, R. P. Lewellyn, James Foster, W. E. Pounder and William Gaddy.

And the clerk will also proceed at once to fill the vacancies now existing in the 1st and 2d precincts of Reem's Creek and in Avery's Creek and Black Mountain precincts. (657)

And as these offices are now vacant, and it being admitted that he has now in his possession a list of names furnished him by Hal W. Ayer, State Chairman of the People's Party, for the various precincts, he will forthwith and without delay proceed to fill said vacancies by appointing the persons so named and designated by the said Hal W. Ayer as Chairman aforesaid; and if the said Hal W. Ayer shall have failed to name and designate names for any one or more of said precincts, he will at once proceed to appoint and fill the same for the People's Party. Such appointees of his, if it shall be necessary for him to make of persons not designated by said Ayer, shall have the other qualifications provided by said Act of 1895.

And he will make known to me, at chambers, at the Supreme Court Building in the city of Raleigh, N. C., at 12 o'clock m., on 29 October, 1896, how and in what manner he has observed, kept and obeyed this order and judgment. This 26 October, 1896.

The plaintiff will recover his costs of defendant.

D. M. FURCHES,
Associate Justice Supreme Court, N. C.

The Sheriff of Buncombe County, N. C., will execute this order forthwith upon its receipt by delivering a copy of the same to J. L. Cathey, Clerk of the Superior Court of Buncombe County, N. C., and make due return thereof to me forthwith. This 26 October, 1896.

D. M. FURCHES,
Associate Justice Supreme Court, N. C.

From this order the defendant appealed to the full bench.

(658) *J. W. Graham for plaintiff.*
Shepherd & Busbee for defendant.

FURCHES, J. The Court being of the opinion that the opinion, findings and judgment of the Court below were correct and should be affirmed if the Act of 1895, ch. 159, known as "The Election Law," is constitutional;

And it having been decided in the case of *McDonald v. Morrow, post,* 666, that said Act is constitutional, therefore, adopting the decision of the constitutional question in *McDonald v. Morrow* and the opinion of the trial court in the discussion of the other matters involved in the case as the opinion of this Court, the judgment appealed from is affirmed.

AVERY, J. (dissenting). Without questioning the conclusion reached by the learned Justice from whose judgment the appeal was taken upon the merits, I dissent from the opinion of the Court on the ground that he had no jurisdiction of the subject-matter of the action, and the Legislature had no power to confer such jurisdiction upon him. In section 8, Article IV, of the Constitution, the jurisdiction of the Supreme Court is defined to extend—

1. To reviewing on appeal any decision of the *courts below* upon any matter of law or legal inference.

2. To giving the same jurisdiction over "issues of fact" and "questions of fact" as were exercised by the same Court before the adoption of the Constitution of 1868.

3. To issuing remedial writs necessary to give it a general supervision and control over the proceedings of inferior courts.

In section 12 of the same article of the Constitution it is provided that "the General Assembly *shall* allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme
(659) Court among *the other courts prescribed in this Constitution or which may be established by law.*"

It is not contended, neither can it be plausibly insisted, that a single Justice of the Supreme Court is a court other than the Supreme Court,

or can be constituted a separate court by legislative enactment. Whatever he does under color of authority purporting to be granted by an act of Assembly, it must be conceded is done without changing the character of his office or assuming the role of a distinct officer created by such statute. In the opinion (by *Chief Justice Pearson*) in *Clark v. Stanley*, 66 N. C., 59, the Court held that "a public office is a public agency," and the person who is appointed to perform the agency is a public officer, and, hence, that to attempt to confer upon the President of the Senate and the Speaker of the House the power to appoint proxies and directors in all public corporations was an attempt to clothe them with a new and additional office. Hence, in such cases, the person appointed is precluded from holding the new office under Section 7, Article XIV, of the Constitution. If it be conceded, as it seems to me it will be, that the attempt to clothe a Justice of the Supreme Court with this power creates no new office, then it is plainly in violation of the Constitution to vest in him jurisdiction which that instrument declares "shall be" allotted and distributed either to courts other than the Supreme Court prescribed by the Constitution or which may be established by law. This provision is clear and mandatory as to whom the Legislature shall clothe with jurisdiction, and clearly a single Justice of the Supreme Court comes within neither of the classes mentioned in that section. If the people, through the organic law, have bound the Legislature by solemn mandate, expressed in unmistakable terms, to confer "all jurisdiction" "which does not pertain to the Supreme Court" upon two other classes of courts specified, and a single Justice of the Supreme Court comes within neither (660) classification, then the attempt to give the powers mentioned in the election law, in so far as the act imposes upon him jurisdiction to pass upon the rights of property of the citizens of the State, is unconstitutional and void.

The power that pertains to the Supreme Court, as a court, to issue remedial writs clearly can not be conferred upon a single member, but only upon the organized body. Therefore, I conclude, upon more mature reflection, that it is in violation of the Constitution to impose upon a single Justice of the Supreme Court any of the powers that the Legislature has attempted to confer upon that Court. What I have written so far is applicable to all of the election cases where the original hearing has been had before, and the appeal taken from the judgment of, a Justice of this Court.

But, in this particular case, the controversy involved the right of certain persons to act as registrars of election under section 7, chapter 159, Laws 1895, known as the Election Law, and the opinion of the Court sustains the right of a single Justice of this Court to order the removal of a registrar or judge of election after he was appointed by the

Clerk of the Superior Court of BUNCOMBE under said section, and had been inducted into office because the clerk had not followed the requirements of said section as construed by this Court, in the selection of persons belonging to different political parties, and in acting on the recommendation of the chairmen as therein prescribed.

I am not disposed to question the correctness of the construction given to the section of the statute under consideration. But certain persons had been appointed and inducted into office as registrars on 5 October and had continued to act until the 24th of the same month.
(661) The conclusion of the Court is that a Justice of the Supreme Court had authority to order the clerk to remove those incumbents and induct into office the persons whom he ought to have appointed at first, under the construction placed upon the act by this Court. To this ruling I wish to dissent also upon other grounds.

In *Worthy v. Barrett,* 63 N. C., 199, Justice READE, delivering the opinion of the Court, said that every person who is appointed or elected under the provisions of law to discharge a public duty and is required to take an oath to support the Constitution of the United States (as registrars and judges are required to do under said section 7) is a public officer. A further evidence that one is an officer, as distinguished from a mere placeman, is the fact that the law allows him fees and emoluments (as does our statutes, section 50, ch. 159, Laws 1895). As already intimated, *Chief Justice Pearson* went further in *Clark v. Stanley, supra,* and for the Court announced the principle that the right "of appointing to a public office constitutes of itself a public officer." I will not suffer myself to be diverted from the proposed line of my argument by discussing the question suggested by the announcement of this principle, to sustain which *Chief Justice Pearson* relied upon what he denominated that "mine of learning," *Hoke v. Henderson,* 15 N. C., 1.* But it would seem difficult to show that the power of appointing judges and registrars of election was not an attempt to confer upon a clerk another office while admitting that the power to appoint railroad directors was an attempt to give to the presiding officers of the two brances of the Legislature dual official duties growing out of the new agency for the public.

The principle decided in *Clark v. Stanley, supra,* was approved
(662) in *Eliason v. Coleman,* 86 N. C., 235, and *Cloud v. Wilson,* 72 N. C., 155.

An office is property, and the Legislature can not deprive an incumbent of his right to it by merely clothing another official with arbitrary power to remove. *Hoke v. Henderson, supra.* This principle is too familiar to warrant any elaboration of it.

*Since overruled, *Mial v. Ellington,* 134 N. C., 131.

If, then, it be conceded that the registrars who had qualified and entered upon the discharge of their duties on 5 October were incumbent officers on 24 October, and had a property in the offices, it seems to me to follow that no judge or justice could proceed to adjudicate the question involved in the face of the constitutional provision (sec. 19, Art. I), that "in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable." The law points out clearly how the Boards of County Commissioners shall proceed in inducting a sheriff into office. Suppose the Legislature should pass a statute empowering a Judge of the Superior Court, a Justice of the Supreme Court or all of the members of that Court to remove one incumbent and substitute another without the intervention of a jury, would any lawyer hesitate to pronounce the act unconstitutional? Yet, the definition of a public officer in all of the recent decisions of this Court as clearly covers a registrar or judge of election as a sheriff, and I can not see why the Legislature might not with the same propriety and show of authority attempt to give a single judge or justice supervisory power over the Board of Commissioners in the induction of sheriffs and clerks into office, including the right of removing one already inducted. Without denying the correctness of the interpretation of the law affecting registrars and judges, it seems to me that the Constitution protects them against such summary methods of ejectment as fully as it does him who is in possession of land and appears on a preliminary hearing to be a trespasser from (663) being ousted without the intervention of a jury. But it is contended that, because the Legislature has clothed single Justices of the Supreme Court with certain other powers which have been exercised by them without question, therefore, whatever may be its language, it follows that it was not an infringement on the organic law to authorize them to direct the Clerk of the Court to remove an officer after his induction into office. If all of the statutes granting authority were analogous to that before us for construction, which I do not concede, it would not follow that two or a dozen infractions of the Constitution, which had so far gone unchallenged, should authorize the Legislature to disregard its provisions again, and the courts to lend their sanction to the claim of the legislative rights to do so.

The case of *In re Bryan,* 60 N. C., 1, and other cases reported in the same volume and relied on as authority, were decided in 1863, before the provisions of the Constitution of 1868, which are now before us for consideration, were passed, and involved the right of the Supreme Court Judges of this State to issue writs of *habeas corpus* to inquire into the rightfulness of the detention of prisoners by Confederate officers.

But, supposing that the Constitution of 1868 had then been adopted, the remedy provided in compliance with the Constitution (Art. I, sec. 18) for all persons restrained of their liberty is, under the provisions of the statute (The Code, sec. 1623), the ancient writ of *habeas corpus.* The Constitution required the Legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right to "prosecute a writ of *habeas corpus*" it followed, *ex vi termini,* (664) that they were entitled to demand this remedy before any judge of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before Magna Charta, and was only reaffirmed, like many other cardinal principles, in that instrument and those that followed reaffirming it. Hurd Habeas Corpus (2 Ed.), p. 132; Church Habeas Corpus, sec. 3. From the earliest times it extended to all cases of illegal imprisonment, and the jurisdiction was exercised by the Judges of King's Bench, Chancery and Common Pleas. Blackstone says (3 Com., pp. 40 to 44) of all of these courts that they exercised as well original as appellate jurisdiction, and some of them acted upon judicial questions in courts of *nisi prius.* 3 Bl. Com., page 59 *et seq.* When in England the right to prosecute a writ of *habeas corpus* was granted it was construed to authorize an application to any of these Judges. So, when the Constitution enjoined upon the Legislature the duty of providing a remedy, and in the exercise of that duty they passed the statute, the right to "prosecute that writ" implied the right to apply to any judge of an inferior court of general jurisdiction or a court of appeal. Besides all this, the right to bring persons before a court, whose presence is necessary in order to the exercise of its powers, like the right to try its own officers for alleged *torts* or criminal acts done under color of office, is inherent in every court of general jurisdiction, and its exercise is essential to the preservation of its power and dignity. *S. v. Hoskins,* 77 N. C., 530, 534.

The power to commit to answer a criminal charge is the converse of that to relieve from illegal restraint. It has been held from the earliest English history to be inherent in every judicial officer clothed with jurisdiction to try criminal offenses, so that the creation (665) of any such office carries with it to the incumbent the right to issue a warrant for arrest and conduct a preliminary examination. It is the beginning of the exercise of criminal jurisdiction and passes whenever the jurisdiction is given. Thus the Constitution, sec. 27, Art. IV, confers the authority on justices of the peace to try certain criminal offenses, and this grant of jurisdiction carries with it by implication the right to conduct preliminary examinations under such regulations as the Legislature may prescribe.

The order in the exercise of a police power that a person convicted on a trial for bastardy or any other criminal offense shall be sent to the workhouse till he work out the cost, as has been decided in the late opinions in bastardy cases, is not a sentence or judgment rendered upon the trial of an action. The power is entrusted to Boards of Commissioners as well as justices of the peace, not for the purpose of inflicting punishment but to protect the public. The superintendent of an insane asylum is empowered to compel patients to work on the farms attached to such institutions, and the authority is exercised not as a punishment but sometimes to promote the health of the patient and sometimes to get the benefit of his labor as a contribution towards his own support. Neither the county commissioners nor superintendents of asylums, in the cases we have referred to, can be said to impose a sentence or usurp the jurisdiction of a court.

Cited: Reid, ex parte, ante, 649; *McDonald v. Morrow, post,* 676, 677; *Quinn v. Lattimore,* 120 N. C., 433; *McNeely v. Morganton,* 125 N. C., 379.

---

(666)

E. McDONALD v. J. M. MORROW, CLERK.

Election Law—Constitutional Law—Jurisdiction of Justices of Supreme Court—Supervising Superior Court Clerks—Declaring Result of Election—Duties of Clerk.

1. Sec. 7 of ch. 159, Acts of 1895 (election law), conferring on the judges of the Supreme and Superior Courts general supervisory jurisdiction over clerks of the Superior Courts in the performance of their duties under such law, with power to issue rules on such clerks, and on the hearing thereof to make summary orders and directions for the proper enforcement of the law, is not in conflict with the Constitution, and is valid. (AVERY, J., dissents, *arguendo.*)

2. The duties of a clerk of the Superior Court under the election laws of 1895, in tabulating the result of the election and declaring the result, are ministerial; and it is his duty to count all returns received through the regular channels unless it appears on their face that they are not in fact the returns from the precincts as they purport to be, in which case he should not count them until directed by a judge of the Supreme or Superior Court.

This was a proceding under section 7 of chapter 159, Laws 1895, to restrain the defendant Clerk of Superior Court of MECKLENBURG from tabulating and counting the election return from Pineville Township,

Precinct No. 2, on the ground of alleged irregularities, intimidation, etc., heard before Hon. D. M. FURCHES, one of the judges of the Supreme Court.

His Honor, in rendering his judgment, filed the following opinion:

"Upon a full consideration of this matter, I am of the opinion that the restraining order heretofore granted should be vacated and the motion for an injunction should be denied. But, in thus holding, I do not find that there had been no irregularities, intimidations or frauds committed on the election in Precinct No. 2, Pineville Township. It is not (667) necessary that I should undertake to decide these questions, nor do I think that I have the power to do so in this proceeding. My opinion is that registrars and judges of election should be residents of the precinct for which they are appointed. But when they are regularly appointed the law presumes they are rightfully appointed and that they are residents of the precincts for which they have been so appointed. If they are not, the law provides the means by which they may be legally tried and *judicially determined.*

No citizen or voter has the right to take the matter in his own hands, and by fraud, violence, intimidation or other unlawful means attempt to correct such mistake, if one has been made. If this were allowed, free elections and free governments would soon be at an end.

No citizen has the right to undertake to correct such mistake, if one has been made, by officiously running the township lines "and filing his report with the Board," acting in discharge of their duties as registrars or judges of election.

And if any person, by such acts or by threats of violence, or threats of indictment or other lawful means, did intimidate said registrars or judges, and by such means did interfere with them in the lawful discharge of their duty as such registrars or judges, they have violated both the criminal and civil law of the State, and in my opinion neither the State nor the individulas who may have been injured thereby are without remedy. But it is not in this proceeding.

I am in full sympathy with what I understand to be the spirit and meaning of the election law of 1895—a free and fair election and fair and honest count. And while I would not consider it my duty to sustain every technical objection that might be made to the manner of executing this law, if I saw that substantial justice had been done and (668) a fair expression of the qualified voters had been obtained I would feel it my duty to exert all the powers I have to prevent fraud and intimidations of any kind. But it seems to me, from the affidavits filed in this proceeding, that this trouble has probably arisen from the fact that two negroes were appointed registrars in this township.

And while it is not for me to say whether they should have been appointed or not (and I do not say whether they should or should not have been appointed), I do say that under the Constitution and laws of this State the negro is a legal elector and is entitled to accept and hold the office of judge or registrar of elections and to exercise and perform the duties appertaining to the same; and the time has passed (if it ever existed) in North Carolina when he can be illegally interfered with and prevented from discharging his duties as such officer on that account. But it is my opinion that the duties of a clerk, in tabulating the vote of an election and in announcing the result, are ministerial duties, and that it is his duty to tabulate and compute all such votes as come to him through the regular channel prescribed by law, unless it shall appear upon the return itself that it is in fact not the return of said precinct for which it purports to be. In such case he should refuse to count it unless he shall be directed to do so by an order of a judge of the Superior or Supreme Court. Upon an examination of a certified copy (not objected to by the plaintiff) of the return of the election in this precinct to the defendant, I can not say that it contains such inherent and patent defects as would have authorized the clerk to reject it under the rule I have stated; and this being so it was his duty to tabulate and count the same.

Therefore the restraining order heretofore granted in this (669) case is vacated and the motion for a permanent injunction is denied. The defendant, J. M. Morrow, will at once proceed to count said vote as the law directs, and the same as if no restraining order had been issued in this proceeding. The defendant will recover his costs of the plaintiff, McDonald. This 9 November, 1896.

D. M. FURCHES,
Associate Justice of Supreme Court, N. C.

From this judgment plaintiff appealed to the full bench.

W. R. Henry for plaintiff.
Burwell, Walker & Cansler and Clarkson & Duls for defendant.

FURCHES, J. This is an appeal by plaintiff from the rulings, findings and judgment of FURCHES, J., in a proceeding instituted before him under chapter 159, Laws 1895, known as the "Election Law." And upon consideration of the case on appeal the Court, without any division, are of the opinion that the rulings and opinion of the Court below are correct and should be affirmed, if the Court had the jurisdictional power to entertain and decide the matter. This being so, we adopt the opinion of the Court below as the opinion of this Court for the

discussion of the matters of fact and law involved, except as to a constitutional question raised on the argument by a member of the Court.

There is no question, but that the act in plain and unmistakable terms, authorized any Judge of the Superior Court or Justice of the Supreme Court to do what was done by one of the Justices of the Supreme Court in this proceeding. This is admitted.

But it is contended that this act is unconstitutional and void; if not void *in toto,* that it is at least unconstitutional and void so far as it relates to the Justices of the Supreme Court. And as we under-
(670) stand, Article IV, secs. 2, 8, 11 and 12 are relied on as sustaining the contention that it is unconstitutional; that the Legislature had no power to pass the act giving to Judges and Justices of the Supreme Court any such jurisdiction, and the act, or that part of it, is void for this reason.

Congress legislates by virtue of the powers granted in the Constitution of the United States, and can not or should not legislate outside of these granted powers. But the powers of the Legislature of North Carolina are just the reverse of the powers of Congress. The powers of the Legislature are inherent, being derived from the people whom it represents, and it has the power to pass any proper act of legislation that it is not *prohibited* from passing by the Constitution. It then necessarily follows that, unless the Legislature is *prohibited* by the Constitution from passing this act, it had the power to do so.

Article IV, sec. 2, of the Constitution of North Carolina is as follows: "The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

Article IV, sec. 8, provides that the Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below. And the jurisdiction of said Court over issues of fact, and questions of fact, shall be the same they were before the Constitution of 1868. And it shall have power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

The eleventh section provides that the Judges of the Superior Courts shall reside in the districts for which they are elected, and shall
(671) preside in the courts of the different districts, etc., without prescribing any duty they are to perform.

The twelfth section provides "the General Assembly shall have no power to deprive the *Judicial Department* of any power or jurisdiction which rightfully pertains to it as a coördinate department of the govern-

ment; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law in such manner as it may deem best; provide also a proper system of appeals, and regulate by law when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

These are the provisions of the Constitution relied on, as we understand, to maintain the contention that this act is unconstitutional. We must confess our inability to see it.

The second section certainly does not do so. It refers to the whole judicial power as a coördinate department of the Government, and in doing so it refers to the courts mentioned in the Constitution, and such other courts inferior to the Supreme Court, as may be established by law. But it does not undertake to distribute this power among the courts. There is no prohibition in this section. The eighth section establishes the *Supreme Court* as a court of appeals. It does not in *terms* prohibit it from exercising other jurisdiction. But it has been so construed, and we do not wish to question this construction. But the Constitution is speaking of it as an *organized court*. It can not be speaking of the individual members of the court, as they possess no appellate jurisdiction. A single member of the Supreme Court has no (672) more right to hear and determine a case on appeal to the Supreme Court than a justice of the peace would have. It is therefore manifest to our minds that this section of the Constitution, when it speaks of the jurisdiction of the Supreme Court, means the *Supreme Court* and not a single member of the Court. Thus understanding this section, we find nothing in it to *prohibit* the Legislature from giving this jurisdiction to a single member of the Supreme Court "as a court established by law inferior to the Supreme Court," as provided for in sec. 12, Article IV of the Constitution. And why not give a single member of the Supreme Court jurisdiction of this matter, as well as to give him jurisdiction to issue writs of *habeas corpus,* to issue warrants for persons charged with crime, to discharge persons on bail, as judges of the Superior Court may do, to take probate of deeds and the private examination of married women? Code, sec. 949. There is no appellate jurisdiction in this, and yet it is being done every day, and has been for a hundred years. We have an unbroken line of authorities where members of this Court have issued writs of *habeas corpus,* as in *Prue v. Hight,* 51 N. C., 265, where PEARSON, C. J., issued the writ, and by request RUFFIN and BATTLE sat with him on the hearing and concurred in the judgment. *In re Bryant,* 60

N. C., 1; *In re Guyer,* 60 N. C., 66; *In re Grantham,* 60 N. C., 73; *In re Dollahite,* 60 N. C., 74; *In re Ritter,* 60 N. C., 76, and many other cases which might be added.

As we have seen that this matter does not fall within that provision of sec. 8, Article IV, constituting the *Supreme Court* a court of appeals, there is just the same reason for declaring it unconstitutional to give it to a Judge of the Superior Court as there is in giving it to a single member of the Supreme Court, as there is nothing in the Con-
(673) stitution that assigns it to them, and they have no power to act in the matter, except the authority given by this legislation. And if it can not be given to a Justice of the Supreme Court, or to a Judge of the Superior Court, to whom can it be given?

Is it true that we are living in a popular government depending upon free and fair elections, and have a Constitution that prohibits the Legislature from authorizing a Judge or a Justice of the Supreme Court to investigate alleged irregularities of the election officers? If this were so, elections would become a farce and free government a failure. But fortunately for the people and the government, in our opinion this is not true, and fair and honest elections are to prevail in this State.

The Legislature, as has been already stated, has given Justices of the Supreme Court the right to take the acknowledgment of deeds and the private examination of married women. This Court has decided that these are judicial acts. *White v. Connelly,* 105 N. C., 65; *Turner v. Connelly, ibid.,* 72. If it is unconstitutional to authorize Justices of the Supreme Court to investigate the regularity of election officers, why is it not unconstitutional to take acknowledgment of deeds and private examinations of married women?

But it is said they are not litigated. And, if this is so, what has that to do with the investment and exercise of a judicial power? But if the judicial acts of taking the acknowledgment of deeds and private acknowledgment of married women are not litigated judicial matters, and this makes any difference (and we fail to see that it does), how is it with regard to writs of *habeas corpus?* They are almost always litigated.

Within the last two years this Court has had two cases that we
(674) remember—both claims to infant children, and both hotly litigated. *Latham v. Ellis,* 116 N. C., 30; *in the matter of D'Anna,* 117 N. C., 462.

It has been the uniform rule of this Court, so far as we remember, to sustain the constitutionality of the Legislature to pass any act unless *it plainly* appears to be in violation of the Constitution. Sec. 4, Article IX, of the Constitution provides that "the net proceeds that may accrue to the State from sales of estrays, or from fines, penalties and forfeitures, shall be sacredly preserved as a school fund, and for no other purpose whatsoever."

Sec. 3841 of The Code gives one-half of the recovery to the standard keeper, and sec. 3842 gives the whole recovery to the party suing for the penalty. And this Court, in *Sutton v. Phillips,* 116 N. C., 502, sustained these sections, and held them to be constitutional. *Clark, J.,* in delivering the opinion of the Court in *Sutton v. Phillips,* uses this language: "While the courts have the power, and it is their duty in a proper case to declare an act of the Legislature unconstitutional, it is a well-recognized principle that the Court will not declare that this coördinate branch of the government has exceeded the powers vested in it, unless it is plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of them by the representatives of the people."

Sec. 27 of Article IV of the Constitution expressly limits the jurisdiction of justices of the peace in civil actions to $200 on contract, and $50 when not on contract; and in criminal cases where the fine can not exceed $50 or imprisonment for thirty days. But in a case where a justice had sentenced a defendant in a bastardy proceeding, which has been held by this Court to be a criminal offense (*S. v. Wynne,* 116 N. C., 981; *S. v. Ostwalt,* 118 N. C., 1208), and sent the (675) defendant to the workhouse for a term of twelve months to work out the fine, costs, and allowance to the mother, this Court (AVERY, J., delivering the opinion) held this judgment of the justice of the peace to be constitutional. *S. v. Nelson, post,* 797.

Then taking it to be settled law in this State that it must *plainly appear* that the act is in violation of the Constitution or its constitutionality will be sustained, we deem it not improper to state that this is the fourth case that has been before the Court at this term demanding a construction of this statute (the election law of 1895); that these cases have been argued for the defendants by such gentlemen of the bar as E. B. Jones, of Winston; T. F. Davidson, of Asheville; Walker, Duls and Maxwell, of Charlotte; J. S. Manning, of Durham, and James E. Shepherd, of Raleigh. And it never occurred to either of these gentlemen that this act is unconstitutional. We say it never occurred to them because they never made or discussed any such question before us; and we are satisfied that, had it occurred to them, they would in the interest of their clients, have done so. We do not mention this fact for the purpose of contending that, because they did not make the point, the Court should not consider the question and decide it to be unconstitutional if it clearly *appeared* to be so; but as a reason why it can not *plainly appear* to be unconstitutional, as the watchful, vigilant, trained legal eye of some, and most likely of all of them would have discovered this fatal infirmity in the plaintiff's case. They are not the gentlemen to allow such legal questions to lie around them in *plain view* without seeing them. The mistake the gentlemen make who contend that this

act is unconstitutional, is that they fail to distinguish the difference between a single Justice of the Supreme Court, and the *Supreme*
(676) *Court as an organized body.* We have in this opinion marked the line of distinction, which in our opinion relieves this act of the charge of being unconstitutional. The Constitution and the Legislature are dealing with the *Supreme Court as an appellate court,* and the justices as individual members of the Court.

The jurisdiction of the Court being determined, it is suggested that the act of 1895 is unconstitutional, in that it authorizes the taking of the office of judge of election from one person and the giving of it to another. And the leading case of *Hoke v. Henderson,* 15 N. C., 1,* is cited as authority for this position.

Without entering into an extended discussion of this question it is sufficient to say that the doctrine enunciated in *Hoke v. Henderson* does not apply to this case or that of *Harkins v. Cathey, ante,* 649. In that case Henderson was appointed clerk, when the law at the time of his appointment gave it to him for life, or during good behavior. In 1832, and while Henderson was still in possession of this office, the Legislature passed an act giving the election to the people, and under this law Hoke was elected. Henderson refused to vacate and Hoke brought suit for the office, and the Court held that the defendant was entitled to hold the office.

This decision is put on the ground that as the law stood at the time Henderson went in he had a life tenure—a property in the office—which could not be taken from him by subsequent legislation. But in *Harkins v. Cathey, supra,* the parties wrongfully appointed by the clerk, Cathey took whatever they had under the act of 1895, and subject to its provisions, one of which was that the Court had the right to supervise the appointments of the clerk.

This being the case, this provision of the statute entered into
(677) and became a part of the contract or terms under which they accepted these offices to the same extent as if it had been an express stipulation between the parties. *McCless v. Meekins,* 117 N. C., 34, and authorities there cited. This distinguishes it from *Hoke v. Henderson.*

So, after a full investigation of this important question, we are led to a satisfactory conclusion that the act is constitutional and that the judgment should be affirmed.

AFFIRMED.

AVERY, J. (dissenting). Under the rule recently adopted by the Court, a justice is required to file dissenting opinions before the adjournment

*Since overruled, *Mial v. Ellington,* 134 N. C., 131.

of the Court, and as my engagements have left me only a few hours before the last meeting for consultation, I wish that the opinion filed within that limit in *Harkins v. Cathey, ante,* 649, be considered in so far as it is applicable as expressing the reasons for my dissent in this case.

Cited: Harkins v. Cathey, ante, 658; *Quinn v. Lattimore,* 120 N. C., 433; *Ward v. Elizabeth City,* 121 N. C., 3; *Caldwell v. Wilson, ib.,* 469; *Motley v. Warehouse Co.,* 122 N. C., 349; *S. v. Ballard, ib.,* 1026; *Day's case,* 124 N. C., 374, 381; *Wilson v. Jordan, ib.,* 709; *Hutton v. Webb, ib.,* 758; *Greene v. Owen,* 125 N. C., 215; *McNeely v. Morganton, ib.,* 379.

HENRY PARKER v. NORFOLK AND CAROLINA RAILROAD COMPANY.

Action for Damages—Diverting Water on Land by Construction of Ditches—Measure of Damages—Statute of Limitations.

1. An action will always lie for damages resulting from the ponding of water on land by the unskillful construction of ditches until, by continuous occupation for twenty years, the presumption of a grant arises.

2. In an action for damages against a railroad company for ponding water upon land, the plaintiff may elect to claim only the damage sustained up to the time of trial of the action, and if the defendant fail to ask in his answer for the assessment of prospective as well as present damages, the bar of the statute will not prevent a recovery of that sustained within three years prior to the issuing of the summons.

3. Under the established and liberal rule of pleading under The Code system that an allegation of facts entitling a party to affirmative relief is equivalent to a formal demand for such relief, an allegation in a complaint in an action for damages for ponding water on plaintiff's land that the fertility of his land had been destroyed and the land rendered totally unfit for agricultural purposes, was properly held by the trial judge to be a demand for permanent damages.

4. Where a railroad company purchased a right of way over plaintiff's land, and in 1888 constructed its ditches, which were proper for the safety of the roadbed, but diverted surface water from other lands so as to cause an overflow on plaintiff's land whereby it was rendered unfit for cultivation: *Held*, that an action for damages caused by such overflow, brought in October, 1894, was not barred by the statute of limitations as to permanent damages or the damages accruing within three years prior to issuing the summons and up to the time of the trial.

5. In an action for permanent damages for ponding water upon land (over which right of way had been granted) resulting from the unskillful construction of ditches by a railroad, whereby plaintiff's land has been rendered unfit for cultivation, the true measure of damages is the difference

in the value of the land in its condition when the right of action accrued and what would have been its value had the road been skillfully constructed.

6. Although authority to divert surface water to its natural outlet, or an outlet capable of receiving it, is included in the easement acquired by a railroad company in the grant or condemnation of the right of way, the company is nevertheless subject to the same restrictions as any other landowner in carrying it off, and is liable for damages if the work is done negligently.

(678) ACTION for damages, tried at Fall Term, 1895, of BERTIE, before *Boykin, J.*, and a jury. The complaint after the formal parts, alleged:

"3. That said Henry Parker for the past six years planted said land in crops of corn, peas, and other products, and endeavored to cultivate crops on said land until it was rendered unfit for cultivation by (679) the unlawful, negligent and wrongful act of the defendant.

"4. That the defendant, the Norfolk and Carolina Railroad Company, some time about the year 1888, negligently, wrongfully, and unlawfully cut ditches along its right of way on plaintiff's land for the purpose of draining the water of Long-pond and Flat Pocosins on said land by means of its side ditches, and also of draining the water which collected in said side ditches.

"5. That, by reason of the negligent, unlawful, careless, and wrongful cutting of said ditches on said land, it was and is constantly overflowed with great quantities of water, which defendant has diverted from its natural course, and from the way in which it had been accustomed to flow, and thereby emptied the same upon the farm of plaintiff, above described.

"6. That, by reason of the negligent, wrongful, and unlawful, and careless cutting of said ditches, and the negligent and unlawful diverting of the course of said water, the plaintiff's farm has been constantly and repeatedly overflowed for the past six years and the crops destroyed, and the land rendered unproductive.

"7. That, by reason of the negligent, wrongful, unlawful, and careless cutting of said ditches, and the negligent and unlawful directing of the course of said water, the plaintiff's farm by said repeated overflow, has been rendered sour and sobbed, and its fertility destroyed and rendered unfit for agricultural purposes.

"8. That, owing to the acts above alleged, plaintiff has been damaged one thousand dollars."

(680) Therefore plaintiff asks judgment:

"1. For one thousand dollars.

"2. For all equitable and legal relief.

"3. For the costs of this action."

The answer was as follows:

The defendant, for answer to the plaintiff's complaint, says:

"1. That defendant admits secs. Nos. 1 and 2 to be true.

"2. That the defendant is informed and believes that sec. 3 of the complaint is not true, and therefore denies the same.

"3. That the defendant admits that it cut ditches on its right of way, but alleges that the said ditches were necessary for the proper drainage of its roadbed, and that in cutting the same it exercised a lawful right, in a lawful and proper manner, and denies that they were wrongfully, negligently, or unlawfully cut.

"4. That the defendant is informed and believes that sec. 5 of the complaint is untrue, and alleges that the plaintiff's land described in the complaint has not been overflowed more frequently since than before the construction of its roadbed, and that it has not diverted any water from its natural course, or caused it to flow upon the land of plaintiff in greater quantities than it hitherto was wont to do.

"5. That the defendant is informed and believes that sec. 6 of the complaint is not true, and therefore denies the same.

"6. That the defendant denies secs. 7 and 8 of the complaint to be true.

"7. that defendant purchased of plaintiff the right-of-way over the land on which the ditches and drains complained of were constructed, and that said ditches and drains were necessary for the proper construction of defendant's roadbed, and the same were properly and skillfully constructed; and if any damage resulted to plaintiff's land (681) in consequence thereof, it was the natural and necessary result of a proper and skillful construction of said roadbed, and plaintiff, in afterwards cultivating said lowlands was guilty of contributory negligence.

"8. That all of the causes of action set out in plaintiff's complaint accrued, if at all, more than three years before this action was commenced, and are barred by the Statute of Limitations."

Wherefore defendant demands judgment that it go without day, and recover of the plaintiff the costs of this action.

The issues and responses were as follows:

"1. Is the plaintiff's cause of action barred by the Statute of Limitations? Answer: 'No.'

"2. Were the defendant's roadbed and drains mentioned in complaint skillfully constructed, and the drains necessary and proper for the safety of said roadbed? Answer: 'Yes.'

"3. Was plaintiff guilty of contributory negligence in planting corn on his low grounds after the construction of said roadbed and drains? Answer: 'Yes.'

"4. Has defendant wrongfully caused the overflow of the plaintiff's land? Answer: 'Yes.'

"5. What damage is plaintiff entitled to recover, if any? Answer: '$300.' "

There was evidence tending to show that the railroad runs east and west through the lands of the plaintiff. The road is north of the farm. Flat Pocosin is east of the *locus in quo*. Long-pond Pocosin is west of the *locus in quo*. Plaintiff's farm is between these two pocosins. The railroad crosses both pocosins, running east and west. Flat Pocosin naturally drains south. Its waters would not drain over plain-
(682) tiff's lands because there is a ridge between plaintiff's land and Flat Pocosin. This ridge prevents the waters of Flat Pocosin draining on plaintiff's lands, and its waters would not touch plaintiff's lands but for the railroad ditches. Long-pond Pocosin naturally drains south, and its waters would not drain over plaintiff's lands because there is a ridge between Long-pond Pocosin and plaintiff's land. The ridge prevents the waters of Long-pond Pocosin draining on plaintiff's land, and its waters would not touch plaintiff's land but for the railroad ditches. The natural drain of Flat Pocosin is into Wartom Pocosin, and its waters empty into that pocosin more than a mile below plaintiff's farm and south of it. The natural drain of the waters of the Long-pond Pocosin is into Cashie Swamp. By reason of ditches cut along the line of the defendant's roadbed, the waters of Flat Pocosin are drained on plaintiff's land from the east by said ditches, and the waters of Long-pond Pocosin are drained on his land from the west by said ditches.

The plaintiff's lands are drained.

Before the cutting of the railroad ditches the land was in good state of cultivation, yielding eight barrels of corn to the acre, and did not overflow. Since the ditches were cut and the overflow caused by them, the yield has been—some years one barrel to the acre and some years nothing, the whole crop being destroyed. Formerly only the waters of Wartom Pocosin drained over the land, but plaintiff cut a large canal in 1873 that carried off those waters. He never lost as much as a barrel of corn after the canal was cut until the overflowing complained of. Fifteen acres in cultivation, seven more cleared, which he abandoned after the overflowing commenced. Corn has averaged $3 per barrel since defendant cut ditches. The land is now "sobbed and soured" by reason of the overflows. Plaintiff's loss was an average of forty
(683) barrels of corn a year. The land was worth $25 per acre before the overflowing. It is worth nothing now. The defendant cut down two feet ten inches across the ridge between plaintiff and Flat Pocosin, and the same depth as to the ridge between the land and Long-pond Pocosin. The damage is done by reason of the draining of water on it that naturally flowed from it. The ditches cut along the roadbed of the defendant are necessary for the safety of the roadbed, and are

skillfully cut. The plaintiff's land has suffered each year since 1888, when the road was built. This action was commenced 19 October, 1894.

The water comes down quickly and stays long. Sometimes plaintiff can not get from one part of his farm to the other. The plaintiff, before the cutting of the railroad ditches, deeded to the defendant a right of way across his land. The plaintiff does not own Long-pond Pocosin nor Flat Swamp Pocosin, and neither touches his land.

It is admitted that before the drain ditches were cut the plaintiff conveyed to the defendant a right of way across his farm.

The defendant in writing, and in apt time, asked the following special prayers, to wit:

"1. That, it being admitted that defendant purchased its right of way from the plaintiff along which the drains complained of are constructed, if the jury shall find that said drains were necessary for the safe and proper construction of its roadbed, and further that said drains were constructed in a skillful and proper manner, then any damage resulting from the construction of said drain must be borne by the plaintiff, and consequently he is not entitled to recover any damage therefor. This instruction was refused and defendant excepted.

"2. That if the jury believe the testimony of the plaintiff to the effect that the construction of said roadbed and drains had rendered said land totally unfit for cultivation, then the plaintiff must (684) recover the damage done to said land in one action, which action accrued to plaintiff when the roadbed and drains were first constructed; and if the jury believe the evidence, it should find that plaintiff's cause of action is barred by the Statute of Limitations."

This instruction was refused, and defendant excepted.

The Court instructed the jury that plaintiff could not recover anything for damage to crops, but that plaintiff was entitled to recover the difference between the value of the land before the road was built and the value after the road was built, provided that the jury should further find that the railroad company wrongfully and negligently, by its side ditches, drained and diverted from their natural courses the waters of Flat Pocosin and Long-pond Pocosin into Wartom Swamp, and by that means overflowed and damaged the *locus in quo*. To this instruction the defendant excepted.

The Court instructed the jury, that if they believed the evidence, the plaintiff's cause of action was not barred by the Statute of Limitations. To this instruction the defendant excepted.

The jury rendered a verdict as above set out. The defendant moved for a *venire de novo*. Motion overruled, and defendant excepted.

Defendant then moved for a judgment upon the verdict. This motion was overruled, and defendant excepted.

Francis D. Winston for plaintiff.
John L. Bridgers and Martin & Peebles for defendant (appellant).

AVERY, J. There was no error in the ruling of the Court that the plaintiff's right of action was not barred by the Statute of Limitations.

(685) The plaintiff had no cause of action if the defendant's ditches and drains were constructed skillfully, and with a due regard for the rights of the owners of adjacent lands. *Adams v. R. R.*, 110 N. C., 235; *Ridley v. R. R.*, 118 N. C., 996. It could only acquire the prescriptive right to pond water on the plaintiff's land by subjecting itself to an action for the injury continuously for twenty years. *Emery v. R. R.*, 102 N. C., 209, at p. 232; *Sherlock v. R. R.*, 115 Ind., 22; I Wood, Lim., sec. 182, p. 466. Until by acquiescence in such continuous occupation for twenty years the presumption of a grant arises, an action will always lie for damage. The plaintiff may elect to claim only the damage sustained up to the trial of the action, and if the defendant fail to ask in his answer for the assessment of prospective as well as present damages, the bar of the statute will not prevent a recovery for that sustained within three years prior to the issuing of the summons. *Sherrill v. Connor*, 107 N. C., 630; 1 Wood on Nuisance, sec. 180. If, however, the plaintiff fail to declare for permanent damage, the defendant at his option may demand that the assessment shall extend to prospective injury, or by silence acquiesce in the finding only of what may have accrued up to the time of trial. *Ridley's case, supra.* The right of action accrues in such cases when the first injury is sustained (*Ridley's case*, p. 1010) and can not be defeated by pleading the statute, except by showing twenty years continuous user. *Emery v. R. R., supra.*

It being manifest that the Statute of Limitations was in no aspect of the testimony an available defense, the next question that arises is whether the judge erred in his instruction as to the measure of damages. He told the jury in substance that if the defendant in constructing its

(686) roadbed had negligently diverted the waters of Flat Pocosin and Long-pond Pocosin from their natural outlets, and by that means had caused the overflow complained of, the plaintiff would be entitled, in any aspect of the evidence, to recover the difference between the value of the land "before the road was built and the value after the road was built." The plaintiff had complained that, "by reason of the negligent, wrongful, unlawful, and careless cutting of said ditches and the negligent and unlawful diverting of the course of said water, the plaintiff's farm by said repeated overflows, has been rendered sour and sobbed, and *its fertility destroyed and rendered unfit for agricultural purposes.*" It is a well-settled principle of pleading under our Code system, that the right of a particular kind of relief depends not upon the

specific demand for it in the prayer, but upon the facts alleged in the complaint or counterclaim and proved upon the trial. The allegation of facts that entitles a party to affirmative relief under our liberal system of pleading, is equivalent to a formal demand for such relief or a general prayer that would have been embraced under the rules of practice in courts of equity. *Stokes v. Taylor,* 104 N. C., 394; *Harris v. Sneeden, ibid.,* 369; *Roberson v. Morgan,* 118 N. C., 991; *Holden v. Warren, ibid.,* 326. Under the rule laid down in these authorities, it was not error to hold that the allegation that the fertility of plaintiff's land was destroyed, and that it was rendered wholly unfit for agricultural purposes, should be construed as a demand for permanent damages, and constituted notice to the defendant to meet the proof that might be offered to establish the truth of the claim. The defendant had requested the Court to instruct the jury that, if the plaintiff had shown that the land was rendered unfit for cultivation, the plaintiff could recover only permanent damage, and that the right of action accrued when the road was first constructed, and was therefore barred. (687)

While the judge correctly held that the assessment should embrace past as well as prospective injury, he was in error when he told the jury that the plaintiff was entitled to recover for all of the diminution in the value of the land caused by the construction of the road, ignoring the fact that compensation had already been made in the purchase of the right of way for any damage that would result from draining the roadbed and cutting proper drains, provided ordinary care was exercised in doing the work. *Fleming v. R. R.,* 115 N. C., 676. The true measure of permanent damage as held in *Ridley v. R. R.,* 118 N. C., 996, at p. 1009, "was the difference in the value of plaintiff's land in its condition when the right of action accrued and what would have been its value had the road been skillfully constructed."

For the misdirection of the jury, as to the measures of damages, there must be a new trial.

But we deem it best to pass upon the only remaining assignment of error, since the same question will almost certainly be again raised in the Court below. The authority to divert surface water from a drain through which it previously made its way to its natural outlet, with the proviso that it is carried in the side ditches either directly to its natural outlet, or to a natural outlet capable of receiving it, is included in the easement acquired by the unrestricted grant or condemnation of the right of way. *Fleming v. R. R., supra,* at pp. 693, 698; *Staton v. R. R.,* 109 N. C., 337; Gould on Waters, sec. 273. A railroad company enjoys, as to its right of way, the same privilege as any other landowner, and is subject to the same restrictions and qualifications in carrying off, or diverting, accumulations of surface water. *Jenkins v. R. R.,* 110

(688) N. C., 438. It follows that there is no merit in the exception to that portion of the charge relating to the diversion of surface water by the negligent and unskillful cutting of side ditches. If the lands of the plaintiff were overflowed and damaged by reason of such diversion of surface water from its natural outlet, without taking it to an adequate outlet, he was entitled to recover permanent damages under the rule already laid down.

NEW TRIAL.

Cited: *Nichols v. R. R.*, 120 N. C., 497; *Beach v. R. R., ib.*, 502, 506; *Culbreth v. Downing*, 121 N. C., 206; *Ridley v. R. R.*, 124 N. C., 36, 38; *Hocutt v. R. R., ib.*, 218; *Lassiter v. R. R.*, 126 N. C., 513; *Geer v. Water Co.*, 127 N. C., 354; *Phillips v. Tel. Co.*, 130 N. C., 527; *Candler v. Electric Co.*, 135 N. C., 17; *Chaffin v. Mfg. Co., ib.*, 98; *Mast v. Sapp*, 140 N. C., 537; *Thomason v. R. R.*, 142 N. C., 331; *Beasley v. R. R.*, 147 N. C., 365; *Davenport v. R. R.*, 148 N. C., 293; *Roberts v. Baldwin*, 151 N. C., 408, 409; *Williams v. Lumber Co.*, 154 N. C., 310; *Moser v. Burlington*, 162 N. C., 144; *Brown v. Chemical Co.*, 165 N. C., 423; *Rhodes v. Durham, ib.*, 681.

C. P. HUGHES v. WELLINGTON AND POWELLSVILLE RAILROAD COMPANY.

Railroad Companies—Right of Way—Conveyance of Right of Way—Contract, Construction of.

A contract by the owner of land recited that, in consideration of $160 cash "for 50 acres, more or less," he granted, bargained, sold and conveyed, with general warranty, unto defendant's assignor "and its assigns all (to 12 inches across the stump) the timber on the tract of land" described, and that he granted to said company, its successors, etc., "a right of way through and across the said tract and any other lands owned" by him for the purpose of cutting and removing the timber cut from said land by said company, "or for the purpose of cutting or removing timber from any other tract" purchased or controlled by such company, and the right to erect all tracks, etc., necessary for such purposes; and that such owners granted unto said company "and any persons or body corporate, its lawful successors or assigns, the right of way through said tract of land and all lands owned" by them "for a permanent railway, to be owned and operated by any persons or body corporate to whom said" company "shall assign the right hereby specifically granted." Preceding the first granting clause was the following: "It is a part of this contract that the right of way through the open land is excepted." The contract also provided as follows: "The party of the first part hereby grants, accords, and assures unto the party of the second part and its assigns the full term

of ten years within which to cut and remove the timber hereby conveyed": *Held*, that the exception noted in the instrument is limited to the first branch of the contract, and the effect of the agreement was to convey, first, the timber on the woodland, with the privilege of removing the same within ten years, and the right of way across the woodland only for that purpose; and second, to grant to the defendant's assignor, its successors and assigns, the right of way for a "permanent railway" through all of the grantor's lands.

PROCEEDING, commenced before the Clerk of the Superior (689) Court of BERTIE, under ch. 49 of The Code, for the assessment of compensation claimed by the petitioner for land taken and used by the defendant as a right of way.

The issues raised were certified by the clerk to the Superior Court at Term, and the proceeding was heard before his Honor, *Boykin, J.*, at Fall Term, 1895, of said Court.

Section 3 of the petition was as follows:

"That prior to the filing of this petition the said railroad company entered upon said land without license from petitioner, and has constructed, and is now constructing over and upon the open land of said farm, both a switch and the main line of its railroad, thereby damaging said land, taking up and using a portion thereof, digging ditches thereon, raising mounds, ponding water and rendering travel from one part of said land to the other, difficult, and greatly impairing the value of said land for agricultural purposes."

The answer denied sec. 3 of the petition, and a subsequent allegation of the value of the land taken, and as a further defense alleged:

That by deed duly executed in December, 1890, and duly re- (690) corded in Bertie, in Book 68, page 597, which defendant ask may be taken and considered as part of its answer, the plaintiff and his wife conveyed to Nansemond Timber Company of North Carolina, and to its successors and assigns, all the timber upon said lands in complaint described, and a right of way across the said lands for the purpose of removing the timber cut from said land, or any other land owned or controlled by said timber company, also a right of way through said lands for a permanent railroad, to be owned and occupied by said timber company, or any other person or body corporate to whom the said company shall assign said right granted to it.

"That said Nansemond Timber Company of North Carolina conveyed all the rights and interest acquired by it under the deed aforesaid to the Branning Manufacturing Company, by whose license and authority the defendant entered upon the lands described in the complaint, and the said Branning Manufacturing Company has by deed conveyed all of its said interest and right in the said lands, and to the right of way aforesaid, to the defendant.

"Wherefore defendant demands judgment that it go without day, and that plaintiff take nothing by this action."

The deed referred to in defendant's answer was as follows:

"This agreement made this 10 ....., 1890, between C. P. Hughes and ....., his wife, of the county of Bertie, State of North Carolina, of the first part, and the Nansemond Timber Company of North Carolina of the second or other part, witnesseth:

(691) "That in consideration of the sum of one hundred and sixty dollars, agreed to be paid by the party of the second part unto the parties of the first part, viz.: *For fifty acres, more or less, to be hereinafter laid off and designated out of the tract hereinafter described by said party of the second part,* which purchase-money or consideration is to be paid as follows: One hundred and sixty dollars prior to the execution of this deed, the receipt of which is hereby acknowledged.

"It is a part of this contract that the right of way through the open land is excepted. The said parties of the first part do hereby grant, bargain, sell and convey with general warranty, unto the said party of the second part and its assigns, all (*to twelve inches across the stump*) the timber on the tract of land lying in Bertie County, North Carolina, bounded and described as follows, viz.: By the lands of Freeman Perry, A. Bass, T. D. Holly and others.

"The said parties of the first part hereby grant unto said party of the second part, its successors or assigns, agents and servants, a right of way through and across the said tract of land above described, and any other lands owned by said parties of the first part, for the purpose of cutting or removing timber from any other tract of land purchased or controlled by the said party of the second part.

"And said parties of the first part also grant to said party of the second part the right to erect all tracks, machinery, buildings, improvements and fixtures to be used for the objects and purposes set out in the clause next hereinbefore, and also to remove the same at the pleasure of said party of the second part.

"And the said parties of the first part hereby grant unto said party of the second part, and any persons or body corporate, its lawful

(692) successors or assigns, the right of way through said tract of land, and all lands owned by said parties of the first part, for a permanent railway, to be owned and operated by any persons or body corporate to whom said party of the second part shall assign the right hereby specially granted.

"And said parties of the first part hereby covenant with said party of the second part and its assigns to pay all levies, taxes, assessments, and dues upon the land and timber herein described, during the continuance of this contract, and said parties of the first part hereby grant, accord

and assure unto said party of the second part and its assigns, the full term of ten years within which to cut and remove the timber hereby conveyed."

His Honor rendered the following judgment, from which plaintiff appealed:

"This cause coming now to be heard by the Court, both parties being before the Court, and it being agreed by the parties that the plaintiff's right to the judgment prayed depends upon the construction of the deed set out in the pleadings from C. P. Hughes and wife to the Nansemond Timber Company, and the Court being of opinion that the said deed conveyed to the said company and its successors and assigns, the right of way claimed and used by the defendant, of which plaintiff complains, on motion of defendant's counsel it is adjudged by the Court: That the plaintiff take nothing by his action, and that defendant go without day and recover of plaintiff the cost of this action, to be taxed by the Clerk."

F. D. Winston for plaintiff.
Battle & Mordecai for defendant.

FAIRCLOTH, C. J. The only question presented is a construction of the written agreement of the parties. On inspection we are of opinion that the parties had two objects in view: 1. To sell and buy the timber on the woodland, with the privilege of removing the same (693) within ten years, with the right of way and the right to erect tracks, machinery, buildings, improvements and fixtures for that purpose, and to remove the same at the pleasure of the defendant, the right of way not to go through the plaintiff's open land. 2. To grant to the second party and its successors or assigns the right of way for a "permanent railway" through all the lands of the plaintiff.

We think the exception is limited to the first branch of the contract to wit, the timber lands. If we have failed to find the true intent of the parties, it is owing to the inartificial structure and language of the agreement.

AFFIRMED.

ROCKY MOUNT MILLS v. WILMINGTON AND WELDON RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY.

Action for Damages—Common Carriers—Associated Lines of Transportation—Joint Liability of Members—Delay in Transportation—Measure of Damages—Province of Jury—General Appearance of Party Brought in Under Attachment Proceedings.

1. Where a defendant brought into court on attachment process subsequently entered a general appearance and filed an answer to the merits, a motion to dismiss the attachment on the ground that it would not lie under the statute was properly refused as immaterial.

2. Where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading giving the names of the traffic agents of the different lines, the freight charges to be divided according to the respective mileage of the companies, they become a co-partnership, and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line.

3. In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff, which was engaged in equipping a cotton factory, it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff: *Held*, that the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to workmen and such other costs and expenses incurred by plaintiff in consequence of the delay.

4. Where, in the trial of an action against two railroad companies for damages for delay in transporting freight, it appeared that the contract of shipment was made with an association of freight lines of which defendants were members, and the court submitted to the jury an issue as to whether, under the contract of association, the roads over which the freight was carried were responsible for the entire obligation of the contract of carriage, the jury answered in the affirmative: *Held*, that the error, if any, in permitting the jury to pass upon the effect of the contract, was cured by the verdict.

ACTION for damages for delay in delivery of freight, tried before *Hoke, J.*, and a jury, at June Term, 1896, of EDGECOMBE.

At the call of the cause for trial the defendant, the Pennsylvania Railroad Company, moved in apt time for the dissolution of the attachment, theretofore granted on the grounds stated in the motion. Before making the motion the said defendant had entered a general appearance and filed an answer. His Honor denied the motion, holding that

the defendant having entered a general appearance, the effect (695) thereof was to place it on the same ground as if it had been served personally with process.

The defendant, the Pennsylvania Railroad Company, excepted to the refusal of its motion.

The following were the issues submitted to the jury and the responses:

"1. Was there an agreement between the two defendant companies, the Pennsylvania Railroad and the Wilmington and Weldon Railroad, with other associated and connecting lines of railroad, for their mutual benefit, by which was established an all-rail fast through freight line from points north and east to Rocky Mount, and points south, known as the Atlantic Coast Dispatch, by which the different members of the association became agents for the others, to make contracts of affreightment for through freight, binding upon the members along such lines, and over such roads as the freight should be carried, and making such roads over which freight is carried responsible for the entire obligation of the contract? Answer: 'Yes.'

"2. Did defendant, the Pennsylvania Railroad, contract and agree with plaintiff on 15 February, 1893, to ship to plaintiff at Rocky Mount, N. C., from Lowell, Mass., the cotton machinery, as alleged in complaint? Answer: 'Yes.'

"3. Did defendant, the Pennsylvania Railroad, wrongfully and negligently fail to comply with this contract? Answer: 'Yes.'

"4. What damage has plaintiff sustained by reason of the default on the part of defendant, the Pennslyvania Railroad Company? Answer: '$771.66, with interest from 13 March, 1893.'

"5. Did the defendant, the Wilmington and Weldon Railroad (696) Company, contract and agree with plaintiff on 15 February, 1893, to ship to plaintiff at Rocky Mount, N. C., from Lowell, Mass., the cotton machinery as alleged in complaint? Answer: 'Yes.'

"6. Did the defendant, the Wilmington and Weldon Railroad, wrongfully and negligently fail to comply with this contract? Answer: 'Yes.'

"7. What damage has plaintiff sustained by reason of the default on part of defendant, the Wilmington and Weldon Railroad Company? Answer: '$771.66, with interest from 13 March, 1893.'"

The defendant excepted to the submission of the first issue.

The facts sufficiently appear in the opinion of *Chief Justice Faircloth,* and in the charge of his Honor, *Judge Hoke,* which was as follows:

"This is an action brought by the plaintiff, the Rocky Mount Mills v. the defendants, the Wilmington and Weldon Railroad Company and the Pennsylvania Railroad Company, to recover damages for the delayed shipment of freight from Lowell, Mass., to Rocky Mount, N. C. Plaintiff alleges these defendant roads, in connection with other lines, made a

joint contract with it to ship machinery from Lowell, Mass., to Rocky Mount; that, so far as it was concerned, it was a joint contract on the part of these different companies, making each member responsible for the carrying out of the entire contract. The contract was to ship the machinery with remarkable dispatch, and that they failed to
(697) comply with their contract. The freight was delivered in Lowell on 15 February, 1893, and ought to have come to hand in four or five days, but was not received until 12 March, a delay of twenty-five days since the shipment, and causing the mills to stop and causing them damage of $1,000.

"The defendant denies any joint contract with his company making the roads jointly liable, and denies any liability for any damages beyond its own line, and denies doing any such damage as is claimed. On these denials certain issues have been framed for the jury to pass upon.

"The first issue is whether there was a contract and arrangement between the different roads as to a fast through freight line, making each member the agent of the others, and binding them upon a contract for the through shipments of freights. 2d. Whether the Pennsylvania Road made a contract for through shipment. 3d. If the Pennsylvania Road has made any such contract, has it broken it? 4th. If it did, what damages has the plaintiff sustained thereby? There are also three issues addressed to the W. and W. R. R. Co. Did the W. and W. R. R. Co. contract for through shipment? did it break the contract? if so, what damages has the plaintiff sustained thereby?

"As to the first issue: "Was there an agreement between these two different roads, with other roads and connecting lines, to establish this fast through freight route? The burden of these issues is upon the plaintiff. The law requires the plaintiff, when he comes into court and complains of the defendants, to establish his allegations to the satisfaction of the jury by the greater weight of evidence, and he must establish it. If there is any doubt as to how it was, you should find for the defendants, as the law puts the burden upon the plaintiff.

"(a) If you are satisfied from the evidence that these roads
(698) entered into an agreement between themselves and other lines for their mutual benefit, and established a through fast freight route, assuring faster dispatch and charging higher rates, and each was the agent for the other to make binding contracts for through freight, and charge for freight in solid for entire distance, either at point of receipt or delivery, such an arrangement would operate to make each responsible for the other for the entire obligation or contract, unless it was restricted by something in the contract itself, and in such case the jury should answer the issue, 'Yes.'

"(b) But if there was no such agreement, but only an association of independent lines who united for convenience of the shipper to relieve them of the necessity of reshipping at the end of each line, and had not authority given them to make any joint contract for through shipments of freight binding upon them all, you should answer the issue 'No.' Now, how will you answer the first issue? If there was anything in the contract itself to restrict their liability to defaults occurring on their own line, each road would be responsible for its own road only, and would not be responsible for the others.

"(c) The restriction in this contract, however, so far as the evidence in the case is concerned, is only as to damage and injury to goods shipped and not for delay.

"(d) And your response to the first issue will turn upon the fact whether or not it was an association of these roads to establish a through freight route, with power to bind each other by the contract of one for through freight, or an association for the convenience of shippers and without any such power.

"Mr. Ruffin testifies that it was an arrangement between the roads to establish through freight rates, and that Nye was the agent for the northern and eastern section; that they were associated together to secure greater speed and charge higher rates; so far as he (699) knew, they were agents for each other.

"(e) The contract upon its face is for the jury to consider as to whether it was a through route or not.

"(f) (Reads heading) Joyce is one of the officers, Mayo another; T. M. Emerson, G. F. A., is another officer, and they have all testified by deposition in this case. This bill of lading purports to be signed by Chas. F. Nye, who, Ruffin says, was the Traffic Manager for northern and eastern States.

"S. K. Fountain testifies that he is local agent of the W. and W. Railroad Company at Rocky Mount; that he has authority and does give such through bills of lading for the north and east; that he collects money for through freight for this entire line. There is a stipulation in the original contract itself that each road is responsible for loss and damages occurring on its own road; there is no restriction as to delayed freight. If I have omitted any of the evidence or stated it different from the way you remember it, you take your own memory; I read it over only to refresh your memory; the law makes the jury judges of what witnesses say, and, considering the evidence you must act on it as you recall it.

"The defendants offer the deposition of T. M. Emerson, traffic manager of the Atlantic Coast Line; and also that of Messrs. Shipley, McCully,

Hutchins and Mayo, all officers of the different roads, Messrs. Emerson and Mayo of the Atlantic Coast Line.

"Mr. Emerson is an officer of the W. and W. R. R. His deposition is sworn to and is entitled to be received by the jury as any other evidence of a witness here in court. He testifies that there is no through arrangement by which one of the roads becomes bound for the other; (700) that it was an association between independent lines, and each had a right to charge its rates when it wanted to, and that they were associated together for the benefit of the shipper, to prevent him from having the trouble of a forwarding agent for reshipping at the end of each line; that it was not for the benefit of the two roads. Prevost, an officer of the Pennsylvania road, testifies to the same effect, and that no one has a right to make a contract to bind his road except the authorized officers of the same.

"Consider the evidence under the rules here shown, and respond to the first issue 'Yes' or 'No,' as you find it to be.

"Having responded to the first issue, you will then proceed to consider the evidence and determine the second issue.

"Did the Pennsylvania Railroad contract and agree with the plaintiff for the through shipment of the freight from Lowell, Mass., to Rocky Mount, N. C.? The first issue is addressed to the question as to whether there was a contract of the character set out between the roads themselves. This issue is on the question as to whether there was a contract between the Pennsylvania road and plaintiff. The bill of lading is the contract between the parties. It purports to be a contract of the Atlantic Coast Dispatch, signed Charles F. Nye, and the terms of the bill of lading are the terms of the contract. Your answer to this issue depends in a great measure upon your answer to the first issue. No officer of the Pennsylvania road proper signs it, but an officer of the Atlantic Coast Dispatch. But if Nye was an agent of the Pennsylvania road from being the traffic manager of the Atlantic Coast Dispatch, and also an officer of the Atlantic Coast Dispatch, and the Pennsylvania road was a member of this line as set out in the first issue, then the contract of Nye would bind the Pennsylvania road; but if there was no such arrangement between the parties as set out in the first issue, and you (701) answer that issue 'No,' then you ought to answer the second issue 'No'; for if the Pennsylvania road was a member of this association of lines and made terms as set out in the issue, it would be liable on the contract.

"But if it was not a member of such an association it would not be liable. If you find that the Pennsylvania road was one of the contracting companies, and you answer the first issue 'Yes,' you will answer the second issue 'Yes'; otherwise you will answer it 'No.'

"It is only under the arrangement as set out in the first issue, if it existed, that the Pennsylvania road can be held liable under this contract.

"As to the third issue, 'Did the Pennsylvania road break its contract, if it made one?' if you believe this evidence you will answer this issue 'Yes.' Its excuse is that it was crowded with passenger traffic for the inauguration, and if this was all the delay the excuse might be sufficient. The obligation to carry the United States mail and passengers is higher than common freight, but this cannot avoid defendants if evidence is believed; but there was negligence before the 2d, when it was received at Jersey City.

"The Pennsylvania road received this freight on 2 March and delivered it on 12 March at Rocky Mount, and their offered excuse is sufficient to cover this time. It was received at Jersey City fifteen days after it was shipped from Lowell; and in the absence of satisfactory explanation this delay was negligence and a breach of its contract. If you find the first issue 'Yes' and the second issue 'Yes,' the Pennsylvania Railroad was responsible for the entire time of delay which occurred anywhere along the whole line.

"If you find the second issue 'Yes' you will answer the third (702) issue 'Yes,' because they could have gotten it before 2 March and passed Washington before the crowd at the inauguration interrupted its passage, and the inauguration would not have interfered with them.

"As to the fourth issue, 'What damage has the plaintiff suffered by the wrongful conduct of defendants?' If it is responsible at all it is responsible for all the roads. The general rule of damages is such as was in the reasonable contemplation of the parties at the time the contract was made.

"If the road knew, or could have ascertained by ordinary care, that the freight was cotton machinery and of a kind and a character that a delay would be likely to cause damage to plaintiff and stop its mill, the road would be responsible for the damages resulting from the delay and strictly traceable to it. The rule would be interest on the idle capital, for here it was men unemployed by reason of the delay; and I direct you to allow interest on this idle capital so employed as one of the elements of damage. It would be interest on the capital and the amount paid the hands—such hands as you find were thrown out of employment by the delay and which you think the defendants might fairly expect would be thrown out of employment by this delayed shipment.

"The evidence of the plaintiff tends to show that $150,000 was the amount of the capital that remained idle and unemployed. The interest is $750 per month, and 14 days would be 14-26. The plaintiff claims 17 days instead of 14, and if you find that so you can allow 17-30. The

evidence tends to show that 80 hands were idle at an expense of $25 or $30 per day, and 14 days at $25 would be $350; interest on unemployed capital, $375; and cost of telegrams, $2—in their efforts to find the car—making $727. If the company did not know that stoppage of the
(703) mill would follow, and could not by reasonable care know it, then all the damage suffered by the plaintiff would be the $2 spent for telegrams in looking up the car (while engaged in looking up the car) and the per diem of Mr. Ruffin (while engaged in looking up the car).

"Having settled upon the amount of damage, you will consider whether you will award interest or not. Whenever a man knows what he has to pay on a demand, or it can be ascertained by calculation, the law makes him pay interest, and when he does not know the amount the jury declare it; the jury can allow interest or not, as it may think proper. You will allow interest from 13 March, 1893, or not, as you see fit.

"As to the fifth issue, If the W. and W. was a member of this association of roads and you answer the first issue 'Yes' you will answer this issue 'Yes'; but if you find the first issue 'No' and yet you are satisfied that T. M. Emerson was an officer of the W. and W., acting for that company as freight agent, and he caused this contract to be signed for his company, binding his company for the through freight from Lowell to Rocky Mount, his company would be bound for it whether it was a member of the association of roads or not. But if T. M. Emerson did not contract to ship the freight from Lowell to Rocky Mount, you will answer the issue 'No.' Upon the issue J. H. Ruffin testifies that he saw Mr. Emerson personally, and the latter offered him inducements to ship through him; so did S. K. Fountain, professing to act by orders from Emerson and the W. and W. Railroad. He says that he went to Ruffin by authority of Emerson to make the contract, and the terms of the bill of lading are the terms of the contract Mr. Emerson directed him
(704) to make with Ruffin. The agency of Nye is also for the jury to consider. T. M. Emerson says he never made any contract except over his own road. You will consider this; also whether the W. and W. contracted to ship freight through from Lowell, and if it did you will answer the issue 'Yes.'

"As to the sixth issue, If you find they made the contract and believe the evidence, you will find that they broke it. The freight was shipped 15 February and delivered 12 March, and no satisfactory reason given why they did not keep the contract.

"As to the seventh issue, as to the amount of damages the defendant road shall pay, you will apply the same rule as I gave it to you on the fourth issue. The court will arrange as to how it is to be paid."

There was judgment for the plaintiff on the verdict, and the defendants appealed.

Jacob Battle, Brown and Connor for plaintiff.
John L. Bridgers for defendants.

FAIRCLOTH, C. J. The defendants are duly organized companies engaged in the business of common carriers, with their several connecting lines, with all the responsibilities and immunities attaching to the business of such carriers. Whilst we do not find it necessary to enter into the vast field of authorities and decisions defining the duties and relations of such carriers among themselves and to the public, a few general principles may be stated without citing authorities.

Common carriers are required to carry freight safely over their own lines, and make prompt delivery to the nearest connecting line when the consignee lives beyond the terminus of their own line, and when this is done, in the absence of any other agreement, their duties are performed, and they are not responsible for any loss or damage unless it occurs while the goods are in their possession and under the con- (705) trol of themselves or their agents and servants.

A common carrier has power to enter into contracts and may stipulate with his customers, imposing a limitation on his common-law liability in regard to rates, distance, time, and place of delivery and the nature of the articles to be carried, whether perishable or not, unusual hazards and the like: *Provided always,* that the limitations are just and reasonable in the eye of the law, and such contracts will be enforced.

One well-settled rule of law is that no such company can stipulate for exemption from the consequences of its own negligence or that of its agents or servants. A just regard for the rights of individuals and public policy will not permit it. The business of transporting passengers and freight in our State is important and for the mutual benefit of carrier and shipper, and must be conducted under reasonable regulations. The court cannot assume that either party in such business intends to contract contrary to law and such reasonable regulations as the public interests require. An instance of an unreasonable stipulation is pointed out in *Branch v. R. R.,* 88 N. C., 573, where the clause in the bill of lading was that the goods will be shipped "at the convenience of the company," which was held not to protect against an unreasonable delay. The bill of lading filed in the record contains both the receipt and the contract. It is not denied that all the parties had power to enter into the contract, and the terms of the contract are not in dispute. It is agreed that the bill contains the contract. The meaning and effect of the contract on the rights of the parties are the questions presented. The defendant, Pennsylvania Railroad Company, was brought into court by attachment process, and subsequently entered a general appearance and filed an answer to the complaint, and then moved to dismiss the attach- (706)

ment on the ground that an attachment would not lie under our statute. We think his Honor rightly held that the motion to dismiss the attachment was immaterial, as the defendant was then otherwise in court. So that matter is out of the way. It appears that the defendant, Wilmington and Weldon Railroad Company, is one of several connecting lines running south and doing business under the name of the Atlantic Coast Line, and that the defendant, Pennsylvania Railroad Company, is a system with several lines running northeast. The machinery was received at Lowell, Mass., and its destination was Rocky Mount, N. C., a point on the Wilmington and Weldon Railroad Company line, and that these systems connect somewhere between Lowell and Rocky Mount. The contract was between the plaintiff and the Atlantic Coast Dispatch All-rail Fast Freight Line, operating over the Pennsylvania Railroad and the Atlantic Coast Line and connections. This agreement is signed by T. M. Emerson, Traffic Manager Atlantic Coast Line, Wilmington, N. C., and by Charles F. Nye, Northeastern Freight Agent, Boston, Mass., and by other agents of other roads included in said systems. The machinery received was marked, consigned, and destined to the plaintiff at Rocky Mount, N. C.

It is not denied that the defendants collected the whole freight at the point of delivery, and that the same is divided among the several lines in these systems in proportion to the number of miles on each road over which the goods are carried.

Upon these facts the plaintiff argues that the defendants and their connecting roads have agreed among themselves to conduct business through their systems under the name and style of the "Atlantic Coast
(707) Dispatch"; that they have so advertised to the public, and have so contracted with him, and charge higher rates as a consideration for the fast service they profess to give, and that each road which is a member of the "Coast Dispatch" line is liable for the negligence of the other roads. The defendants admit what appears in the bill and receipt, and that they do business under the name and style indicated, but insist that the "Coast Dispatch" is simply the name under which the defendants have agreed to operate their business; that they are thereby a simple association for the convenience of the public and not bound for each other's negligence on the several roads, and that, in fact, it is agreed in the conditions attached to their contract that neither company shall be liable for loss or damage not occurring on its own road.

This action is for damages resulting from delay in the transportation, and not for loss or damage to the articles shipped. The plaintiff argues that there is no stipulation in the conditions against damage for delay, and that as to that matter there is no contract, and that he is remitted to his common-law right against carriers for unreasonable delay. We

are not disposed to put the case upon that technical ground, as we are satisfied the parties desire the opinion of the Court on the main question.

The machinery was on the road from Lowell to Rocky Mount twenty-five days, and allowing the time claimed during inauguration week there is still sixteen or seventeen days, which is conceded to be an unusual length of time for passage between the points. So there was inexcusable delay somewhere along the line. In the view we take, however, the particular place is an immaterial matter. Upon examination and reflection we are of opinion that the defendants and their connecting lines are jointly liable, each for the others, on the contract before us, and that they are also entitled to the same immunity and privilege as (708) if the contract had been made by the individual company sought to be charged under said contract, that is to say, that they are engaged in business as partners under the name of the "Atlantic Coast Dispatch." They are still common carriers, none the less so because they have certain stipulations. Having jointly agreed to conduct the "All-rail Fast Freight Line" business under the name above stated between the terminal points of their connections North and South, and having so informed the public and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business, and such character cannot be thrown aside by any declarations in the contract in relation to the consequences or liabilities attaching thereto.

The "Coast Dispatch" is one of the contracting parties, and if it represents anybody it must represent the defendants as two of its members. The fact that T. M. Emerson, traffic manager, is an agent of one of the defendants, and W. H. Joyce, general freight agent, is an agent of the other, and so, also, of the whole list of agents at different localities can make no difference. Why are they conducting business under the name of the "Coast Dispatch" instead of their own companies? The argument is that they are doing so for mutual convenience. In some respects that is plain; but suppose the plaintiff should have to go to Pittsburg or other distant place to enforce his remedy. The convenience to him is not perceived. The receiving agent, Nye, at Lowell, appearing on the bill of lading as "Northeastern Freight Agent" only, we must assume he represents the "Dispatch" line, composed of defendants and others. Taking notice, as we are at liberty to do, that the numerous transportation lines in our country connecting with each other, constituting continuous lines between remote localities, are important facts in (709) the commercial life of the country, we can readily see that if the shipper should have to go to a distant State and find as best he can the negligent party, and enforce his remedy against him there, then the expense and trouble would in many cases be ruinous. On the contrary, the carrier's remedy in a case like the present would be easy and speedy.

The whole matter is this: The defendants and their associates have engaged in a public business, in the manner described, for mutual benefit and convenience, and attempted to avoid the legal consequences by adopting some fancy name and by stipulating for limitations on the liabilities incurred in the exercise of their privileges in such business. We find no case on "all-fours" with the present, but the discussions in the following cases support the principle and conclusions at which we have arrived: *Bank v. Adams Ex. Co.,* 93 U. S., 174, 183; *Bradford v. R. R.,* 62 Am. Dec., 411; *Clyde v. Hubbard,* 88 Pa. St., 358; 3 Wood Railroads, p. 1922; *Phillips v. R. R.,* 78 N. C., 294, 298; 59 Am. Dec., 447, 450.

The second assignment of error was that the court should have construed the contract and not submitted it to the jury. If so, the verdict cures it, according to our view of the case. The other requests and exceptions are dependent on the view of the court on the principal question. As to damages, we think his Honor instructed the jury according to the rule prescribed by this Court. *Foard v. R. R.,* 53 N. C., 235; *Roberts v. Cole,* 82 N. C., 292.

Affirmed.

Cited: Mfg. Co. v. R. R., 121 N. C., 517; *Neal v. Hardware Co.,* 122 N. C., 106; *Tompkins v. Cotton Mills,* 130 N. C., 352; *Parker v. R. R.,* 133 N. C., 338, 343; *Critcher v. Porter Co.,* 135 N. C., 552; *Harrill v. R. R., ib.,* 609; *Lee v. R. R.,* 136 N. C., 536; *Carleton v. R. R.,* 143 N. C., 47, 49; *Furniture Co. v. Express Co.,* 144 N. C., 645; *Development Co. v. R. R.,* 147 N. C., 509; *Furniture Co. v. Express Co.,* 148 N. C., 90, 100; *Mfg. Co. v. R. R.,* 149 N. C., 264; *Bell v. Machine Co.,* 150 N. C., 112; *Lumber Co. v. R. R.,* 151 N. C., 25; *Brown v. R. R.,* 154 N. C., 304; *Peanut Co. v. R. R.,* 155 N. C., 151; *Pritchard v. R. R.,* 166 N. C., 536; *Fiber Co. v. Hardin,* 172 N. C., 773; *Hosiery Mills v. R. R.,* 174 N. C., 451.

---

(710)

W. B. ALLEN v. WILMINGTON AND WELDON RAILROAD COMPANY.

Railroads—Common Carriers—Ejection of Passengers on Wrong Train —Punitive Damages—Action in Tort—Trial—Practice—Issues.

1. One who boarded a train and, upon offering a ticket to a station at which the train was not scheduled to stop, and refusing to pay the fare to the next station beyond, at which the train would stop, was ejected from the train, cannot recover punitive damages for the *tort* where the ejection was done without insolence or undue force.

2. In the trial of an action it is not error to eliminate from an issue tendered superfluous words and words which give to it a construction not warranted by the testimony.

3. A conductor of one train is not bound by the advice or instructions given by the conductor of another train, if in conflict with instructions from the company.

4. Where an action is brought and tried as an action *in tort* it must be reviewed on appeal on the same theory, and this Court will not undertake to determine whether it might not have been tried favorably for the plaintiff as an action for breach of contract, even though the complaint contains averments which would sustain such an action.

ACTION, tried before *Robinson, J.*, and a jury, at May Term, 1896, of HALIFAX. The facts sufficiently appear in the opinion of *Associate Justice Furches.* There was a verdict for the defendant, and plaintiff appealed from the judgment thereon.

David Bell and Mullen & Daniel for plaintiff (appellant).
MacRae & Day contra.

FURCHES, J. In reviewing this case upon the record and the manner in which it was presented and tried in the court below, the judgment must be affirmed. The complaint was evidently intended to (711) be an action of *tort,* and it was so tried.

The plaintiff bought a through ticket at Goldsboro, from that place to Enfield, on defendant's road. After he bought the ticket a friend of his, thinking the train did not go through to Enfield that night, made inquiry of the defendant's ticket agent at Goldsboro as to whether that train (called the "shoo-fly") went through to Enfield that night, and was told that it did. After plaintiff boarded this train he was told by the conductor, upon presenting his ticket, that this train did not go to Enfield but stopped at Rocky Mount, but was informed by the conductor that another train passed Rocky Mount, and for plaintiff to take that train; that it did not stop at Enfield, but for plaintiff to take that train, and as he had a ticket for Enfield the conductor would have to stop and let him off. Under these circumstances and this advice plaintiff boarded this train as it passed Rocky Mount. Upon presenting his ticket to the conductor soon after leaving Rocky Mount he was told that the train did not stop at Enfield, and the conductor refused to take his ticket unless the plaintiff would pay the additional fare to the next station, where his train would stop. This the plaintiff refused to do, and the conductor stopped the train and asked the plaintiff to get off. This he said he would not do unless he was put off, and told the conductor to take hold of him, which he did, and plaintiff got off. It is alleged in the complaint that plaintiff was rudely, insolently, and with force and violence ejected from defendant's train. But plaintiff's own evidence, as well as that of the other witnesses, shows that this was not the case.

Upon this state of facts plaintiff insisted that he was entitled to punitive damages for this wrongful, violent, and forcible ejection. On the

trial the plaintiff tendered three issues, which he asked the court
(712) to submit to the jury. The first was, "Did the defendant company, *through its conductor,* wrongfully eject the plaintiff from its cars on 17 December, 1893?"

The second issue was in the same language as the first, except it added the words "rudely, wantonly, forcibly, and wickedly" eject the plaintiff from its cars on 17 December, 1893. And the third, "What damage has the plaintiff sustained by such ejection?"

The court did not submit the first and second issues in the precise language in which they were tendered, leaving out of the first issue "through its conductor," rejecting the second issue, and giving the third in the language in which it was tendered by the plaintiff.

We see no error in this ruling. The first issue is in substance the same as it was in the language employed by plaintiff, only improved by rejecting the surplus words, "through its conductor." The second issue was substantially the same as the first, except it added additional adverbs as to the force used to eject the plaintiff from defendant's cars. We fail to see that refusing to submit this issue prejudiced the plaintiff. If it had been submitted it would have devolved upon the plaintiff to show from the evidence that it was true. And upon an examination of the evidence (the whole of which is sent up as upon a nonsuit) we fail to find any evidence to sustain the allegations of force described in this issue. The plaintiff's own evidence does not do so. The third issue was submitted to the jury in the same language as tendered by the plaintiff.

The plaintiff tendered three prayers for instructions, all asking the court to charge that plaintiff was entitled to recover punitive damages
for the wrongful ejection of plaintiff from defendant's cars after
(713) leaving Rocky Mount on the night of 17 December, 1893. The court declined to give these instructions, and we see no error in this, as there was no force used by defendant in making this ejection and as plaintiff was wrongfully on this train. If he had been rightfully on the train, having paid his fare or being ready to pay his fare to the next station where the train stopped, any ejection would have been wrongful—*a tort*—and plaintiff would have been entitled to recover.

The opinion of the conductor on the "shoo-fly" train that the plaintiff could take the fast train, and as he had a ticket to Enfield the conductor would be bound to stop the train and let him off, was misleading to the plaintiff. But the conductor on the "shoo-fly" train had no right to instruct the conductor on the fast train, and he was not bound by it. In fact, he had no right to do so if the advice of the conductor on the "shoo-fly" was in conflict with his instructions from the company. 1 Wood Ry. Law, sec. 164; Meacham on Agency, secs. 273 *et seq.*

As plaintiff was wrongfully on this fast train without paying or offering to pay his fare from Enfield to the next station where the train was scheduled to stop, and in fact refused to pay it, it was not only the right but the duty of the conductor to put the plaintiff off.

But he must do this without using unnecessary force and without insolence. *R. R. v. Nixum,* 19 Am. Rep., 703; 2 Fields Lawyers' Briefs, 59, 60; 34 Atlantic, 880.

This seems to dispose of the case as presented by the record and arguments. But it was suggested in conference that the plaintiff probably had a cause of action for breach of contract for failing to carry him through to Enfield that night—the ticket not allowing him to stop over, and that, although the complaint appears to have been drawn *in tort,* there might be sufficient averments in the complaint to con- (714) stitute a cause of action on contract under *Stokes v. Taylor,* 104 N. C., 394, and that line of cases. And we are not prepared to say that there are not.

But in these cases of defective statement of cause of action the actions were tried upon the true ground of complaint, and upon appeal this Court held that where sufficient appeared in the complaint to make out the case tried, this Court would sustain the judgment. But that is not the case here. The complaint is not only defective in stating a cause of action on contract, but the case was tried as a *tort,* and it was so argued before us. The plaintiff's brief commences with the following paragraphs:

"This was an action brought by the plaintiff to recover damages from defendant for being wrongfully ejected from its cars on the night of 17 December, 1893."

The only thing to consider in this appeal is, Did the plaintiff make out a case from his standpoint?

And as we find no error in the court trying this case as a *tort* for ejecting the plaintiff from defendant's cars—the plaintiff insisting that *tort* was the action he brought and tried, and insisting that this is the only thing to be considered in this appeal—we do not think that it would be fair to the parties or to the court that we should look out to see if it might not have been tried on a different theory with different results. While we would not feel ourselves bound by an erroneous admission of a proposition of law, we must have respect to the manner in which parties present and try their cases.

NO ERROR.

Cited: Graves v. Barrett, 126 N. C., 270; *Hendon v. R. R.,* 127 N. C., 113; *Ammons v. R. R.,* 138 N. C., 559; *S. v. McWhirter,* 141 N. C., 810; *Warren v. Susman,* 168 N. C., 462; *Coble v. Barringer,* 171 N. C., 447; *Webb v. Rosemond,* 172 N. C., 850.

(715)

J. C. MARKHAM, ADMINISTRATOR OF WILLIAM PERRY, DECEASED, v. RALEIGH AND GASTON RAILROAD COMPANY.

Action for Damages—Injury to Person Walking on Side-path Near Track—Evidence, Sufficiency of—Locomotive Engineer.

1. Where a person walking on the side-path of a railroad where he is safe, falls from running or otherwise so as to be struck by the locomotive when it is too late for the engineer to stop, no fault can be imputed to the engineer, and where, in the trial of an action for damages for the injury to such person resulting in his death, those facts appeared together with the further fact that deceased heard and could, by looking backward, have seen the train, it was not error in the trial judge to hold that in no view of the evidence could the plaintiff recover.

2. An engineer seeing a person walking on or near the railroad track, and having no reason to know or believe that he is disabled in any way from seeing, hearing, and understanding the situation, is allowed to presume that the person is sane and prudent, and will either remain upon the side-track, where he is safe, or will leave the roadbed proper upon the approach of the train.

ACTION for damages, for the alleged negligent killing of plaintiff's intestate, tried before *McIver, J.*, and a jury, at April Term, 1896, of WAKE. The following is the testimony:

S. H. Perry, a witness for the plaintiff, testified:

"I am a son of the intestate, and was with him going towards home from Wake Forest; we were walking on the path beside the railroad. I passed him and went over past the crossing; heard the train blow and looked back and saw him down by the side of the road at the end of the crossties, twenty-five or thirty feet from the crossing. The engine
(716) blew after it passed me, twenty-five or thirty yards from the crossing. I heard no other blow or signal. I joined my father at Forestville; he was fifty years old, strong and healthy. He was a farmer. I worked with him. He made $400 or $500 per year. He had been drinking but was not a drunken man; he had a pint of whiskey and four men drank out of it. There was something like a gill left.

"The road crossing was about 150 yards from the depot. I suppose the train was at the depot when we passed along the dirt road. I could have seen it if I had looked. That year my father was not farming; he was hiring himself out."

Dr. J. B. Powers, a witness for the defendant, testified:

"I was at Wake Forest that day and was called to see intestate, and reached him in ten or thirteen minutes after the injury. He said he was running up the path, stumped his toe and fell; that the engine did not touch him but front wheel ran over his arm. He died from the injury.

I smelt whiskey but did not see any. He was rational. He said he heard the train coming and ran to get out of the way and fell."

Mrs. Perry, the wife of the intestate, testified that deceased was fifty years old; a farmer; had no mean habits, but drank his dram. He did not make a habit fo drinking.

James Hartsfield, a witness for plaintiff, testified:

"I met intestate, and was twenty-five yards from him when he fell. I heard the train blow when it had passed the road crossing. I was not looking at him when the train passed. If he had stepped to one side the train would not have hit him. It would not hit him in the path. When I saw him fall the engine was opposite to him." (717)

Plaintiff rested.

His Honor having intimated that the plaintiff would not be entitled to recover in any aspect of the testimony, the plaintiff submitted to a nonsuit and appealed.

B. C. Beckwith for plaintiff.

L. R. Watts, MacRae & Day, and J. B. Batchelor for defendant.

FAIRCLOTH, C. J. His Honor properly held that the evidence in this case was insufficient to justify a jury in returning a verdict for the plaintiff. It appears that plaintiff's intestate was not on the roadbed but walking along the path beside the railroad, that is the foot-path at the end of the crossties. The son said he could have seen the train if he had looked back. The deceased said he heard the train coming, and ran to get out of the way and fell, and his arm was caught by the front wheel. It further appeared that if he had remained in the path the train would not have struck him. *Young v. R. R.*, 116 N. C., 932.

An engineer seeing a person walking on the road track without any reason to know or believe that such person is disabled in some way from seeing and hearing and understanding the situation, may reasonably assume that such person is sane, and as a prudent man will either remain on the side-path where he is safe or will leave the roadbed proper when the train is approaching. If the deceased fell in the wrong direction from running or otherwise near by the train when it was too late for the engineer to stop, it was his misfortune and not the fault of the engineer. *Matthews v. R. R.*, 117 N. C., 640.

AFFIRMED.

Cited: Pharr v. R. R., 133 N. C., 611; *Baker v. R. R.*, 144 N. C., 43; *Crenshaw v. R. R., ib.*, 322; *Patterson v. Power Co.*, 160 N. C., 580; *Davis v. R. R.*, 170 N. C., 589.

(718)

A. D. WILLIS v. ATLANTIC AND DANVILLE RAILWAY COMPANY.

Appeal—Case on Appeal—Waiver of Service—Agreement of Counsel—Certiorari.

Upon an appeal being taken at the close of a trial it was agreed that appellant should have twenty days to serve his case on appeal and the appellee the same time to serve his countercase; and, in answer to an inquiry by appellant's counsel, "To whom shall the case be sent?" one of appellee's counsel said, "Send it to J." The case with the judge's notes was accordingly sent to "J." by express six days before the expiration of the limit, and a letter was also sent by mail the same day. Appellee's counsel did not return the case or notify the appellant's counsel that service by an officer would be required until another letter was written, and the twenty days had expired: *Held*, that, upon the undenied facts as to the agreement, the appellant's counsel had reasonable ground to believe that The Code requirement as to service by an officer was waived, and *certiorari* will issue to bring up the record.

ACTION, tried at Fall Term, 1896, of CASWELL. The appellant moved in this Court for a writ of *certiorari* to bring up the record. The grounds of the motion are set out in the opinion of *Associate Justice Clark.*

J. A. Long and J. W. Graham for plaintiff.
Battle & Mordecai, E. B. Withers, and W. A. Fentress for defendant.

CLARK, J. This is not the case of a verbal agreement of counsel, which if denied the Court will not consider. Rule 39; *Sondley v. Asheville,* 112 N. C., 694; *Graham v. Edwards,* 114 N. C., 228. But here both sides agree substantially as to what passed. It was agreed that in lieu (719) of the time prescribed by The Code the appellant should be allowed twenty days to serve the case on appeal and the appellee twenty days to serve a countercase. In reply to an inquiry of the appellant's counsel, "To whom shall I send the case?" one of the appellee's counsel said, "Send to J." By this arrangement the appellant's counsel understood, and not unreasonably, that The Code requirement as to service was waived, as well as the time limit, and sent the case on appeal and the judge's notes to "J." by express six days before the agreed twenty days expired, and also wrote him a letter by the same mail notifying him of the fact. The appellee's counsel insists that he did not intend to waive service by an officer, but he must have perceived from the appellant's counsel sending the case by express and the purport of his letter that the latter had so understood him, and if he had promptly notified the appellant's counsel of his mistake there would have been ample time

to have corrected the error by causing service to be made by an officer. But he did not give such notification till another letter had been written him and the twenty days time had expired.

We can give no weight to the alleged "liberal practice prevailing in the district," which cannot avail against the statute (*Wilson v. Hutchinson,* 74 N. C., 432), but from the undenied facts there was a reasonable misapprehension on the part of the appellant's counsel, and the writ of *certiorari* should issue. *Parker v. R. R.,* 84 N. C., 118; *Graves v. Hines,* 106 N. C., 323; *Walton v. Pearson,* 83 N. C., 309.

The appellee will have until five days after the certificate of this opinion is filed in the office of the Clerk of the Superior Court of CASWELL to serve his countercase or exceptions to the appellant's case. If the parties cannot agree upon a case, it will then be (720) settled by the judge who tried the case, in the manner provided by The Code.

PETITION GRANTED.

Cited: Smith v. Smith, ante, 311, 313.

FANNY L. UTLEY v. WILMINGTON AND WELDON RAILROAD COMPANY.

Railroad Companies — Appropriation of Land — Damages — Limitations—Color of Title.

1. Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation of the action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of The Code, sec. 155 (2) and (3), (statute of limitations), and the refusal of the trial judge to submit an issue upon the statute of limitations was not error.

2. An unregistered deed, accompanied by continuous possession by the grantor since its execution, is color of title, notwithstanding "Connor's Act" (ch. 147, Laws 1885), and was properly admitted in evidence in a proceeding to recover damages from a railroad for appropriating a part of the land before the registration of the deed.

This was a PROCEEDING under the statute (The Code, chapter 49, commenced by petition and summons by way of notice before the Clerk of the Superior Court of CUMBERLAND on 11 August, 1893, by the plaintiff against the defendant, asking for the appointment of commissioners of

appraisal to ascertain, determine, and report the compensation the defendant ought to pay the plaintiff for constructing its roadway across her town lot in Fayetteville, known as "The Nursery," in 1885,
(721) without her authority and consent, and without any proceeding of condemnation or compensation therefor.

The defendants contended that by the pleadings issues of fact were raised which must be determined before any judgment or order was made by the clerk in the case, and moved that the issues so raised be transferred to the civil issue docket, to be tried by a jury at term.

The clerk overruled said motion and made an order appointing commissioners of appraisal to ascertain and report the damage and compensation the petitioner ought to receive. From this order the defendant appealed to the Superior Court at term.

The case came on to be heard upon the appeal from the clerk before *Hoke, J.,* at November Term, 1895, of the Superior Court of Cumberland County, when the defendant moved to set aside the order of the clerk as premature; and, contending that the court had only jurisdiction upon the appeal to pass upon the order of the clerk, asked the court to remand the case to the clerk with instructions to send up issues for trial to the Superior Court at term.

In response to defendant's motion his Honor had the following order entered of record in the case:

"In this cause, the clerk having issued an order for commissioners to assess damages when there were material issues in bar of plaintiff's claim undecided,

"It is considered and adjudged that the order appointing commissioners be and the same is hereby set aside, and the cause stands for trial in this court on the issues made by pleadings."

Defendant excepted and prayed an appeal, which was dis-
(722) allowed.

His Honor submitted the issues to the jury as follows:

"1. Is the plaintiff the owner and in possession of the tract of land through which the defendant's road runs and described in complaint?

"2. Does the defendant wrongfully use and occupy the said land for its right of way without making compensation therefor?"

The defendant asked the court to submit an issue as to the statute of limitations. Upon objection of the plaintiff the court declined to do so, and the defendant excepted. The plaintiff offered in evidence a deed made by Thos. S. Lutterloh, administrator and commissioner, to the plaintiff, then Miss Fanny Lutterloh, now Mrs. Fanny L. Utley, widow, dated 11 September, 1860, conveying the premises, which was recorded after probate, 26 June, 1886. The defendant objected upon the grounds

that the deed purported to be a deed made by the said Thos. S. Lutterloh as administrator of Charles Lutterloh, Jr., and that unless an order of the court was shown authorizing a sale of the land, and sale had been made in pursuance thereof and a report to court, and a confirmation of the sale was made, that the deed was void.

Plaintiff stated that the deed was offered as color of title. Defendant objected. The court allowed the deed to be read as color, and defendant excepted.

The defendant further insisted and contended that the registration of the deed being in June, 1886, and the railroad having been constructed across the lot in 1885, the deed by subsequent registration, and being also void, could not be made color.

The court overruled the objection and allowed the deed to be (723) read as color. Defendant excepted.

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

R. P. Buxton for plaintiff.
G. M. Rose for defendant.

MONTGOMERY, J. The defendant company on the trial below made numerous exceptions, but in the argument here it abandoned them all except the second and third, which are in substance as follows: "2. Because *Judge Hoke* (at a previous term) upon objection by plaintiff refused to submit an issue upon the statute of limitations, although asked to do so by defendant. 3. Because *Judge Hoke* held that the deed to the plaintiff from T. S. Lutterloh, administrator and commissioner, dated 11 September, 1860, accompanied by possession, was color of title, although only recorded 26 June, 1886, and although the railroad had been constructed across the lot in 1885."

There was no error in the ruling of his Honor upon either of the matters to which those exceptions were made. In the case of *Land v. R. R.*, 107 N. C., 72, it was decided that the defendant there (the defendant here also) could not avail itself of the provisions of section 155, subdivisions 2 and 3 (statute of limitations) of The Code, in actions like this, on account of peculiar features in its charter. The plaintiff, to show title to the land, offered in evidence a deed as color of title which was executed to herself by T. S. Lutterloh on 11 September, 1860, and which had been accompanied by the possession of the plaintiff or tenant since its execution, but which had never been registered until after the railroad had been constructed across the land in 1885. The deed was admitted by the court as color of title, and the defendant filed (724)

the second exception. This deed, accompanied as it was with the possession as above set out, was color of title, notwithstanding Laws 1885, ch. 147. *Avent v. Arrington,* 105 N. C., 377.

NO ERROR.

Cited: Narron v. R. R., 122 N. C., 859, 861; *Janney v. Robbins,* 141 N. C., 408.

WILLIAM WHITLEY v. SOUTHERN RAILWAY COMPANY.

Practice—Dismissal of Action—Waiver—Defective Complaint—Aider by Answer.

A defendant who interposes such an answer as shows him to be cognizant of the real cause of action upon which plaintiff relies, and denies the allegations of the complaint, cures, by way of aider, any defective statement of a cause of action in the complaint and is not entitled to a dismissal on the ground of such defect.

ACTION, heard before *Greene, J.,* at Fall Term, 1896, of CABARRUS, on a motion of defendant to dismiss, because the complaint contained only a statement of a defective cause of action, and the court adjudged that the cause be dismissed and that the defendant go without day and recover costs, and from this judgment the plaintiff appealed.

The complaint is as follows:

"1. Alleges defendant to be a corporation, etc., and is operating the North Carolina Railroad, on which are the towns of Concord and (725) Charlotte.

"2. That the plaintiff's daughter, Mrs. Deaton, desiring to go and take her three small children from Concord to Charlotte on defendant's regular passenger train, which was due and arrived at defendant's station in Concord about 11 a. m., the plaintiff, for the purpose of purchasing the necessary tickets, accompanied said daughter and children to the station, and the defendant agreed and undertook for hire, to wit, the sum of 75 cents, which was paid to it and a ticket obtained for the passage or carriage of said daughter and children and their baggage, before the arrival of said train, to carry on said train, from said station in Concord to defendant's station in Charlotte, said daughter and children and their baggage, which baggage was a valise of ordinary size.

"3. That upon the arrival of defendant's train at the station in Concord, and while it was stopped for passengers to get on and off, said station being then and now a regular station for that purpose, none of

defendant's servants, agents, or employees aided or offered to aid said daughter or children, or either of them, to get on board defendant's train or car, or to put or help to put said baggage thereon; and thereupon the plaintiff, in the presence and view of the conductor, who was the defendant's agent, servant, or employee, and had charge of said train of cars, and after having notified said conductor of his (plaintiff's) intention to aid said daughter and children to get on board of defendant's car with said baggage, and to seat said daughter and children in said car, and, as soon as that was done, of plaintiff's purpose to get off, aided and assisted, with the utmost dispatch and without objection from said conductor or other agent, servant, or employee of defendant, said daughter and children to board and enter with said baggage, the car in which said daughter and children were entitled to ride and have said (726) baggage; and plaintiff started to leave and get off said car and train without delay, and before he had seated said daughter and children, and notwithstanding the hurry and dispatch of plaintiff, of which said conductor had knowledge, and also of his intent to get off, when plaintiff stepped upon the platform of said car for the purpose of getting off said train, and when said conductor knew plaintiff had not gotten off and had not had time to do so, the defendant wrongfully and negligently caused its said train of cars to be slowly and almost imperceptibly moved forward; and although plaintiff was making reasonable haste to get off said train, and could have done so without difficulty and notwithstanding said motion, just as plaintiff reached the first step of the said platform the defendant negligently and wrongfully caused said car to be given a sudden and violent jerk, thereby, without any fault or negligence on his part, causing plaintiff to lose his equilibrium, and before he could gain the same the motion or speed of said train had become such as to throw the plaintiff, without any fault or negligence on his part, but by the negligence and wrong of the defendant, from said platform step upon the ground, and with such force as to break two bones of or near the ankle of his right leg, from which wound or injury he has suffered and does yet suffer great bodily and mental anguish, and said wound or injury has caused him to become a permanent invalid or cripple, to his damage two thousand dollars. Wherefore, plaintiff demands judgment against defendant for two thousand dollars and cost of this action."

The defendant put in an answer, but at the trial moved to dismiss the action upon the ground that the complaint contained only a statement of a defective cause of action.

The motion was sustained, and the plaintiff excepted and (727) appealed from the judgment rendered.

W. G. Means for plaintiff.

No counsel contra.

AVERY, J. The court allowed a motion to dismiss on the ground that the complaint contained only a statement of a defective cause of action. An answer had been filed, which was evidently framed upon the assumption that the plaintiff had properly set forth the material averment that he had been injured by the negligence of the defendant's servants, while on the premises of defendant company accompanying a passenger, and therefore entitled to protection against negligence of servants. *Daniel v. R. R.,* 116 N. C. The defendant admits in the answer the contract of carriage, denies the allegation that the injury was caused by its negligence, and sets up by way of defense the plea of contributory negligence. If it were conceded that the statement of the cause of action was insufficient, such an answer would be held by way of aider to have cured any such defect, though the complaint might have been held bad pleading on demurrer. *Knowles v. R. R.,* 102 N. C., 59. The answer shows that the defendant was not misled, but understood the cause of action to be the alleged injury received by a passenger through the neglect of its servants in charge of the train. The right to dismiss for defects of this kind grows out of the fundamental principle that a declaration or complaint must be sufficient to put the party sued upon notice of the nature of the claim, so as to enable him to intelligently prepare his defense. *Garrett v. Trotter,* 65 N. C., 430. But this and other rights, even though guaranteed by the organic law, may be waived by conduct inconsistent with the purpose to insist upon their enforcement or by a failure in
(728) the manner of asserting them to observe a due regard for the rights of others. *Driller Co. v. Worth,* 117 N. C., 515.

The plaintiff has a right to demand a speedy trial upon putting the defendant on notice to prepare to meet his demand. The defendant demonstrates by the pleadings the fact that it understands the nature of the claim which it has the right to controvert. There is, therefore, no reason why either should be surprised or injured by trying the issues raised by the pleadings.

We must not be understood as deciding that the complaint was in fact defective. But it is sufficient for the disposition of this appeal to hold that, conceding its insufficiency, the defect was cured by the answer. The judgment is

REVERSED.

Cited: S. c., 122 N. C., 987, 989; *Harvell v. Lumber Co.,* 154 N. C., 260.

D. E. PURCELL v. SOUTHERN RAILWAY COMPANY.

Action for Damages — Master and Servant — Vice-Principal — Negligence—New Trial—Misconduct of Jury.

1. A conductor while in charge of an independent train is a vice-principal as to brakemen on the train.

2. The servants of a railroad company have the right to expect and demand that reasonable care shall be exercised by the company in providing for their protection.

3. Where a brakeman, in accordance with his duty, was about to uncouple a car and the conductor uncoupled it and started the train without notice to the brakeman, who in consequence fell and was injured: *Held*, that the company was negligent and liable for the injury.

4. In the trial of an action for injuries to a brakeman caused by the negligence of the conductor, defendant was not prejudiced by an instruction that the conductor could change his own relation to the company from that of *alter ego* to that of fellow-servant of the brakeman by volunteering to anticipate the plaintiff in the performance of his ordinary duty.

5. A verdict awarding damages cannot be impeached by evidence of jurors showing how the damages were assessed.

ACTION for damages, tried at July Term, 1896, of ROCKINGHAM, before *Hoke, J.*, and a jury. (729)

It appeared that plaintiff was a brakeman in defendant's employ; that at night he was standing on the rear end of a freight car in a train, preparing to uncouple it from the car behind it; that the train was still or nearly still at the time; that the conductor had, without plaintiff's knowledge, uncoupled the cars; and that, while plaintiff was thus preparing to uncouple the cars, the engineer, in response to signals by the conductor, suddenly started the car plaintiff was on, and those in front of it, throwing plaintiff to the ground and injuring him.

The issues and responses are as follows:

"1. Was the injury complained of caused by the negligence of the defendant? Answer: 'Yes.'

"2. Did the plaintiff by his own negligence contribute to the injury complained of? Answer: 'No.'

"3. What damage, if any, has the plaintiff sustained by the injury so complained of? Answer: 'Fourteen hundred and ninety dollars.'"

The defendant asked the following instructions:

"1. That if the jury shall believe that the conductor was accustomed to uncouple cars and signal the engineer forward, and such duty was also performed by the brakemen, and that the conductor on this occasion,

desiring to set off a car, uncoupled it and signaled the engineer forward in the performance of this duty, he was a fellow-servant of the brakeman on top of the car."

(The judge refused to give the instruction except as contained in the charge as given, and for such failure the defendant excepted and alleges the same as error.) (730)

"2. If a brakeman on top of a car knew that there was to be a shifting of cars, and was about to go to the end of a car to see if it was an airbrake car, and the conductor uncoupled the car and signaled it forward, it was not negligence on the part of the company that the conductor did not notify the brakeman."

(The judge refused to give this instruction except as contained in the charge, and for failure defendant excepted and assigned error.)

"3. Upon all the evidence in this case the plaintiff is not entitled to a verdict upon the first issue."

(The judge refused to give the instruction, and for this refusal the defendant excepted and assigned error.)

His Honor charged the jury as follows:

"This is a civil action brought by the plaintiff against the defendant for alleged negligence on the part of the defendant, and by which plaintiff claims his foot and leg have been broken and he has suffered damage which he now seeks to recover. There are three issues submitted for the decision of the jury: The first issue is addressed to the conduct of the defendant. Was the injury caused by the defendant's negligence? The second is addressed to the conduct of the plaintiff. Did the plaintiff by his own negligence contribute to the injury? The law being that, though the defendant may have been negligent and so caused the injury complained of, yet plaintiff cannot recover if he has himself been negligent, and by his own negligent conduct contributed to the injury. The third issue is addressed to the question of damage. What damage has plaintiff suffered? This is to be decided by the jury, only in case a finding on the first two issues should make a response to this issue necessary. (731)

"On the first issue the burden is on the plaintiff to show by the greater weight of evidence that the defendant has been negligent; and the responsibility of the defendant on this issue is to be determined by the conduct of the conductor of the train, where he acts for the company, his employer, in the control and management of the train as conductor. No responsibility can attach to defendant company by reason of any misconduct or malpractice on the part of the surgeon who attended plaintiff, even if such malpractice occurred. The only duty attaching to defendant in this respect would be that if the company undertook to employ a physician for the purpose, they must use due care and select

one of known or approved skill. The plaintiff having admitted in open court that the defendant had selected and employed a physician of that character, the defendant has in that respect performed its full duty. The defendants are not insurers of the physician's treatment, and no responsibility can or does attach to defendant for any alleged misconduct of the physician, either on this issue or the issue of damage, should a finding on that issue become necessary.

"Nor is defendant company responsible for any act or misconduct on the part of the engineer. Even if the train started forward by an unusual jerk and in an unusual and negligent manner in starting the engine by the conduct of the engineer of defendant company, the defendant company is not responsible. The engineer was a fellow-servant, and where the injury occurs by the act of a fellow-servant the law forbids a recovery. It would destroy or seriously restrict all employment of labor if a master or employer could be held responsible for the negligent acts of their laborers towards each other, where the employer was not (732) present and which he did not command or direct.

"Nor would the defendant company be responsible on this issue if it was one of the ordinary duties of brakemen to uncouple and start the trains, and the conductor in this instance in uncoupling and starting the train was simply performing the act of a brakeman, for in performing such acts and duties he is considered as a fellow-servant, and for negligence in such acts the company is not responsible to its other employees.

"It is only when the act complained of is negligent and done in the discharge of his duties as a conductor that the act is considered that of the employer and for which the employer becomes liable. If this train was at the time wrongfully and negligently uncoupled and started forward by the conductor, acting as conductor and manager of the train in the capacity of conductor, and plaintiff was then injured, the defendant would be responsible.

"And in that case, if it was not in the usual line of a conductor's business to uncouple these cars, but was in the usual line of plaintiff's duties, and the conductor knowing this, and knowing that the plaintiff was then on the top of the car from which he uncoupled the rear portion of the train, and in a position where a sudden and unexpected starting of the car was likely to cause him an injury, and in discharging his duties as conductor, then and there directed the train to start forward without any warning to plaintiff, and so caused plaintiff's injury, he wuold be guilty of negligence. The failure of the conductor to give the warning and causing the train to start under such circumstances would be negligence for which the defendant company would be responsible, and the jury in that event should answer the first issue 'Yes.'

"If it was in the usual line of the conductor's duties to uncouple that train, or the conductor didn't know that the plaintiff was at the
(733) time in a position to render an injury probable, or if the conductor in uncoupling and starting the train was then in the performance of the ordinary duties of a brakeman, in either event the defendant would not be responsible and the jury should answer the first issue 'No.' "

The court here referred to the evidence of plaintiff and defendant, which is deemed pertinent on the issue, and then further charged the jury:

"If the jury answer the first issue 'No' they need not consider the other issues; but if the first issue is answered 'Yes' the jury shall further consider the evidence, and under the charge of the court respond to the second issue.

"This issue is addressed to the conduct of the plaintiff. As heretofore stated, although the defendant is negligent, the plaintiff cannot recover if his own negligent conduct contributed to the injury. He occupied the position of brakeman, whose duties required him to be frequently on top of trains, and it was proved and admitted to be a place of danger. In accepting such a place, he assumed the duties incident to a place of that kind. It further became his duty to defendant to be alert, and use his faculties for his own safety and protection, and observe the care that a prudent man would use in a dangerous position of that kind, and if the plaintiff failed to use that degree of care which his position and the circumstances required, and in that way contributed to his own injury, he cannot recover.

"If the plaintiff knew the conductor was in the habit of uncoupling cars, or that he was then about to do so, or that he or any other train hand might do so at any moment, it was his duty to guard against that, and take such a position as would insure his own safety; and if he failed in this, and thereby caused his own injury, or helped to do it, the plaintiff cannot recover, and the jury should answer the second issue
(734) 'Yes.' Or, if the plaintiff took a position that was dangerous, and which was not required by the proper performance of his duties, and was thereby injured, he would be barred of recovery, and the issue should be answered 'Yes.'

"But if the plaintiff was in a prudent position, doing what his duties required, and in the proper discharge of them, and was hurt by the negligent starting of the car by the conductor, when he thought and had every reason to believe the conductor was forward or at a different place, there would, in that case, be no negligence on the part of the plaintiff, and the jury should answer the second issue 'No.' "

The court here recited the evidence deemed pertinent, and then further charged the jury:

"If the jury answer the first issue 'No' or the second issue 'Yes,' they must not respond to the third issue. But if the first issue be answered 'Yes' and the second issue 'No,' that is, if the jury find the defendant was negligent, causing the injury, and the plaintiff did not by his own negligence contribute to the injury, then the jury will further consider the evidence and respond to the third issue, which is on the question of damages. What damage has plaintiff suffered by reason of defendant's negligence?

"And on this the jury will award to the plaintiff what, in their judgment, is a fair compensation for the injury which is directly attributed to the negligent act of the defendant.

"The jury will not allow anything for damages which is traceable to any malpractice or bad advice or bad treatment on the part of the physician, nor for any additional damages which arose from plaintiff's own imprudence, nor for any such damages which may have occurred from neglecting directions of or disobeying the doctor, nor even for his failure to send for a physician in time, after he was removed to (735) his own home, and when ordinary prudence would have suggested that another physician should be sent for. The defendant is only responsible for damages arising from and traceable to its own negligent conduct. And applying the rule, the court excluding the consideration of these other matters, the jury can award such damages as they decide to be proper, allowing for plaintiff's loss of time, his pain and suffering, etc. They cannot exceed the amount demanded ($1,990), and may give as much smaller sum as they deem right."

The defendant excepted to the charge as given, and assigned as error:

"That his Honor charged that if it was in the usual line of the plaintiff's, that is, a brakeman's duties, to uncouple cars, and the conductor uncoupled them and signaled the train forward, the company would be liable, whereas he had previously charged that if he (the conductor) was performing the duties of a brakeman in such acts, the company would not be liable.

"For that his Honor charged that it was the duty of the conductor to notify the plaintiff that he was about to uncouple the cars and signal the train forward.

"In that his Honor left it to the jury to say whether the plaintiff knew that the conductor or any train hand might uncouple the cars at any moment, when all the evidence was to the effect that he had such knowledge, and there was no evidence that the plaintiff did not know that the conductor or any trainman might uncouple the cars at any moment; and that his Honor should have charged that, as plaintiff knew that the conductor sometimes uncoupled the cars, or that he or any other

train hand might uncouple them at any moment, it was his duty to guard against it and to take such a position as would insure his own safety.

"For that the charge is inconsistent in itself and calculated to
(736) mislead in reference to alleging the duties of a conductor and of a brakeman in regard to uncoupling cars and acts connected with it."

A verdict was rendered as above set forth, and defendant appealed from the judgment thereon.

Within a few minutes, not exceeding twelve or fifteen, after the rendition of the verdict the court adjourned for the term. The counsel for the defendant, within two hours and a half after the adjournment of the court, learned of certain conduct of the jury in reaching their verdict, and filed the following affidavit:

"F. H. Busbee, being duly sworn, saith that within a very short time after the rendition of a verdict in the above entitled cause, and before it was possible to make any investigation into the conduct of the jury, the court adjourned; that since the adjournment affiant has learned and avers, upon reliable information and belief, that the verdict of the jury in the above-mentioned case was reached by an agreement that each juror should name the amount of the verdict in his opinion proper to be rendered, and add the amount up and divide the amount by 12, and that the verdict was reached in this manner.

"That affiant is attorney for the defendant; that it was not possible to make this motion during the few minutes which elapsed between the rendition of the verdict and the adjournment of the court.

"F. H. BUSBEE.

"Sworn and subscribed to before me, this 30 July, 1896.

"W. A. HOKE,
"Judge Superior Court."

This affidavit was presented to the judge of the court immediately after he reached Reidsville, the station on the railroad, on 30 July, and early the following morning was communicated to the counsel for
(737) the plaintiff, and the defendant's counsel offered to make full proof of the action of the jury if an opportunity should be afforded him.

The plaintiff's counsel objected on the ground that a motion for a new trial upon the ground of the misconduct of the jury cannot be made after the adjournment of the court.

His Honor found as a fact that defendant's counsel had not learned of the action of the jury until after the adjournment of the court for the term, and that he had no opportunity to make the motion pending the term of the court, and that the court adjourned almost immediately upon

the rendition of the verdict. He further found that the defendant's counsel had received the information stated in his affidavit in good faith, and believed the same, but that under the law he could not entertain the motion, or permit the defendant to make further proof thereof if required, and he therefore declined to consider the motion after the adjournment of the court for the term.

The defendant excepted and appealed.

J. T. Morehead for plaintiff.
F. H. Busbee for defendant.

AVERY, J. The conductor, while in charge of an independent train, was a vice-principal, and his acts were in contemplation of law the acts of the railway company. *Mason v. Railway,* 111 N. C., 482; *Turner v. Lumber Company, ante,* 387. Strangers are warranted in assuming that the servants of a railway company will discharge their respective duties, and are not negligent in acting on that assumption. *Tillett v. R. R.,* 118 N. C., 1031, at page 1045. The servants themselves have the right to expect and demand that reasonable care be exercised (738) by the company in providing for their protection. *Mason v. R. R., supra; Chesson v. Lumber Company,* 118 N. C., 59. The conductor, who was the embodiment of the authority of the company, was negligent in ordering any movement of the train without warning to the plaintiff, if he had reasonable ground to apprehend that without such caution the plaintiff acting within the scope of his ordinary duties, might be subjected to danger from such movement. *Little v. R. R.,* 118 N. C., 1072; *Blue v. R. R.,* 116 N. C., 955; *Emry v. R. R.,* 102 N. C., 209 and 234; *Tillett v. R. R.,* 118 N. C., 1031; *Turner v. Lumber Company, supra.*

Though there is conflict in the testimony as to the question whether the conductor was in the habit of taking the place of the brakeman by uncoupling cars, it was not disputed that it was a duty which the brakeman was accustomed to perform, and which he was justified in assuming devolved upon him when he was injured. The plaintiff was not negligent in preparing in the usual way to uncouple the cars, and in subjecting himself only to such danger as he knew to be incident to discharging that duty. If the conductor knew that the plaintiff usually descended from the top of the cars for that purpose, and in doing so necessarily placed himself in a perilous position, he was culpable, if he anticipated his subordinate, and without warning to him or in any way looking to his safety ordered the car to be moved suddenly forward, and by such carelessness he subjected the company to liability for any damage that might have reasonably been expected to ensue from his omission to give such warning, and that might have been averted by giving it.

Acting under the instruction given by the Court, the jury
(739) must have found from the testimony that it was not in the usual line of the conductor's but was in the usual line of the plaintiff's duty to unconple the cars, and that the conductor, knowing that a sudden and unexpected starting of the train without notice to the plaintiff would probably endanger his safety, ordered it to be moved without giving warning to him. The defendant had no cause to complain of the instruction of the Court that the conductor could change his own relation to the company from that of *alter ego* to that of a fellow-servant of a brakeman by volunteering to anticipate the plaintiff in the performance of his ordinary duty. If the conductor had ordered the fireman to do an act which might reasonably have been expected to endanger the brakeman, and which did result in injury to him, the company would have been answerable for the natural consequences of his order. It would be unreasonable to hold that, by doing the careless act himself instead of ordering another who felt constrained to obey to do it, he relieved the company of responsibility. *Qui facet per alium facit per se* is the maxim which applies where, as vice-principal, he compels another to do what is culpable. It would be illogical to say that, where he directs or orders, he utters the command of the company and adopts for it the act of the employee who obeys, and yet when he does the act in proper person he descends from the role of vice-principal to that of servant.

The evidence of a juror cannot be heard to impeach his own verdict by showing how the damage was assessed. *Johnson v. Allen,* 101 N. C., 137; *Jones v. Parker,* 97 N. C., 33; *S. v. Royal,* 90 N. C., 755. There was, therefore, no error in refusing to grant a new trial upon the affi-
davit setting forth information derived from jurors as to what
(740) occurred in their own private consultations. The truth of the allegation could not have been shown except by allowing one of the jurors to become a witness, and this the policy of the law will not permit.

NO ERROR.

Cited: *Pleasants v. R. R.,* 121 N. C., 495.

B. F. WEEKS v. SOUTHERN RAILWAY COMPANY.

Trial—Evidence, Sufficiency of for Jury—Nonsuit.

1. Where there is evidence of a fact which, in connection with other matters if proved, would establish the fact in issue, then the fact so calculated to form a link in the chain, although the other links are not supplied, is some evidence tending to establish the fact in issue, and its sufficiency should be passed on by the jury; otherwise when the evidence under no circumstances has any relevancy or tendency to establish the fact in issue.

2. In an action for personal injuries caused by being thrown from a car by a collision with an engine, where there was some evidence tending to show that a sudden push of the engine was reckless negligence, it was error for the court to state that under the evidence the plaintiff was not entitled to recover.

ACTION for damages for injuries caused by the negligent operation by defendant's servants of one of its cars in which plaintiff was at work with defendant's knowledge, tried before *Starbuck, J.*, at March Term, 1896, of MECKLENBURG. The facts appear in the opinion of *Chief Justice Faircloth.*

Burwell, Walker & Cansler for plaintiff. (741)
Geo. F. Bason for defendant.

FAIRCLOTH, C. J. This case was tried upon the following evidence, taken as true for the purpose of this trial:

B. F. Weeks, the plaintiff, testified in his own behalf as follows:

"On 16 August, 1895, I was employed by the Charlotte Cotton Mills as a carpenter to fasten a picker in one of the defendant's box cars, ready for shipment. The defendant placed the car on the sidetrack in front of the warehouse of the cotton factory in order that the picker might be loaded and fastened down in the car properly for shipment. I was instructed by my employer to go in the car and nail down the picker. While I was yet in the car, engaged in fastening down the picker, the defendant's agents backed its shifting engine in on the sidetrack, attached it to the car in which I was working and pulled it out on the main line in order to run in a coal car over the sidetrack to the cotton factory. I continued to work while the car was moving. After box car was pulled out on the main line, the coal car was attached in the rear and the box car and coal car were all pushed back upon the sidetrack in front of the factory. Just as the car in which I was working got about where it was standing when it was first attached to shifting engine the train came almost to a standstill. It just was moving. Just at this

time I finished my work, and was in the act of rising from the floor of the car where I had been nailing down the picker, when the engine gave a sudden push and threw me out of the car onto the track, causing the serious injury to my leg, jerking it out of joint, from which I was laid up six weeks, since which time I have been compelled to use
(742) crutches until two weeks ago. The picker was located in the middle of the car between the two doors, and I was working within two or three feet of the door; was about that distance from it when I was thrown out. My work required that I should be that close to it. Hughes, Torrance and two negroes were in the car with me. When the car was suddenly pushed back and I was thrown out, the picker was most tilted over and the two negroes were nearly knocked down. Defendant's agents knew I was at work in the car. I was at the time of the injury working for $1.25 per day. Have not been able to do any work since. My leg hurts when I walk and never will be any account to me again.

The defendant introduced evidence also which is not necessary to be recited in the view we take of the case. Contributory negligence on plaintiff's part was alleged by defendant.

At the close of the evidence the Court intimated that in no view of the evidence was the plaintiff entitled to recover. Exception, nonsuit and appeal by the plaintiff. This is all we have to consider, that is the much-discussed question of the sufficiency of evidence to be submitted to the jury. *Young v. R. R.*, 116 N. C., 932; *Young v. Alford*, 118 N. C., 215.

The right of trial by jury is "sacred and inviolable." This principle is found in our fundamental and organic law, and can only be departed from when well-established principles of law justify it.

Juries are not allowed to encroach upon the province of the judge, nor can the judge usurp the true province of the jury. It is easy to lay down the rule, but its application to a given state of facts is sometimes more difficult. For this opinion we will refer to and adopt the opinion in *S. v. Allen*, 48 N. C., 257, on this subject: "The distinction be-
(743) tween 'no evidence' and 'slight evidence' is often a very nice one, and the dividing line can scarcely be traced. The safest course in such cases is to depend upon the good sense of the jury, and to take it for granted, subject to the corrective power of the court, that a jury will not conjecture or guess at a fact when there is no sufficient evidence to establish it."

The dividing line may be marked then, for, when there is evidence of a fact which, in connection with other facts, if proved would form a chain of circumstances sufficient to establish the fact in issue, the fact so calculated to form a link in the chain, although the other links are not

supplied, is nevertheless *some* evidence tending to establish the fact in issue, and its sufficiency must be passed on by the jury; but when the evidence under no circumstances could form a link in the chain, and, although competent, yet has no relevancy or tendency to prove the fact in issue, the jury should be so instructed. The evidence in this case runs near the line, and we are not prepared, under the above rules, to say there is no evidence fit for the jury to consider. Whether the "sudden push" of the engine was reckless or unavoidable or accidental is not for this Court to determine.

NEW TRIAL.

Cited: Gregory v. Bullock, 121 N. C., 145; *Graves v. R. R.,* 136 N. C., 4.

(744)

J. F. BRADLEY, ADMINISTRATOR OF SARAH J. KENIPE, v. OHIO RIVER AND CHARLESTON RAILROAD COMPANY.

Removal of Causes—Petition for Removal—Diverse Citizenship Must Exist at Commencement of Action.

Where neither the petition for the removal of a cause from a State to a Federal court on the ground of diverse citizenship nor any other part of the record shows the diverse citizenship at the *commencement of the action,* the Federal court is without jurisdiction, and its order of removal based on such defective petition is a nullity.

ACTION, pending in the Superior Court of MCDOWELL. At May, 1896, Special Term, before *Brown, J.,* the defendant, the Ohio and Charleston Railway Company, presented certain orders and proceedings of the Circuit Court of the United States, undertaking to remove this cause to the said Circuit Court, upon the grounds of local prejudice, and that said defendant was a corporation and citizen of another State.

The defendant thereupon moved this Court that it proceed no further in said cause as to said defendant.

His Honor refused the motion, and the said defendant appealed.

E. J. Justice for plaintiff.
P. J. Sinclair for defendant.

MONTGOMERY, J. There were many questions raised in the record, all of which were discussed at length in the argument here. It is unnecessary, however, for us to consider but a single one of them. Both the affidavits for the removal of the cause from the State Court

(745) to the United States Circuit Court and the order of his Honor, *Judge Dick,* of the latter court, directing its removal, are fatally defective in their most material and necessary features. The affidavit shows that the petitioner (the defendant in the action) was, at the time the affidavit was made, a resident and citizen of the State of South Carolina, and that the plaintiff was at that time a resident and citizen of the State of North Carolina, and the order of removal only recites the citizenship of the parties as it was set out in the petition. It does not appear affirmatively, either in the petition or in the order of removal or anywhere else in the record, that the diverse citizenship of the parties existed also at the time of the *commencement* of the action. And for that reason the order is a nullity, the Circuit Court not having jurisdiction to make the order on the affidavit. *Stevens v. Nichols,* 130 U. S., 232, is exactly in point and decisive of this matter. The Supreme Court said in that case: "The petition for removal does not allege the citizenship of the parties except at the *date when it was filed,* and it is not shown elsewhere in the record that Stevens & Myrick were at the *commencement* of the action, citizens of a State other than the one of which the plaintiff was at that time a citizen. The Court therefore can not consider the merits of the case." The judgment is reversed upon the ground that it does not appear that the Circuit Court had jurisdiction, and the case is remanded to that court with directions to send it back to the State Court.

NO ERROR.

Cited: Mecke v. Mineral Co., 122 N. C., 798; *Howard v. R. R., ib.,* 954; *Debnam v. Telephone Co.,* 126 N. C., 837. See *S. c., post,* 918.

---

(746)

IREDELL WILLIAMS v. SOUTHERN RAILWAY COMPANY.

Action for Damages—Master and Servant—Negligence—Trial—Instruction.

1. An employer is required, in the conduct of his business by his servants, to provide only against danger that can reasonably be expected, and not against the consequences of accidents that may or may not happen, and whether due diligence has or has not been observed by the employer to guard against injury to his servant is a question for the jury.

2. In the trial of an action by a servant against his master for injuries received from the fall of a timber which was being raised by a rope which slipped off, it was error to instruct the jury that the defendant was negligent if the rope was so fastened that it was "liable" to slip off.

WILLIAMS *v.* R. R.

ACTION, for damages, tried before *Norwood, J.*, and a jury, at Spring Term, 1895, of SURRY. The action was prosecuted by the plaintiff as next friend of his son, a minor, who was injured while in the employment of the defendant and engaged in repairing a bridge on the Northwestern North Carolina Railroad.

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

"1. Was the plaintiff's son injured and endamaged by the default and negligence of the defendant? Answer: 'Yes.'

"2. If so, did the plaintiff's son, by his own default and negligence, contribute to the injury he sustained? Answer: 'No.'

"3. Was the plaintiff's son a minor? Answer: 'Yes.'

"4. What damage, if any, has plaintiff sustained? Answer: 'Fifty dollars.'"

John Williams, on whose behalf the action was brought, tes- (747) tified:

"We were ending up a log 12x12 by 14 feet long. I was at the foot of the log; the rope slipped off and I heard Reister shout, 'Turn it loose,' and it fell on me. The old posts stood so thick that I could not get out. I had no notice in time to get out of the way. Reister hired hands there, and discharged them when he felt like it. I can walk a little piece now, but when it is hot weather I can not do anything. When I lift anything heavy my leg gives way. I was past eighteen years old when I was hurt. I was hurt about two miles from Rockford. Mr. Reister was there when I was hurt; so was Summers. Two men were above, pulling the log up by a rope—the lower end of the log was mortised and was to fit into a hole. I was at the foot, and so were the rest of the hands. The rope slipped off. When they said 'Look out,' I felt the log. The beam fell because the rope slipped off. There were enough men there to have held the log up if they had not let loose."

W. A. Summers, for defendant, testified:

"I am a sub-foreman on railroad under Mr. Reister. I was in charge of this work when plaintiff was hurt. We were raising a timber 12x12 and 14 feet long; timber had rope on it. I was at the foot of it. There were three men back of me (including the plaintiff) lifting the logs. They were pulling up the log. When rope slipped off I shouted to them, and they all got away except plaintiff; the log fell on him. He could have gotten out of the way when the rope slipped off The hands that I had there were capable men for the work. I went to plaintiff and asked him to work his toes, and he did so. He came to us to get work, and told us that he was 21 years old. Reister told him that he looked too light. He said that he weighed one hundred and fifty pounds. (748) Reister employed him. He went off and got his bedclothes. I always took good care to avoid accidents. I had before this cautioned

this boy to be careful. I can't state positively whether the men that had hold of the log could have held it until they all got out of the way. They all let go when I told them to let loose. I am a section foreman now."

W. W. Reister, for defendant, testified:

"I was foreman on railroad work. When we were raising this log we had capable men. I do not remember how many. Two men were pulling the log up by a rope. Summers was down at the bottom of log. I could not see them. I heard Summers say, 'Look out!' I asked if anybody was hurt. I saw John. He said that he did not think that he was much hurt. He worked his foot. His leg was mashed but not broken. This railroad has no rule forbidding the employment of minors. I had told John that I doubted his being twenty-one years old. I don't know whether the men could have held up the timber after the rope slipped or not."

Among other instructions the court told the jury "that it was negligence to raise the timber with a rope if it was so fastened that it was liable to slip off and injure the said John Williams, or any one else employed under Mr. Reister and working there that day."

There was judgment for the plaintiff on the verdict, and defendant appealed, assigning (among other alleged errors) the instruction above set out.

Virgil E. Holcomb for plaintiff.
Glenn & Manly for defendant.

AVERY, J. It was conceded by both parties that the foreman or superintendent of the work were both representatives of the company (749) and not fellow-servants of the plaintiff's injured son. That admission puts the first question that would have arisen in the natural order of inquiry in this case behind us. If such was the relation subsisting at the time of sustaining the injury, an act of the boy which ordinarily would have been deemed negligent because it exposed him to apparent danger would not, if done suddenly under the command of his superior, have made him culpable, because the law assumes that his conduct was influenced by a well-founded fear of losing employment if he disobeyed the order. *Turner v. Lumber Co., ante,* 387; *Mason v. R. R.,* 111 N. C., 482; *S. c.,* 114 N. C., 718; *Logan v. R. R.,* 116 N. C., 940. The court told the jury, however, that "it was negligence to raise a log with a rope if the rope was so fastened that it was *liable* to slip off and injure John Williams or any one else employed under Reister and working there that day." The word "liable" must be interpreted in this connection in its application to the manner of tying the rope, in the sense of "exposed to the casualty or contingency more or less probable" of

slipping off the log. Webster's Dictionary. The jury were warranted in drawing the inference that if the rope was so tied that by any accident due to any cause, however unexpected, it might slip off, the defendant was guilty of negligence and answerable for the injury. Persons, natural or artificial, are wanting in ordinary care if they fail to take precaution to prevent others from being subjected to danger, when by reasonable diligence, and without omitting to discharge a higher duty, they can avert such peril. But the law requires of all the exercise only of such a degree of diligence in the management of their own affairs, whether as to what is done or left undone by them, that they do not unnecessarily subject others to danger that might naturally have been expected as a consequence of such acts or omissions. *Turner v. Lumber* (750) *Co., supra; Blue v. R. R.,* 116 N. C., 955; *Little v. R. R.,* 118 N. C., 1072; *Tillett v. R. R.,* 118 N. C., 1031. The foreman was not bound to so fasten a rope as to insure all of the employees of the company who were assisting in raising the timber against casualties. His duty was done when he provided against what could reasonably have been expected, not against the consequences of accidents that might or might not happen. *Emry v. R. R.,* 102 N. C., 209, at page 226. The court below erred in so defining the duties of the defendant as to require it to provide against all accidents caused by defective appliances or machinery, or the failure to arrange and handle appliances in the safest possible manner. Whether due diligence has or has not been shown, to discover and guard against injury, as a result of the conditions shown to have existed, is a question for the jury. *Mason v. R. R., supra.*

Did the defendant exercise reasonable care to provide for the safety of those engaged in raising the timber? It was the province of the jury to answer this inquiry. In the aspect of the evidence presented in plaintiff's request, it was error to tell them that in law the defendant was negligent.

It did not necessarily follow, because the jury thought it possible for all of the employees to have held up the log after the rope had slipped, that the foreman was culpable for telling all to get out of the way. The others did escape unhurt. The question whether all might have held it up was one as to which either of two inferences might have been drawn by the jury, and either would have been based merely upon the opinion of a witness. For error mentioned,

NEW TRIAL.

Cited: Johnson v. R. R., 122 N. C., 958; *Harris v. Quarry Co.,* 131 N. C., 559; *Whitson v. Wrenn,* 134 N. C., 91; *Fitzgerald v. R. R.,* 141 N. C., 545; *Bowers v. R. R.,* 144 N. C., 688.

(751)

H. N. PHARR, ADMINISTRATOR OF JACK EZZELLE, v. THE SOUTHERN RAILWAY COMPANY.

Action for Damages—Railroad Company—Duty of Engineer—Injury to Person on Track—Negligence—Liability Notwithstanding Contributory Negligence.

1. It is the duty of an engineer while running an engine to keep a careful lookout along the track in order to avoid or avert danger in case he shall observe any obstruction in his front.

2. Where a man, apparently intoxicated or asleep, or both, was lying so near the outer side of a rail as to expose himself to danger from a passing engine, and the engineer by ordinary care could have seen him in time to stop the train by the use of the appliances at his command and without peril to passengers on the train, before the engine struck him, the company is liable for the resulting injury, notwithstanding the man's contributory negligence.

ACTION, tried before *Brown, J.*, at October Term, 1896, of MECKLENBURG. The action was brought by the plaintiff, administrator of Jack Ezzelle, deceased, to recover damages for the negligent killing of the plaintiff's intestate by the agents of the defendant company, on the.... day of September, 1895.

The evidence, offered by the plaintiff to sustain his claim for damages, is as follows:

W. E. Younts, witness for the plaintiff, testified as follows:

"I saw the place pointed out to me by James Crawford where Jack Ezzelle was killed. The track was level on side. I measured the distance from where deceased was killed to the first curve in the track, and it was 600 steps. I tried in stepping it to step a yard, and I think I did.

(752) The day deceased was killed was a clear day, to the best of my recollection. The train that killed him was going in the direction of Columbia, that is, south. The place where deceased was killed was 600 steps south of the curve. I don't think there was anything on the track to prevent deceased from being seen by the engineer. The roadbed had recently been leveled up with gravl. Deceased was 45 or 50 years old and was a colored man—would get drunk. Crawford pointed out to me the place where his body was found. His head was lying between the crossties just outside of the rails, and his body extended across the ditch. I saw deceased just after he was killed and saw blood on his head. He got drunk very often and had whiskey in his valise the day he was killed, also railroad ticket in his pocket from Charlotte to Fort Mill, S. C. Ticket was found at coroner's examination."

J. R. Hunter, the engineer on the train that killed the deceased, testified as follows:

"Was engineer of No. 63. Between 11 and 12 o'clock of the day as I got out of the curve, my train going south, I saw something lying on side of track in ditch. Could not tell what it was. Had no idea it was a man. When I got between 50 and 75 yards of it the object raised its head. I then discovered for the first time that it was a man. I at once put air brakes on as hard as I could get them and blew for hand brakes, which were applied at once. It was a freight train and had some air brakes and some hand brakes. The effect was to stop the train at a little more than its length. It was made up of 30 box cars, some empty and some loaded. Each box car was 32 feet long. The last car was 10 or 15 car lengths from body after it passed and the train stopped. I did all I could to stop after I saw the object was a man. I did not reverse the engine, because I could not have stopped the train as quickly if I had. I applied the air brakes to the driving wheel. The engineers' schools teach that it is best not to reverse the engine when air (753) brakes are on drivers. The wheels will slide. The brakes will stop the train quicker if the engine is not reversed. After stopping the train, went back and found the body of colored man lying in ditch. His head was lying on the crossties outside of the rails. A bolt under the pilot of the engine had struck his head and inflicted a would that caused his death. He was still breathing when we first found him, but died in a few minutes. I carried the body to Pineville. If he had not raised his head he would not have been struck by the engine. There was a valise containing a jug of whiskey setting beside the body when we found him. The track was straight and down grade towards Pineville from the curve. We were running 25 miles an hour. When I saw the object first I thought it was a crosstie lying out from the track. I looked carefully. Crossties are frequently left that way. I did not see the man's head. It is nothing uncommon to see such objects along the track. I put on emergency brakes as soon as I had reason to see it was a man. I had already applied some brakes in getting ready to stop at Pineville. Had all the brakes partly on when I saw it was a man, but put them on with full force and blew for hand brakes as soon as I discovered the object to be a man. Had two regular brakemen and conductor on train. The freight conductors also brake, and he was on top of the train when it stopped. Air brakes are better than hand brakes. Had some air brakes on 10 cars and hand brakes on 20. After applying all brakes the train stopped in 1,500 or 1,600 feet. No obstructions on track. No part of body on track. I did not suppose the object was a man until he raised his head. Then I put on all the power I had to stop the train."

D. M. Broome, the fireman, the next witness of the defendant, testified: (754)

"I first saw object after we turned curve. Did not think it was a man. The object extended out from the track. We were going down a heavy grade towards Pineville. First discovered it was a man when 50 or 75 yards from it, when the object raised head. I said it was a man. The engineer said, 'Yes,' and at once put on and blew for brakes and rang bell. The train passed the object some few car lengths before it stopped. Deceased's head was between the crossties when we found the body. When we first discovered the object I could not see the head. We sanded the track and put on all brakes, as the engineer described. I thought the object was a crosstie." This witness in the remainder of his testimony corroborated the engineer in substance, as did also the conductor.

Among the special instructions requested by plaintiff was the following:

"If the jury find from all the evidence that the engineer, by keeping a proper lookout from his engine, could have discovered that the object which he testifies he thought was a crosstie was a human being, lying apparently helpless so near the rail of the track as to expose him to danger from the passing of the engine, and when he first discovered, or by the exercise of ordinary care and diligence could have discovered, that it was a human being in that position, he could, by the use of the appliances at his command, and without peril to those on his train, have stopped the train in time to have avoided the injury to plaintiff's intestate, the defendant was guilty of negligence, notwithstanding the plaintiff's intestate was careless in lying down near the track, and the jury will answer the first issue 'Yes' and the third issue 'Yes.'"

(755) The court declined to give instructions prayed for by the plaintiff, and the plaintiff duly excepted. The Court then intimated that, in lieu of the instructions prayed for, it would instruct the jury as follows:

"That the burden of proof is on the plaintiff on all the issues except the second; that as to whether the jury believes the witnesses is purely a matter for the jury; that if the jury believe the testimony of the witnesses in this case to be true and find the facts to be as testified by them, the plaintiff is not entitled to recover in this case, and that the jury should find the issues for the defendant and award no damages. Upon such intimation the plaintiff duly excepted and submitted to a nonsuit and appealed.

Burwell, Walker & Cansler for plaintiff.
George F. Bason for defendant.

MONTGOMERY, J. The plaintiff was lying in a position horizonal to the railroad track, with a part of his body resting in a slight depression caused by a small ditch. His head, on or between the sills, could not be

seen by engineer and firemen, according to their testimony, and was so near the rail as to be struck by the engine as it passed. From the evidence he was asleep or drunk, probably both. The engineer testified that, as he turned a curve in the road at a point six hundred yards distant from the place where the man was killed, he saw the object; that he looked at it carefully and thought it was a crosstie. It attracted his attention. His duty then was more than ever to have kept a reasonable and proper lookout in his front in order to discover the nature of the object in time to stop the train and prevent injury if it should turn out to be a man or animal. And yet, as we understand the testimony of both the engineer and the fireman, after a careful reading of it, there was no further lookout until the engine was within fifty or seventy-five yards from where the man was killed—too late to stop the train and prevent the injury. (756)

The counsel of the defendant, in his argument here, undertook to distinguish the facts in this case from those in the case of *Pickett v. R. R.*, 117 N. C., 616, and insisted that the law which was announced there upon the facts did not apply to the facts in this case. It is true that in *Pickett's case, supra,* the man was lying on the track, partly between the rails, asleep, while in this case no part of the body was between the rails. But we think that the rule which requires an engineer to keep a reasonable lookout in his front in observing the track applies as fully to the facts in this case as to those in *Pickett's case.* A railroad company would certainly be liable to passengers if its engineer by a reasonable and proper lookout could have seen an object, though not immediately on the track but on the side and so near as to obstruct an engine and cause injury to them, and did not stop his engine in time to prevent it. And it does seem that the same rule would apply, and the company be liable to the next of kin at suit of personal representative, where a man might have been seen lying apparently helpless and so near to the track as to be killed by a passing engine. We think that this Court has so decided in effect, if not directly in *Deans v. R. R.*, 107 N. C., 686. There the Court said, "It is the duty of an engineer while running an engine to keep a careful lookout along the track in order to avoid or avert danger in case he shall observe any obstruction in his front." The position of the man as to the railroad track in that case was on the side of the track. A witness testified that "he could not tell from his position whether he was lying across the rail, but thought his head was on the roadbed beyond the ends of the crossties."

We are therefore of the opinion that his Honor was in error (757) when he instructed the jury that if they believed the testimony of the witnesses, and found the facts to be as testified by them, the plaintiff could not recover, and that they should find the issues for the

defendant. He should, upon the issues submitted, have instructed the jury that the plaintiff had contributed to his own inquiry. The testimony on that point was uncontradicted; in fact, the contributory negligence was admitted. He should then have instructed the jury as to the third issue, which was in these words: "Notwithstanding the negligence of said intestate, did the defendant's agents exercise ordinary and reasonable care to prevent the injury?" that if from the evidence (it clearly appearing that two inferences might be drawn therefrom by fair-minded men) they should find that he engineer by keeping a reasonable and careful lookout could have discovered the object, which he said he thought was a crosstie, was a man lying apparently helpless so near the rail of the track as to expose him to danger from the passing engine, or when he first discovered, or by the exercise of ordinary care and diligence could have discovered, that it was a man, he could by the use of the appliances at his command, and without peril to those on his train, have stopped the train in time to have avoided the injury to the plaintiff's intestate, the defendant was guilty of negligence, notwithstanding the plaintiff's intestate was careless in lying down near the track, and the jury will answer the first issue "Yes" and the third issue "Yes."

As the plaintiff is entitled to a new trial we will not discuss any further the special instructions asked by the counsel of the plaintiff, as they may not arise on the new trial.

NEW TRIAL.

Cited: Bradley v. R. R., 126 N. C., 741; *Jeffries v. R. R.*, 129 N. C., 240; *McArver v. R. R., ib.*, 384; *Lassiter v. R. R.*, 133 N. C., 248; *Stewart v. R. R.*, 136 N. C., 389; *Edge v. R. R.*, 153 N. C., 217; *Meroney v. R. R.*, 165 N. C., 613; *Tilghman v. R. R.*, 167 N. C., 163.

---

(758)

D. H. MAYES v. THE SOUTHERN RAILWAY COMPANY.

Action for Damages—Railroads—Accident at Railroad Crossings—Instructions.

1. It is the duty of one approaching a railroad crossing to use ordinary and reasonable care to avoid accident and to exercise his senses of hearing and sight to keep a lookout for approaching trains, and if he does not do so, but drives inattentively upon the track without keeping a lookout or listening for approaching trains and injury results, he is ordinarily, but not in all cases, guilty of contributory negligence.

2. In the trial of an action to recover for injuries received at a railroad crossing it was not error to refuse to charge that, though plaintiff looked and listened and did not see or hear the approaching train, yet if he might have done so, it was contributory negligence.

3. In the trial of an action to recover for injuries received at a railroad crossing, it was not error to refuse to charge, in response to a special request by defendant, that, though defendant was running its train backward on a dark night, at excessive speed and without ringing the engine bell and without a light on the front end of the leading car, yet if plaintiff could have avoided the injury by the use of reasonable care, the jury should find him guilty of contributory negligence, the court having already charged the jury as to the duty of the plaintiff to stop and look and listen before attempting to cross.

ACTION, tried at October Term, 1896, of MECKLENBURG, before *Brown, J.*, and a jury. Plaintiff sued for damages on account of personal injuries received by him, caused by a collision between a train, alleged to have been negligently arranged by defendant, and his buggy, in which he was attempting to cross Mint Street, in Charlotte.

The Court charged the jury among other things:

"(*a*) If you find from the evidence that plaintiff kept a look- (767) out as he approached the track, pulled his horse down to a walk before reaching the track and some fifty yards before reaching it, and listened and looked for the train as he approached the track, and not seeing or hearing any, and then started to drive across the track and was injured, there is no contributory negligence and you will answer the second issue 'No.' (*b*)."

And to so much of the charge as is between (*a*) and (*b*) defendants excepted.

Among other instructions prayed for by defendant were the following:

"5. If the plaintiff could have seen the approaching train by looking, in time to have averted the injury, and did not see it, it is the same as if he had not looked, and the answer to the second issue should be 'Yes.'"

This instruction was refused and defendant excepted.

"6. If the plaintiff could have heard the approaching train by listening and did not hear it, it is the same as if he did not listen, and the answer to the second issue should be 'Yes.'"

This instruction was refused and defendant excepted.

"7. It was the duty of plaintiff both to look and listen and to see and hear, if he could have done so, and if he failed in any of these requirements the answer to the second issue should be 'Yes.'"

This instruction was refused and defendant excepted.

"9. If the jury should believe from the evidence that defendant was running its train without ringing the bell and without a light on the front end of the leading car, and at an excessive rate of speed, still if

the plaintiff could have avoided the injury by the use of reasonable care he can not recover and the answer to the second issue should (768) be 'Yes.'"

This instruction was refused and defendant excepted.

"The jury found all the issues in favor of the plaintiff and assessed his damages at six hundred and fifty dollars ($650)."

There was judgment for plaintiff upon the verdict and defendant appealed, assigning as errors:

"1. That the Court charged the jury as noted in defendant's first exception.

"2. That the Court erred in refusing to give defendant's instructions marked 5, 6, 7 and 9."

Jones & Tillett for plaintiff.

George F. Bason and J. W. Keerans for defendant.

CLARK, J. The exception to the charge, and the first three exceptions for refusal to charge, present substantially the same proposition—that, though the plaintiff looked and listened, and did not see nor hear the approaching train, yet, if he might have done so, it is contributory negligence. If by this it was proposed to ask the Court to charge that the plaintiff was not excused if he looked and listened carelessly and negligently, this should have been pointedly and plainly asked. Besides, it was covered substantially by the charge given, that "it was the duty of the plaintiff to use ordinary and reasonable care to avoid accident, and to exercise his senses of hearing and sight, to keep a lookout for approaching trains, and if he did not, and drove inattentively on the track, without keeping a lookout or listening for approaching trains, it is (769) contributory negligence." This charge, repeated three times in different phases, was really erroneous towards the plaintiff (the appellee), in that it makes him guilty of contributory negligence for not looking and listening in all cases, even if no light was on the front end of the moving train (at night), and no bell rung. Yet, if such was the case (and the plaintiff both alleged it was and offered proof of it), the failure of the plaintiff to look and listen at a crossing was not contributory negligence. *Hinkle v. R. R.*, 109 N. C., 472; *Russell v. R. R.*, 118 N. C., 1098.

But we do not understand the defendant to complain that the jury was not instructed that the looking and listening must be done with proper care, but this proposition is that, if the plaintiff looked and listened and might have seen or heard and did not see or hear, as a proposition of law he did not look and listen. That, however, is a matter of fact, and not a proposition of law. By "looking and listening" the jury must have understood, under the terms of the charge, "looking and listening with

proper attention." The syllogism of the defendant is something like this: "Though 3 plus 4 are 7, yet, if they make 8, they are not 3 plus 4." True enough, but the question of fact is whether there was "3 plus 4," and that determines whether the sum is 7 or not. The defendant is traveling in a circle. If the plaintiff looked and listened with care, he saw or heard the approaching train if he could have done so; and if he did not see and hear it, when he might have done so, then he did not with proper attention, look and listen. *Pickett v. R. R.*, 117 N. C., 616, and several cases since have settled that, though an engineer does not see a man lying on the track, the company is liable, if with reasonable care the engineer could have seen him in time to avoid injury. But that is based on the engineer's negligence in not keeping a proper look-out. Here the Court told the jury that the plaintiff was guilty (770) of contributory negligence if he went on the crossing without keeping a proper lookout and listening. If the engineer keeps a proper lookout, and is unable to see the man lying on the track till too late to avoid injury, there is no negligence on his part and no liability on the company.

The only other exception is that he Court did not give an instruction asked that, though the defendant was running its train (backward on a dark night) at an excessive speed, and without ringing the bell, and without a light on the front end of the leading car, still, if the plaintiff could have avoided the injury by the use of reasonable care, the jury should find him guilty of contributory negligence. This was in substance given by the Court in its charge on the second issue, in stating the duty of the plaintiff to stop, look, and listen before attempting to cross. And in so doing, there was error as against the appellee as already pointed out, by not qualifying it by adding, as in *Hinkle v. R. R.*, and *Russell v. R. R., supra,* that the plaintiff would not be guilty of contributory negligence in going upon the railroad crossing without looking and listening, if the defendant did not sound the whistle or ring the bell, or in the night time did not have a light on the front end of the train, the proximate cause in such cases being the failure to give warning. It is not negligence in a traveler to cross the track, unless he disregards a warning not to cross, which he might have seen or heard with proper care.

Cited: Mesic v. R. R., 120 N. C., 491; *McIlhenny v. R. R., ib.*, 554; *Purnell v. R. R.*, 122 N. C., 847; *Norton v. R. R., ib.*, 936; *Edwards v. R. R.*, 132 N. C., 101; *Cooper v. R. R.*, 140 N. C., 213, 225; *Gerringer v. R. R.*, 146 N. C., 34; *Osborne v. R. R.*, 160 N. C., 313; *Shepherd v. R. R.*, 163 N. C., 522; *Powers v. R. R.*, 166 N. C., 601; *Horne v. R. R.*, 170 N. C., 651.

(771)

J. F. LITTLE v. CAROLINA CENTRAL RAILROAD COMPANY.

Action for Damages—Railroads—Injury to Person on Track—Negligence—Contributory Negligence—Reasonable Care—Evidence—Instructions.

1. Where, in the trial of an action for damages, one issue was whether plaintiff was injured by defendant's train, and it was admitted by the defendant that plaintiff was hurt by being struck by the defendant's train, it was proper to direct the jury to answer the issue in the affirmative.

2. In the trial of an action for damages it appeared that plaintiff attempted to walk across a trestle on defendant's road, and while so doing was struck by a train and injured. The trestle was about 300 feet long and 50 high. Before going on the trestle plaintiff saw a signboard warning all persons not to cross it, and he knew, too, that it was about time for a train to pass: *Held*, that it was not error to direct the jury to find the plaintiff was guilty of contributory negligence.

3. Where, in the trial of an action involving the question of negligence and contributory negligence, 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 party or the concurrent negligence of both parties; hence,

4. Where, in the trial of an action for damages, it appeared that plaintiff, while crossing a long high trestle, saw a train coming and got out on the cap-sill, but was struck by some part of the train; that workmen repairing the bridge often took that position to avoid passing trains without injury; that the engineer saw plaintiff on the trestle and slowed down; that, seeing plaintiff go out on the cap-sill and thinking he was safe he did not stop his train but crossed the trestle at the usual rate of speed: *Held*, that it was not error to instruct the jury, if they believed the testimony, to find that the engineer had exercised reasonable care.

5. It was not error to permit the defendant to show that workmen often took a position on the cap-sill of the trestle to avoid passing trains, and that no one had ever been injured while in such position.

6. The trial judge having, at the request of plaintiff, put his charge in writing, read and handed it to the jury and allowed them to carry it to the jury room. The plaintiff objected upon the ground that the court had not been requested to hand the written charge to the jury. Thereupon, and after his Honor had offered to withdraw the written charge from the jury, in whose possession it had been about five minutes, the defendant requested that the jury be permitted to keep the written charge in accordance with the act (ch. 137, Laws 1885): *Held*, that it was not error upon such request of the defendant to permit the jury to retain the written charge.

7. While recapitulating the evidence to the jury the trial judge referred to the answer of the defendant, which had been put in evidence by the plaintiff, as appearing "to be in the usual legal form": *Held*, that such remark was not an expression of opinion upon the evidence.

ACTION for damages, for an injury alleged to have been caused (772) by the negligence of defendant company, tried before *Brown, J.*, and a jury, at Spring Term, 1896 of UNION.

The issues and responses were as follows:

1. Was plaintiff injured by defendant's train? Answer: "Yes."

2. Did plaintiff, by his own negligence, contribute to his own injury. Answer: "Yes."

3. Notwithstanding the contributory negligence of plaintiff, did defendant's engineer exercise ordinary care to prevent the injury? Answer: "Yes."

4. What damage, if any, has plaintiff sustained? Answer: "....."

The facts sufficiently appear in the charge of his Honor, *Judge Brown,* and in the opinion of *Associate Justice Montgomery.*

During the trial the following evidence was permitted to be read before the jury from the notes of the testimony of Randall: "My hands would, when working on the trestle when a train (773) passed get out and sit on the capsills and let the train pass." To this testimony the plaintiff objected; objection overruled; plaintiff excepted.

The Court reduced the charge to writing at request of plaintiff, and signed it, and after reading it to the jury and recapitulating all the evidence, handed it to the jury, and allowed them to carry it to the jury room; and the plaintiff objected upon the ground that the Court had not been requested to hand the charge to the jury. After looking at the Act of 1885, the Court remarked that the law required him to give it to the jury at the request of either party. Thereupon, the defendant's counsel requested that the Court should permit the jury to keep the written charge in accordance with the act. At the time this request was made by defendant, the jury had been absent from the Court room about five minutes, and the Court had offered to withdraw the written charge from the jury. But being requested by defendant as aforesaid, the Court permitted the jury to keep it. Plaintiff excepted.

In recapitulating the evidence the Court took up the answer of the defendant which had been put in evidence by the plaintiff, and said to the jury: "This is the answer of defendant. It appears to be in the usual legal form. The contents of it are put in evidence by plaintiff, in support of his case." Plaintiff objected, and excepted to the Court's using the words, "in the usual legal form," as being an expression of opinion upon the evidence. Objection overruled, and exception by plaintiff. The Court read the answer to the jury. The Court read over from its written notes to the jury, all the evidence in the case, and

then gave in writing and read to the jury the following written charge: "It is admitted that the plaintiff was injured by defendant's train striking him. You are therefore directed to answer the first issue
(774) 'Yes.' When the plaintiff saw the sign of warning posted at trestle, as he says he did, it was his duty not to go on the trestle. Upon plaintiff's own testimony he is guilty of contributory negligence, and you are directed to answer the second issue 'Yes.'" To above portion of the charge the plaintiff excepted. "Although plaintiff may have been careless and guilty of contributory negligence, yet it was still the duty of the engineer to use ordinary care to prevent the injury. The defendant admits that the engineer saw the plaintiff on the trestle in time to have stopped the train. When the engineer saw plaintiff's position, although plaintiff is guilty of negligence himself, it was the engineer's duty to use ordinary care to prevent injuring the plaintiff. Whether or not the engineer did, under all the circumstances exercise such ordinary care, is the subject of the third issue. It being admitted that the engineer could have stopped, and did not, it is the duty of defendant to show to the satisfaction of the jury, but not beyond a reasonable doubt, that although the engineer did not come to a stop, yet he exercised ordinary care under the circumstances to prevent the injury. The engineer is not expected to exercise infallible judgment, but only ordinary and reasonable care. The credibility of testimony is a matter exclusively for the jury. As to whether the jury believed the evidence is a matter for the jury. Taking all the evidence together as a whole, if you believe the testimony to be true, the plaintiff can not recover, and it is your duty to answer the third issue 'Yes'; for, if the testimony is to be believed the engineer did exercise reasonable and ordinary care under the circumstances." To above portion of charge plaintiff excepted. "If the jury answer the third issue 'Yes,' then the plaintiff will not be entitled to any damages, and they need not answer the fourth issue. If the jury do not believe the evidence to be true, and shall find that ordinary
(775) care to prevent the injury was not exercised by the engineer, then plaintiff will be entitled to recover under the fourth issue, such actual damage as he has sustained, actual expense in nursing, loss of time, loss from inability to perform mental or physical labor, or capacity to earn money, and actual mental or bodily suffering."

There was judgment for the defendant upon the verdict; motion for a new trial was refused, and plaintiff appealed.

F. I. Osborne for plaintiff.

L. R. Watts and MacRae & Day for defendant.

MONTGOMERY, J. The following issues (without objection) were submitted to the jury:

"1. Was plaintiff injured by defendant's train?

"2. Did plaintiff by his own negligence contribute to his injury?

"3. Notwithstanding the contributory negligence of plaintiff, did defendant's engineer exercise ordinary care to prevent the injury?

"4. What damage, if any, has plaintiff sustained?"

His Honor's direction that the jury should answer the first issue "Yes" was proper, for it was admitted that the plaintiff was hurt by being struck by the defendant's train. He told the jury that upon the plaintiff's own testimony he was guilty of contributory negligence, and directed them to answer the second issue "Yes." The plaintiff excepted. The instruction was a correct one, and the exception is not sustained. The plaintiff had testified that the trestle upon which he was injured, was one hundred yards long and fifty feet high; and that hands were at work repairing it at the further end; that he saw when he got on the trestle a signboard notifying persons not to go on the trestle, and that when he went on it he knew it was about time for a train (776) to come along.

Beyond question he contributed to his own injury. Under the circumstances it was his duty not to go on the trestle. It was decided in *Clark v. R. R.*, 109 N. C., 430, that a person who places himself on a railroad trestle so high as to make it perilous for him to jump to the ground, is negligent, and that he is guilty of contributory negligence if he is injured by a passing train.

In reference to the third issue his Honor instructed the jury that even if the plaintiff was guilty of contributory negligence it was yet the duty of the engineer to use ordinary care to avoid injuring him. It was admitted by the engineer that he could have stopped the engine in time to prevent the injury of the plaintiff but that he did not; and his Honor told the jury that the defendant had to show to their satisfaction that although he did not stop the train, he yet exercised ordinary care under all the circumstances to prevent the plaintiff's injury. He further told the jury that the engineer was not expected to exercise infallible judgment, but only ordinary and reasonable care; and that "taking all the evidence together as a whole, if you believe the testimony to be true, the plaintiff can not recover, and it is your duty to answer the third issue 'Yes,' for if the testimony is to be believed the engineer did exercise reasonable and ordinary care under the circumstances." The plaintiff excepted.

We are of the opinion that his Honor's instructions on the third issue were correct. The uncontradicted testimony was that this trestle was

being repaired at the time of the accident, the workmen being then engaged, and had been for some considerable length of time just before; that frequently, probably every day, the workmen had stepped off the track on to the capsills on the side of the track at the approach of
(777) train, and none of them were ever harmed. One witness testified that "it was a common thing for the railroad hands, every day, to get on the capsills of this trestle, and let trains pass." It was uncontradicted that the capsills extended a sufficient distance from the track to allow two men to stand on each one without harm or injury as the trains would pass over the trestle, and that the engineer in charge of the engine, on the occasion of the accident, had frequently seen the workmen get on the capsills for safety on the passing of trains. The engineer testified, that from the conduct of the plaintiff at the time of his injury, he believed the plaintiff was a workman of the railroad, and that as he had frequently done before he moved his engine on at the usual speed in crossing trestles; that the plaintiff, just as the hands were accustomed to do on the passing of trains, stepped off the track on to the capsill, and he thought it was a safe position, as he had often passed in like circumstances the workmen of the railroad without injury to them. It seems to us from the evidence that the engineer acted as a prudent man should have acted under all the circumstances. His conclusion that the plaintiff from his conduct on the trestle was a railroad workman, and that he had gotten on the capsill for safety, was a reasonable conclusion; and that being so, he was not negligent in driving his engine on at the usual speed in crossing trestles, for no workmen had ever been injured under like circumstances. It is true that an engineer situated as this one was at the time of this accident, is required if there be a reasonable doubt as to what course to pursue, to so act as to protect life. But he is not required to provide against contingencies which he reasonably has no ground to believe would happen; he is not compelled to provide against the
(778) unexpected, the unusual, the extraordinary. *Blue v. R. R.*, 116 N. C., 955; *Tillett v. R. R.*, 118 N. C., 1031. The facts in this case are undisputed, and we think that the only inference that could be drawn from them by fair-minded men is that the defendant acted as a prudent man should have acted under all the circumstances, and that it used ordinary care to prevent the injury. "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." *Russell v. R. R.*, 118 N. C., 1098. To the same effect are *Ellerbee v. R. R.*, 118 N. C., 1024, and *Hinshaw v. R. R., ibid.*, 1047.

The objections made by the plaintiff to the testimony ought to have been overruled, as they were, by his Honor. We have examined all the other exceptions made by the plaintiff to the rulings of the Court, and they ought not to be sustained.

NO ERROR.

Cited: *Weeks v. R. R.*, 131 N. C., 81, 83.

(779)

STATE v. JOHN W. WOOLARD.

Practice in Criminal Cases—Instructions—Statutes—Title—Repeal and Amendment of Statute.

1. When justified by the evidence, a trial judge may charge the jury that if they believe the testimony of a defendant who testifies in his own behalf they should find him guilty.
2. Chapter 83, Laws of 1893, entitled "An act to amend chapter 504, Laws of 1889" (which act of 1889 placed the trial of the offense of abandonment under the jurisdiction of a justice of the peace) is not defeated in its purpose of repealing the act of 1889 by an ambiguity arising in the body of the act in the failure to specify "Laws of 1889."
3. The title of an act is a legislative declaration of the tenor and object of the act, and when the meaning or subject-matter of a statute is at all doubtful, the title should be considered.
4. An act of the Legislature subsequent to and in amendment of a former act of the same session, and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended act is erroneously stated, provided it sufficiently appears beyond cavil what prior act is referred to.

INDICTMENT for abandonment, tried before *Graham, J.*, and a jury, at May Term, 1896, of BEAUFORT. On the trial the defendant testified in his own behalf, and his Honor charged the jury, that if they believed the testimony of the defendant, they should return a verdict of guilty, but that they were the judges of the facts and they alone could pass upon the evidence. The defentant was convicted and appealed, assigning as error the charge of his Honor. In this Court the appellant made other contentions, which are referred to in the opinion of *Associate Justice Clark*.

Attorney-General, B. B. Nicholson and Charles F. Warren for the State.

W. B. Rodman for defendant (appellant).

(780) CLARK, J. The charge to the jury that if they believed the defendant's testimony to find him guilty, was fully justified by the evidence, and it was competent for the judge in such case to so instruct the jury. *S. v. Riley,* 113 N. C., 648.

The chief reliance of the appellant, however, is that chapter 504, Laws 1889, which placed the jurisdiction of the offense of abandonment in a justice of the peace, is not repealed by chapter 83, Laws 1893, because the body of the latter act only amends "chapter 504," omitting the words, "Laws 1889," but in the title of said chapter 83, Laws 1893, it is described as "An Act to amend chapter 504, Laws 1889," This makes the meaning and purport of said chapter 83, Laws 1893, entirely clear. It is true that at common law the title of an act was little considered. The reason of this was because in England the title was no part of an act, but was prefixed by the clerk of that House in which the bill originated. The titles were styled Rubrics because written in red ink. Indeed, prior to the eleventh year of Henry VII (1495), titles were very rarely prefixed at all. But now the title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act. Indeed, so far is this true, and so important has the title become, that in many State Constitutions there are now provisions to guard against the title of bills being misleading. *Ratione cessante, cessant ipsa lex.* Consequently, when the meaning of an act is at all (781) doubtful, all the authorities now concur that the title should be considered. Sedg. Stat. Law, 50; Potter's Dwarris on Stat., 101, 105; Cooley Const. (6 Ed.), 169; Sutherland Stat. Constr., sec. 210; Endlich Stat., sec. 58; *Wilson v. Spalding,* 19 Fed., 304.

If there was nothing more before us than chapter 83, Laws 1893, still it would be clear, taking into consideration the title in connection with the body of the Act, that the chapter 504 amended, was chapter 504, Laws 1889, and therefore, that jurisdiction of the offense of abandonment was restored to the Superior Court as it stood under The Code, sec. 970. Had there been the least doubt on this point, however, it was removed by the supplementary act at the same session, chapter 481, Laws 1893, which expresses in the body of it, that the prior act of the same session, "To amend chapter 504, Laws 1889," should be amended by inserting the words "Laws 1889" in the body of the Act after the words, "Chapter 504." It is true the said chapter 481, in referring to chapter 83 (as it was afterwards numbered) mentions it as "ratified 14 February, 1893," when in fact it was ratified 11 February, 1893. We do not know whether the discrepancy between 11 February and 14 February, was a

clerical error in copying, or a typographical error in printing, or an inadvertence in drawing the supplementary act or bill, but sufficient appears to make it clear beyond cavil what prior act is referred to. The Court will not "distinguish and divide a hair betwixt South and Southwest side." A stronger case than ours in favor of following the clear legislative intent is *Wilson v. Spalding, supra; Cram v. Cram,* 116 N. C., 288, relied on by appellant, in no wise conflicts with what is above stated, since that case merely holds that the heading of a section (782) prepared by the compilers of The Code will not 'affect the construction of the language of the section, when its meaning is perfectly obvious."

No ERROR.

Cited: *S. v. Neal,* 120 N. C., 621; *Fowler v. Fowler,* 131 N. C., 171; *S. v. May,* 132 N. C., 1021; *S. v. Patterson,* 134 N. C., 614; *S. v. Lewis,* 142 N. C., 653; *S. v. R. R.,* 145 N. C., 578.

STATE v. CAD DUKES.

Indictment for Fornication and Adultery—Evidence.

1. In the trial of an indictment for fornication and adultery it is not necessary to show by direct proof the actual bedding and cohabiting, but only beyond a reasonable doubt circumstances from which the guilt of the parties may be inferred.
2. While evidence of an act of illegal intercourse occurring more than two years before the indictment is not competent as substantive testimony, it may be considered, if believed, as corroborative evidence of subsequent association.

INDICTMENT for fornication and adultery, tried before *Graham, J.,* and a jury, at Spring Term, 1896, of NORTHAMPTON. The defendants were convicted, and the male defendant appealed. The facts are stated in the opinion of *Associate Justice Avery.*

Attorney-General and Perrin Busbee for the State.
MacRae & Day and Calvert for defendant (appellant).

AVERY, J. More than two years before the male defendant was indicted he was seen, if the testimony was believed, taking a very indecent liberty with the female defendant, who, on remonstrance by the person who saw the act, said in the presence of Cad Dukes, "it was pretty

(783) much what they had done." In connection with this, there was evidence tending to show that they lived a half mile apart, and that a witness had seen them frequently together at his own house and elsewhere up to ten months ago. The witness who testified to the indecent liberty, had not seen them together since last spring. It was in evidence that she gave birth to a child last spring.

The defendant's counsel asked the Court to instruct the jury that upon the whole evidence the defendants are not guilty. To the refusal of the Court to comply with this request the defendant Cad Dukes excepted and appealed.

The Court told the jury in substance that this offense was of such a nature that it was not necessary to show by direct proof the actual bedding and cohabiting together, but that it was sufficient to show beyond a reasonable doubt, circumstances from which the jury might reasonably infer the guilt of the parties. They were instructed further, that evidence of an act of illegal intercourse which occurred more than two years before the finding of the indictment was not competent as substantive testimony, but might be considered, if believed, as corroborating evidence of subsequent association. There was no error in the instruction given. *S. v. Guest,* 100 N. C., 410; *S. v. Kemp,* 87 N. C., 538; *S. v. Poteet,* 30 N. C., 23; *S. v. Pippen,* 88 N. C., 647.

The rules of evidence are founded upon reason and common sense. When parties, who have been once seen in the attitude described by a witness, continue to associate with each other for a year in which time the visits of the male defendant often average twice a week, the law allows a juror to draw the same inference that every other reasonable man deduces from such circumstances.

No error.

Cited: Powell v. Strickland, 163 N. C., 402; *S. v. McGlammery,* 173 N. C., 749.

---

(784)

STATE v. WALTER MITCHELL.

Bastardy Proceedings—Oath and Examination of Woman—Prima Facie Evidence—Constitutional Privilege of Accused to Confront Accuser and Witnesses—Waiver—Objection to Evidence.

1. On the trial of an appeal from a judgment of a justice of the peace in bastardy proceedings, the oath and examination of the woman is *prima facie* evidence of the defendant's guilt, and the burden is on him to exonerate himself from the charge.

2. The term "*prima facie*" is synonymous with the word "presumptive" as used in sec. 32 of The Code, in defining evidence that is to be received and treated as true "until rebutted by other testimony which may be introduced by the defendant."

3. The defendant in bastardy proceedings may waive the right guaranteed by sec. 11 of Art. II of the Constitution, to be informed of the accusation against him and to confront the accusers and witnesses face to face; and where, on the trial of an appeal from the judgment of a justice of the peace, the oath and examination of the woman taken before him is offered, the defendant will be deemed to have waived such constitutional privilege where he does not in express terms insist on the bodily presence of the prosecutrix on the witness stand, and a general objection to the evidence is not sufficient.

(CLARK, J., dissents, *arguendo.*)

The defendant was arrested and brought before a justice of the peace upon the charge of bastardy. He entered the plea of not guilty, and offering no evidence upon the affidavit or complaint, he was adjudged to be the father of the child, and judgment was entered against him accordingly. He appealed to the Superior Court of Wilson, where at June Term, 1896, a jury was empaneled.

June Term, 1896, before *Boykin, J.* His Honor charged the (785) jury that the oath and examination of the prosecutrix taken before the justice of the peace was under the statute *prima facie* evidence of defendant's guilt, and that the burden was upon defendant to exonerate himself from the charge so made against him. To this charge the defendant excepted and appealed from the judgment rendered.

Attorney-General and Perrin Busbee for the State.
No counsel contra.

AVERY, J. The charge that the oath and examination of the mother of the bastard child was *prima facie* evidence of the defendant's guilt, was not erroneous. *S. v. Rogers,* 79 N. C., 609; The Code, sec. 32. *Prima facie* evidence is that which is received or continues until the contrary is shown. *Kelly v. Johnson,* 6 Peters (U. S.), 622. It is clear from the terms of the Statute (Code, sec. 32) that the word "presumptive" is used there to define evidence that must be received and treated as true "till rebutted by other testimony, which may be introduced by the defendant," and that it is therefore synonymous with *prima facie.* We see no force in the suggestion that there was error in the use of one of the terms rather than the other.

Another ground of objection to the competency of the written examination of the mother is that its admission was a violation of the Constitution, Article I, sec. 11. That section provides that "in all criminal prose-

cutions every man *has the right* to be informed of the accusations against him, and to confront the accusers and witnesses with other testimony.

Conceding that since the begetting of a bastard child has been made a criminal offense, the accused has *the right* to insist upon the pro-
(786) duction of his accusers, it is nevertheless, a right that is waived by failure to assert it in apt time like the guaranty contained in the same section, that he shall not be compelled to give evidence against himself. The application of the principle to the crimination of a party by his own testimony is so common in practice, as to have become familiar learning. When asked the criminating question it is the privilege of the witness to determine whether it is preferable to answer, or to ask the protection of his constitutional right. Indeed, it is a general rule that a party may waive the benefit of a constitutional as well as a statutory provision. Sedgwick Stat. and Const. Law, p. 111. The right may be waived either by express consent, by failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it. Sedgwick, *supra; Lee v. Tillotson,* 24 Wend., 337; Const., Article I, sec. 19; Code, sec. 398; *Reynolds v. U. S.,* 98 U. S., 145; *S. v. Behrman,* 114 N. C., 797; *S. v. Thomas,* 64 N. C., 74; *Driller Co. v. Worth,* 118 N. C., 746, and same case, 117 N. C., 515. It is settled law in North Carolina, that the more important privilege of being present in person, so as to confront one's accusers on trial for a criminal offense, may, except in capital felonies, be waived by counsel. *S. v. Jacobs,* 107 N. C., 772; *S. v. Weaver,* 35 N. C., 203; *S. v. Paylor,* 89 N. C., 539; *S. v. Kelly,* 97 N. C., 404. For like reasons, one who is actually or constructively present at the trial of an indictment against him for offenses of the lower grade must be deemed to have waived when he does not in express terms insist upon the bodily presence of the prosecutrix on the witness stand. The Legislature has made a defendant a competent witness on the trial of an indictment against himself. He may exercise this privilege or not, but if he once elects to go upon the stand he is deemed to have
(787) waived his right to refuse to answer questions intended to elicit self-criminating testimony from him, where such questions would have been competent on the examination of other witnesses. *S. v. Thomas,* 98 N. C., 599; *S. v. Allen,* 107 N. C., 805. Where a statute gives a prisoner the privilege of taking depositions outside of the State upon condition that the State shall have the like right, it has been held that he waives the benefit of the constitutional privilege by the exercise of the right to avail himself of such testimony. *Butler v. State,* 97 Ind., 378. He takes the new statutory privilege upon the condition annexed by its provisions to its acceptance—that he shall thereby waive his constitutional right to face the witness. The Legislature clearly has the

general power to pass statutes giving artificial weight to any particular kind of testimony in specified classes of criminal actions. *S. v. Burton,* 113 N. C., 655, and cases there cited. The statute (Code, sec. 32) must be enforced till it comes in conflict with the Constitution. The broad exception to the admissibility of the oath and examination of the woman, is sufficient to raise the question which we first discussed; but if the defendant intended to throw himself upon his constitutional privileges, which he might at his option waive or demand, it was incumbent on him to object on the specific ground that he insisted upon the right to have the woman introduced, and to be confronted by her as his accusser. Had the defendant pursued this course, it may be that the solicitor would have had the prosecutrix sworn and tended her for cross-examination. Such an offer unquestionably would have afforded him the opportunity contemplated by the Constitution of meeting his antagonist face to face. *S. v. Thomas,* 64 N. C., 74. This general assignment of error in admitting a document declared competent by statute no more raises the constitutional question, than would an exception (788) to criminating testimony given by a witness without objection on the specific ground that it might subject him to punishment. The constitutional right, if it existed, was waived by the failure to object to the testimony, because the right guaranteed to him was not that he should be compelled to confront his accuser in a case like that before us, but that he might on demand have her compelled to meet him "face to face."

NO ERROR.

CLARK, J. (dissenting): In the dissenting opinion of Brother Montgomery and myself, in *S. v. Ostwalt,* 118 N. C., 1217, we pointed out many of the inconveniences and inconsistencies which would follow the departure from the long-settled legislative and judicial recognition of bastardy as a police regulation, and therefore, a *quasi* civil proceeding. The present adds an additional instance to those cited by us. It may be that, on thus being called to the attention of the law-making power, the evil may be remedied by unequivocal legislation. It is no benefit to add bastardy to the criminal law when there exists already a far more efficient criminal proceeding by an indictment for fornication and adultery, and besides, by giving to bastardy proceedings the technical advantages conferred on those put on trial for crime, it has been rendered utterly inefficient for the purposes for which it was really intended, and used for so long a period of making the father support the child and protect the county from liability therefor.

Cited: S. v. Rogers, post, 794, 795; *Belvin v. Paper Co.,* 132 N. C., 150; *S. v. McDonald,* 152 N. C., 805; *S. v. Dry, ib.,* 814.

(789)

STATE v. J. W. BROWN.

Officers—Enrolling Clerk of General Assembly—Corruption—Fraudulent Enrollment of Bill—"Assignment Act."

On a trial of an indictment against the Enrolling Clerk of the General Assembly for fraudulently enrolling a bill which had never passed either branch, the testimony of all the witnesses for the defendant, and all but one of those for the State, tended to show that the defendant never saw the bill, and had no knowledge of its existence until after the close of the session. One witness for the State, who had copied the bill, testified that defendant had assisted her in verifying the copy on the last day of the session, when there was a great deal of confusion in the defendant's office, but this was denied by defendant and other witnesses. There was no evidence of bribery or of any understanding or collusion between the defendant and others in regard to the enrollment of the bill: *Held*, that it was error to refuse an instruction to the jury that there was no evidence of corruption on the part of the defendant.

INDICTMENT of J. W. Brown, Enrolling Clerk of the General Assembly of 1895, tried before *McIver, J.*, and a jury, at January Term, 1896, of WAKE. The defendant was indicted for having unlawfully, willfully, and corruptly omitted, neglected, and refused to discharge a duty of his office by fraudulently causing and permitting to be enrolled as a public law, a bill ("the Assignment Act") which had never passed either branch of the General Assembly, but had been laid on the table in the House of Representatives. The material parts of the testimony appear in the opinion of *Associate Justice Montgomery.*

There was a verdict of guilty, and from the judgment thereon defendant appealed.

(790) *Attorney-General for the State.*

J. B. Batchelor and Edwards & Royster for defendant (appellant).

MONTGOMERY, J. After the examination of the witnesses had been concluded, the defendant's counsel asked the court to instruct the jury that there was no evidence of corruption on the part of the defendant. Upon a most careful consideration of the whole evidence we are of the opinion that the defendant was entitled to the instruction and that his Honor should have given it. Eight witnesses, three for the State and five for the defendant, were examined. The testimony of two of the State's witnesses and that of all the defendant's is without the least trace of inculpating matter, either taken singly or in connection with all the evidence in the case. In fact, upon the whole evidence, with the exception of that of the witness for the State (Miss Branson), there was not

one particle, either direct or circumstantial, going to show that the defendant ever had any knowledge or information of any kind concerning the existence of the bill until long after the Legislature had adjourned. Leaving out her testimony, there is not a scintilla of proof that the defendant ever saw the bill, either in the original or in the enrolled copy, until it was found in the old library among tabled bills by the witness Ellington, who was the State Librarian, after the Legislature had adjourned. Whatever testimony there was unfavorable to the defendant is embraced in that of Miss Branson. She testified that she got the bill to make a copy of it from the defendant or one of the clerks on the last day of the session; that she kept it for that purpose for two or three hours, and then returned it to the defendant and read it over to him, several other persons being in the room, to see if it was correctly copied; that there was a great rush and confusion during the last days of the session. (Mr. Walser, the Speaker of the House, had testified (791) that on the last day of the session more than 360 bills were ratified.) The defendant denied most positively that he gave this bill or any other one to Miss Branson to copy, or that she read it over with him. Suppose it be true that she did read the bill over to him, is it the least evidence of *corruption* on the part of the defendant when the circumstances of time and place are considered? It might, assuming for the purpose of this case that it was true, be some evidence tending to show negligence in his failure to look at and carefully examine the back of the bill to see what disposition had been made of it; but we do not see any evidence of a corrupt intent to enroll or to have enrolled a fraudulent bill. This failure to examine carefully the bill might have been made by the most conscientious person in the hurry of that day's business. It appears from the testimony that the defendant, as enrolling clerk, kept a book in which was entered a list of the bills which were given out to copyists to be transcribed for enrollment. The defendant failed to have this book on the trial. This failure was undoubtedly a circumstance against him. "The conduct of a party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises a strong suspicion that such evidence, if adduced, would operate to his prejudice." Starkie on Evidence, p. 73. But suppose the strongest presumption against him should arise, that is, that the book did contain the record that this bill was given out to Miss Branson, how could that alone, or taken in connection with the reading of the bill over with Miss Branson, according to her testimony, and his denying the testi- (792) mony to be true, prove or tend to prove corruption, in the absence of other circumstances tending in some way to show a wicked purpose,

that he acted "for the sake of oppression, or fraudulent gain, or any other wicked motive"? It might tend with other circumstances to prove carelessness, negligence, but under all the circumstances of this case, not to show a corrupt and wicked purpose to derive a personal benefit therefrom or to injure the public.

There was no attempt to show bribery, gain, or any understanding between the defendant and any other person about the bill, or to connect him with any suspicious circumstances relating to it.

We are, therefore, of the opinion that his Honor was in error in refusing to give to the jury the instruction asked by the defendant, that there was no evidence of corruption on his part. His charge was carefully delivered and fair to the defendant, and temperate and humane, ending with a caution which he deemed necessary, to wit: "Much has been said about the importance of this case and the great wrong which has been done the State; still, it is your duty to try this case as you would any other, and if you convict the defendant it must be from the testimony alone."

ERROR.

(793)

STATE v. MACK ROGERS.

Bastardy—Constitutional Law—Power of Legislation—Criminal Law—Evidence—Presumptive Evidence—Right of Accused to Confront Accuser—Trial—Instructions.

1. The Legislature has the power to provide that, upon the trial of certain classes of criminal or civil actions, artificial weight shall be given to specific kinds of testimony; hence,

2. Sec. 32 of The Code, declaring that the oath and examination of the mother of a bastard child to be "presumptive" evidence against the person accused, "is" valid exercise of legislative power.

3. Where one charged with the paternity of a bastard child failed to demand an opportunity to confront and cross-examine the prosecutrix at the time her examination was offered, he waived thereby his right to subsequently object to the evidence on the ground that he was not offered such opportunity.

4. Notwithstanding the fact that the oath and examination of the mother of a bastard child are presumptive evidence against defendant, yet if the defendant denies the paternity and contradicts the testimony of the prosecutrix, the matter is put at large, and the jury must be satisfied, beyond a reasonable doubt, of the defendant's guilt, and an instruction which allows the jury to convict on testimony that merely "satisfies" them of his guilt is erroneous.

STATE *v.* ROGERS.

PROSECUTION for bastardy, tried before *McIver, J.*, at March Term, 1896, of WAKE. The defendant was committed and appealed. The facts sufficiently appear in the opinion of *Associate Justice Avery.*

Attorney-General and T. P. Devereux for the State.
W. L. Watson for defendant (appellant).

AVERY, J. The statute (Code, sec. 32) declares that the oath and examination of the mother of a bastard child shall be "presumptive evidence against the person accused." *S. v. Rogers,* 79 N. C., (794) 609. The Legislature clearly has the power upon the trial of certain classes of criminal or civil actions to provide that artificial weight shall be given to specific kinds of testimony. *S. v. Burton,* 113 N. C., at p. 655; *S. v. Cagle,* 114 N. C., 835; *S. v. Mitchell, ante,* 784.

If the purpose of the defendant was to rest his objection to the oath and examination of the prosecutrix, Molly Bobbitt, as evidence, on the ground that he had the right under the Constitution to confront his accuser, he waived his right to insist upon that objection in the subsequent stages of the trial below or on appeal, by failing to demand that opportunity be given him to confront and cross-examine her when the written evidence was offered. *S. v. Mitchell, supra.* This question was fully discussed in *Mitchell's case,* and it is needless to repeat what was there said. There was no error in admitting the written testimony or in telling the jury that it was presumptive evidence of the defendant's guilt.

This is not a case where the violation of the letter of the law is admitted or not disputed, and a license or necessity, or some defense that confesses the act charged, and seeks to avoid the consequences by showing some excuse recognized by the law as sufficient to relieve it of its criminal character. But, notwithstanding the artificial weight given to the oath and examination, the defendant went upon the stand as a witness and offered testimony directly contradictory of the charge of paternity itself, and insists that it is sufficient to rebut it. Where the killing with a deadly weapon is admitted on the trial of an indictment for murder, it raises a presumption, since the passage of our statute grading homicides, that the defendant is guilty of murder in the second degree. But where the State offers testimony tending to show a killing (795) with a deadly weapon, and the prisoner offers contradictory evidence to show that no such weapon was used, the matter is put at large and the ultimate inquiry for the jury is whether, from the whole of the testimony, they are satisfied beyond a reasonable doubt of the defendant's guilt by being convinced of the truth of the testimony offered to establish it, including that in reference to the use of a deadly weapon. So here, though the law makes the oath of the woman presumptive proof, it no more changes the rule for ultimately coming to a conclusion when the

fact of begetting the bastard is contradicted by the defendant's testimony than when the testimony tending to prove the killing with a deadly weapon is contradicted.

Proof of having certain weapons off the premises of him who is accused is *prima facie* evidence of concealment, and it has been held in *S. v. Mitchell, supra,* that the terms are in such cases synonymous. Yet where the defendant undertakes to prove that he carried no weapon at all, it will not be contended that it is not incumbent on the State to fully satisfy the jury from the whole of the evidence of his guilt.

On the other hand, where one admits that he went upon the land of another after being forbidden to do so, but proposes to show that he entered under a *bona fide* claim of right, he concedes the fact of doing an act that is criminal unless he can make good the defense which relieves it of its criminal character. Another familiar illustration of this distinction is the class of cases where the act denounced by the law is admitted, and the defendant attempts to show that it was done under the stress of necessity, and is required to prove the extraordinary
(796) defense to the satisfaction of the jury. *S. v. R. R., post,* 814.

But in all cases where rebutting testimony is offered to disprove the main facts constituting guilt, not merely testimony to set up a defense by way of confession and avoidance, it is for the jury to determine whether the artificial weight of the evidence has been overbalanced by that offered in rebuttal, and in doing so it is proper for the court to submit the established rule for their guidance. It has been held that it is not error to instruct the jury on the trial of criminal actions that in order to convict it is sufficient if the testimony "fully satisfies" them of the defendant's guilt, instead of adopting the ordinary formula that they must be "satisfied beyond a reasonable doubt." *S. v. Sears,* 61 N. C., 146; *S. v. Knox, ib.,* 312; *S. v. Parker, ib.,* 473.

The ruling in the cases cited is founded upon the idea that there is no prescribed formula, and that a juror who is "fully satisfied" is certainly as free from doubt as one who is "satisfied beyond a reasonable doubt." *S. v. Sears, supra.* Had the court substituted the words "fully satisfied" for "satisfied beyond a reasonable doubt," the charge would not have been erroneous. But since the begetting of a bastard child has been made a criminal offense, it is clearly insufficient and misleading to tell the jury that they may convict upon testimony that "satisfies" them of the defendant's guilt. For this error a new trial is granted.

NEW TRIAL.

Cited: In re Reid, ante, 648; *S. v. McDonald,* 152 N. C., 805.

(797)

STATE AND HATTIE WILLIAMS v. EDGAR NELSON.

Bastardy—Criminal Action—Default in Payment of Fine and Allowance—Commitment of Justice of the Peace—Jurisdiction.

1. The begetting of a bastard child is a criminal offense under sec. 35 of The Code.

2. Under sec. 38 of The Code a justice of the peace, in the exercise of the police power, may sentence the defendant to imprisonment for a term exceeding thirty days, to which period, in ordinary criminal cases, his jurisdiction is limited by sec. 27 of Article IV of the Constitution.

3. The judgment of a justice of the peace in imprisoning a defendant in bastardy proceeding for default in payment of the fine, allowance and costs must fix the limit with a view to securing their payment; hence, where defendant was in default only for a fine of $10 and an allowance of $50 to the mother of the bastard, a sentence to imprisonment at hard labor for twelve months was excessive.

WARRANT for bastardy, issued by W. M. Russ, a justice of the peace of Raleigh Township, in WAKE, on the oath of Hattie Williams.

The defendant on being brought before the court pleaded guilty to the charge, and thereupon the following judgment was entered up against him:

"It is ordered and adjudged that the said Edgar Nelson pay, as allowance to the use of the said Hattie Williams, the sum of $50, a fine of $10 and $25.40 costs of this action, the said allowance, fine and costs to be paid into this court immediately, and that the said Edgar Nelson enter into bond in the sum of $100, with surety, to indemnify Wake County against any and all charges for the maintenance of the said bastard child. It is further adjudged that in default of compliance with the foregoing judgment the said Edgar Nelson is in contempt of (798) court, and under and by virtue of the police power of the State, and as authorized by section 38 of The Code, it is ordered and adjudged that the said Edgar Nelson be committed to the House of Correction of Wake County for the term of twelve months, with authority to the commissioners of said county to work him on the public roads of the county, and that the sum of $6 per month allowed for the labor of the said Nelson be paid into this court in satisfaction of the said allowance, fine, and costs. And in default, as aforesaid, the said Edgar Nelson is this day committed to jail with a copy of this judgment, to be with him delivered to the superintendent of the Wake County House of Correction; also a copy of said judgment, to be delivered to the clerk of the board of commissioners."

From said judgment the defendant took no appeal; and thereupon, on the .... day of ....., 189.., he was committed to the workhouse of Wake County, to work on the public roads according to the said judgment.

On 15 July, 1896, the defendant filed a petition before his Honor, *Judge Boykin,* for a writ of *recordari,* to be directed to W. M. Russ, J. P., requiring him to certify the record in this case to the Superior Court. This order of the Superior Court having been complied with by Justice Russ, his Honor, *Judge Boykin,* on 17 July, 1896, after an inspection of the record and argument of counsel for the petitioner and for the State, adjudged that the imprisonment of the said Nelson was illegal and in contravention of Article IV, section 27, of the Constitution, and ordered that, upon compliance by the defendant with chapter 27, Vol. 2 of The Code, he be discharged from custody, and from this judgment the State and Hattie Williams craved an appeal, which was granted.

The State and Hattie Williams alleged that the order of his Honor, *Judge Boykin,* was illegal in that (1) his Honor should have (799) remanded the prisoner before Justice Russ, and directed him to have entered up the proper judgment according to law; (2) for the reason that the order from the justice of the peace imprisoning the defendant for twelve months, under section 38 of The Code, was not a punishment but an exercise of a *police power,* and was therefore legal and not in excess of the jurisdiction of the magistrate.

Attorney-General and Harris and Johnson for plaintiffs (appellants).
W. L. Watson and A. B. Andrews, Jr., for defendant.

AVERY, J. It seems to have been definitely settled by the adjudications of this Court:

1. That the act of 1879 (The Code, sec. 35) made the begetting of a bastard child a criminal offense, cognizable for twelve months after it is committed exclusively before a justice of the peace, and punishable by fine of ten dollars. *Myers v. Stafford,* 114 N. C., 234; *S. v. Burton,* 113 N. C., 655; *S. v. Wynne,* 116 N. C., 981; *S. v. Ostwalt,* 118 N. C., 1208.

2. That the same act confers upon the court before whom the offender may be tried the incidental authority to enforce the police regulation as provided by law. *S. v. Parsons,* 115 N. C., 730; *S. v. Wynne,* 116 N. C., 981, at p. 983.

3. That a judgment for fine and costs, or for an allowance for the mother of the bastard, is not a debt arising out of contract, to which the protection afforded by the inhibition of the Constitution, Art. I, sec. 16, extended, but is rendered as a means of enforcing a legal obligation and duty imposed by the Legislature under the police power of the State

upon one who is responsible for bringing into existence a bastard child that may become a burden to society. *S. v. Cannady,* 78 N. C., 539; *S. v. Parsons, supra; S. v. Manuel,* 20 N. C., 144. (800)

It is conceded that in the exercise of the criminal jurisdiction of a justice of the peace, with which the law clothes the mayor, by virtue of his office, he had no authority to sentence the defendant to imprisonment for twelve months as a punishment, because he could not under the Constitution, Art. IV, sec. 27, take cognizance of any offense the punishment whereof could exceed a fine of $50 or imprisonment for thirty days, and for the further reason that the Legislature had not attempted to exceed its authority but had limited the punishment for bastardy to a fine of $10. But the act of 1879 (The Code, sec. 35) provides not only that upon conviction or submission the defendant *shall be fined not* exceeding the sum of $10, but that "the court *shall make* an allowance to the woman not exceeding the sum of $50, to be paid in such installments as the judge or justice shall see fit, and he shall give bond to indemnify the county as provided in section 32, and in default of such payment he shall be committed to prison." In section 38 of The Code, under the authority of which the judgment of the court was rendered, it is provided that "in all cases arising under this chapter (5) when the putative father shall be *charged with costs* or the *payment of money for the support of a bastard child,* and such father shall by law be subject to be committed to prison in default of paying the same, it shall be competent for the *court to sentence* such putative father to the house of correction for such time, *not exceeding twelve months, as the court may deem proper,*" with a proviso that instead of being committed to prison the putative father may at his discretion bind himself as an apprentice "for such time and at such price as the court may direct," "instead of being committed to prison or to the house of correction." In *S. v. Yandle, post,* 874, it was held that in order to provide for the payment of a (801) judgment for fine and costs rightfully pronounced against one convicted of crime, the defendant, as incident to such judgment, may be required by order of the board of commissioners of the county wherein he is convicted to work on the public streets, public highways, or public works. Code, sec. 2448; *Myers v. Stafford,* 114 N. C., 234. But it is insisted that this is not a judgment for fine and costs alone but also for an allowance, and that a judgment for the imprisonment of the defendant for twelve months on default of paying the fine, costs, and allowance, under section 38 of The Code, is in violation of section 27, Article IV of the Constitution, which fixes the limit to the punishment that a justice of the peace may impose. The question to be decided, therefore, is whether it is competent for the Legislature to authorize a justice of the peace, instead of a county commissioner, to order one convicted of bas-

tardy and who is unable to pay the fine, cost, and allowance, to work upon the public roads, not as a punishment for the offense nor as an incarceration for a debt contracted by him, but in the enforcement of a duty or obligation he owes to society to protect the State or the county, one of its governmental subdivisions, against the probable consequences of his own conduct. *S. v. Yandle, supra.* When the defendant committed the offense of begetting the bastard child he acted in contemplation of the fact that the law authorized a justice of the peace to impose, as a punishment, a fine of not exceeding ten dollars, as well as to fix the allowance for the mother so that it should not exceed fifty dollars. Had he paid the allowance, he could, nevertheless, on failure to pay the judgment for fine and costs, have been required as in other criminal cases to work upon the public highways for a time prescribed by the
(802) commissioners (presumably with a view to the payment of the amount due). If the Legislature was authorized, as an incident to the judgment and in the exercise of its general police power, to provide for the protection of the public by compelling the defendant to work out the costs and fine, why was it not competent to clothe the justice of the peace or the judge imposing the sentence, where it should appear that the person convicted would not pay fine, costs, and allowance for the support of a bastard, with power to fix the time of confinement at hard labor with a view to discharging the amount, which he is under obligation to pay for the protection of the public? The alternative offered the defendant, who is unable to pay the money, of being apprenticed "for such time and at such price as the court may direct," is plainly indicative of the legislative intent that whether the court should be called upon to fix a time for the work on a highway or to determine the limit of the apprenticeship, the period should be prescribed upon the idea that it ought to be long enough for the criminal to earn by his labor a sum sufficient to pay the amount rightfully claimed by the State, in order to protect the public against the probable consequences of his infringement of the law.

While it seems to be settled that it is competent for the Legislature, in the exercise of its general police power, to protect the public by permitting either county commissioners or justices of the peace to fix such limit of confinement at hard labor as will enable a defendant to pay a fine due to the State or cost to its officers, or an allowance made to support a child that, without it, might become a charge to the public, it must be admitted that imprisonment for a term longer than was necessary to pay a fine, costs, and allowance by laboring at the wages per month mentioned in the order ($10) savors rather of the nature of punish-
(803) ment than a purpose to protect the public against costs. It may be that a term of hard labor could lawfully exceed the precise

number of days or months necessary at a known compensation to discharge what is due to the State and the mother, because some allowance might be made for contingencies, such as loss of time. But it seems in this case that the time is far beyond the period requisite to earn the fine of $10, the allowance of $50, and the costs. Conceding, therefore, that imprisonment under the police regulation for the purpose of protecting the public is not within the constitutional inhibition against imprisonment for debt, nor a violation of section 27, Article IV of the Organic Law, it is nevertheless clear that not only must a statute, purporting to have been passed under the police power, upon its face grant the authority to imprison for police purposes (as section 38 of The Code does), but that the officer, who is the donee of the power, must keep within the provisions of the law and avoid the error of punishing the defendant beyond what is reasonably necessary in order to compel the discharge of his duty to the public.

There was error in the ruling of the court below that the judgment of the justice of the peace was in violation of section 27, Article IV of the Constitution, except in so far as the term of hard labor was fixed so as grossly to exceed the period necessary for earning the sum due as costs, fine, and allowance. The case should have been remanded to the mayor, who tried it originally, to modify his judgment so as to correct this error. The declaration in the judgment of the mayor that the defendant was in contempt of court was merely surplusage, since it was followed by the recital that the court was acting by virtue of the authority vested in it by section 38 of The Code, which has been already quoted.

If the imprisonment would have been illegal, therefore, had it been imposed as a punishment either for contempt or for the (804) criminal offense of begetting a bastard child, it was in fact unauthorized by law, when the court expressly declared that its action was taken in pursuance of the provisions of section 38 of The Code, and was careful not to transcend the limit of the power therein conferred upon it.

For the reasons given the judgment ought to be so modified as to remand the case to the mayor, with instructions to proceed to judgment and to alter the judgment already entered by him, so as to fix the limit of imprisonment with a view not to the punishment of the defendant, but to securing the payment of the costs, fine and allowance. Judgment modified and affirmed.

AFFIRMED.

Cited: McDonald v. Morrow, ante, 675; *S. v. Ballard,* 122 N. C., 1026; *Abbott v. Beddingfield,* 125 N. C., 284; *S. v. White, ib.,* 679, 682; *S. v. Morgan,* 141 N. C., 732.

Overruled: S. v. Liles, 134 N. C., 735.

STATE v. E. G. GLENN AND FRED. AMIS.

Indictment for Affray—Affray—Sufficiency of Evidence.

On the trial of defendants G. and A. for an affray and mutual assault with a deadly weapon, it appeared that G., after walking up and down the street swearing that he could whip any man, struck A. in the face with his fist, the blow being heard across the street; that A. struck G. with a pair of iron pliers; that G. then put his hand in his pocket as if to draw a knife and A. caught him by the arms and prevented him from getting his hand out of the pocket, and that G., getting loose, jumped upon a box and saying he was an officer, commanded the peace: *Held*, that the evidence was sufficient to support a verdict of guilty against G., (A. having pleaded guilty).

INDICTMENT for affray and assault with deadly weapons, tried before *Boykin, J.*, at Spring Term, 1896, of VANCE.

(805) The defendant Amis pleaded guilty, and upon the trial of defendant Glenn, L. W. Barnes, a witness for the State, testified that defendant Glenn was on the street in the town of Henderson, walking up and down, cursing and swearing that he was six steps and could whip any man; that the defendant Amis was a few feet away, near a post; that defendant Glenn walked up to defendant Amis and struck him with his fist in the face and knocked his head against the near-by post, the lick sounding loud enough to be plainly heard across the street by witness; that defendant Amis struck Glenn with a pair of iron pliers; that defendant Glenn then put his hand in his pocket as if to draw a knife, and defendant Amis caught him by the arms and prevented him from getting his hand out; that defendant Glenn got away and jumped on a box and said he was an officer and commanded the peace. Other witnesses for the State testified to the same.

Defendant Glenn testified in his own behalf; admitted he struck the defendant Amis, but said he was not mad with Amis at the time, and that Amis struck him with the pair of iron pliers.

There was no evidence that Glenn had any weapon.

There was a verdict of guilty. Motion for new trial because verdict was contrary to evidence and because no deadly weapon was used, etc. Motion overruled. Judgment that the defendant be confined in common jail of Vance County for thirty days. Defendant Glenn appealed.

Attorney-General for the State.
T. M. Pittman for defendant Glenn (appellant).

FAIRCLOTH, C. J. Glenn and Amis were indicted for an affray and mutually assaulting and beating each other with a deadly weapon.

Amis pleaded guilty and Glenn was convicted. He appealed on (806) the ground that no deadly weapon was used, and that the verdict was contrary to the evidence. We have found no authority to support his position. *S. v. Allen,* 11 N. C., 356; *S. v. Stanly,* 49 N. C., 290; *S. v. Ridley,* 114 N. C., 827. We are not informed whether the weapons used were deadly weapons or not, but we do observe that the application of the pair of iron pliers, whatever they may be, had an immediate and salutary effect by transforming a six-foot clubber into an officer, who at once began to discharge his duties by commanding the peace. We assume that the duties and privileges of a peace officer were considered and explained by the court, but the jury did not feel it to be their duty to excuse *this* peace officer for clubbing a citizen in the face with his fist, without any provocation, and if we were permitted to consider the question we think we could approve the verdict. We have no doubt that his Honor in pronouncing judgment gave the defendant full credit for his good intentions in trying to preserve the peace.

AFFIRMED.

STATE v. S. G. MATLOCK.

Indictment for Forgery—Sufficiency of Evidence—Trial—Objections to Evidence—Waiver of Objections.

1. Where, in the trial of one charged with forgery, there was evidence that the prosecutor's cashier missed from his employer's check book two numbered blank checks; that on the afternoon of the same day defendant, who had been seen about the prosecutor's office in the forenoon, presented a check at the bank, numbered like one of the missing blank checks, and fraudulently purporting to be signed by the prosecutor; that on being questioned by the bank teller, defendant tore up the check and ran away; and that when arrested a part of the signed check was found on him, together with a blank check, the number on which corresponded with one of the missing checks—is sufficient to establish a charge of forgery.

2. Where the answer of a witness for the State to a question put by the State is not responsive, the defendant having failed to exercise his privilege of cross-examining the witness, cannot complain because the answer is allowed to stand.

INDICTMENT for forgery, tried before *Coble, J.,* and a jury, at (807) Spring Term, 1896, of DURHAM. The defendant was convicted and appealed. The facts sufficiently appear in the opinion of *Associate Justice Montgomery.*

STATE *v.* MATLOCK.

Attorney-General and Shepherd & Busbee for the State.
No counsel contra.

MONTGOMERY, J. On the morning of 15 November, 1895, J. A. Warren, who was cashier of the prosecutors, upon finding that two checks, numbered respectively 5637 and 5638, had been fraudulently detached from the check book of the prosecutors, went to the First National Bank in Durham, where the checks used by the prosecutors were made payable when properly signed and delivered, and gave notice that the two checks numbered as above had been abstracted and that a forgery was anticipated. The checks were in blank and had not been signed when last seen by Warren. The check book was kept in the office of the tobacco warehouse of the prosecutors, and the defendant had been seen in the office between the hours of 9 and 11 a. m. on 15 November, and also in the warehouse after dinner of the same day. About 3:30 in the
(808) afternoon of the same day the defendant presented for payment at the bank the check numbered 5637, filled in for $84, payable to S. G. Morgan or bearer, and purporting to be signed by the prosecutors and Warren. The bank teller, who had been notified, questioned the defendant so closely concerning the check that he tore it into two parts and ran from the building, the teller following him. When the defendant was arrested one part of the check was found in his pocket. Check numbered 5638, being in blank, was shown on the trial to the witness Woodall, the officer who arrested the defendant, and the witness was asked if he ever saw the check before. He answered that he found it on the person of the defendant when he arrested him. He fitted the check to the stub in the check book and showed it to the jury. The paper was then given in evidence. The defendant objected to this evidence. We do not see on what valid ground. The defendant was not represented by counsel here, either in person or by brief, and we are unable to find any error in admitting the testimony or in the whole record. All the matters testified to were circumstances directly connected with the offense charged, and were material and relevant. All of it was strong testimony tending to show, especially when taken in connection with the fact that the defendant had been seen in the room in which was kept the check book on the morning of its abstraction, that the defendant was the person who took and filled out and signed the check which was presented to the bank for payment. The check book and the stubs attached, which fitted numbers 5637 and 5638, were introduced as evidence in the case. The State was allowed to ask Warren if the defendant sold any tobacco at the prosecutor's warehouse on that day. The witness answered that the defendant did not get any check if he did sell any tobacco there
(809) that day. The defendant excepted to the answer. The answer was not responsive, but the defendant had the privilege to examine

the witness further if he had so desired, and having failed to do so he cannot complain. The defendant introduced no testimony and made no exception to the charge of the court.

NO ERROR.

STATE v. ELISHA BEAL.

Indictment for Murder—Homicide—Sufficiency of Evidence.

1. Where on the trial of defendant, who was charged with causing the death of one G. by screwing down the safety valve of a boiler of which G. was fireman, thereby intentionally causing an explosion which resulted in the death of G. and another, there was evidence tending to show that defendant had malice toward G., who had taken his place as fireman after his discharge from that position; that he was at the boiler alone about midnight of the night before the explosion; that the valve had been screwed down by some one unknown, and the explosion thus caused; that the defendant soon after the explosion was heard to say that he had been expecting every minute that morning to hear the explosion, and consequently had not gone near it, and that he had said the day before that the explosion would occur, and that defendant's character was bad: *Held*, that the evidence was sufficient to authorize the trial judge to submit the case to the jury.

2. Where, by inadvertence, the judgment of the court below in a criminal action is omitted from the transcript, the court will, *ex mero motu*, send down an *instanter certiorari* to perfect the record.

INDICTMENT for murder, tried before *Coble, J.*, at Spring (810) Term, 1896, of CHATHAM. The facts appear in the opinion of *Associate Justice Clark*. The defendant was convicted of manslaughter and appealed.

Attorney-General and Perrin Busbee for the State.
T. B. Womack for defendant.

CLARK, J. The exceptions to evidence are without merit and require no discussion. The prisoner insists, however, that the judge erred in refusing his prayer that there was not sufficient evidence to submit the case to the jury.

The prisoner was charged with having caused the death of one Gunter by screwing down the safety valve of the boiler of a steam engine of which Gunter was fireman, thereby intentionally causing an explosion, resulting in the death of Gunter and another man. There was evidence for the State that the prisoner had been discharged as fireman, Gunter being put in his place, and that he had malice towards Gunter in con-

sequence thereof; that the prisoner was at the boiler alone about midnight before the explosion; that when the explosion occurred the valve had been screwed down by some one unknown, by which the explosion was caused; that the day before the prisoner had said the boiler would explode, and soon after it took place he was heard to say that he had expected every minute that morning to hear the explosion till it took place, and in consequence had not gone near it that morning, etc. The prisoner contended that this evidence was consistent with his
(811) innocence, besides he controverted parts of it by his own testimony. There was evidence of his bad character. There was sufficient evidence to submit the case to the jury. *S. v. Green,* 117 N. C., 695; *S. v. Kiger,* 115 N. C., 746; *S. v. Rhodes,* 111 N. C., 647; and upon this and the other evidence it was the province of the jury to find the facts.

The charge of the court carefully guarded the rights of the prisoner, and if, as the jury must have found, the death of the two men was caused by the prisoner's screwing the safety valve down with intent to cause the explosion, the jury took the most lenient view of the case in returning a verdict for a degree of homicide as low as manslaughter.

By inadvertence the judgment of the court below is omitted from the transcript, but this Court, *ex mero motu,* sent down an *instanter certiorari* to perfect the record in this particular. *S. v. Preston,* 104 N. C., 733.

NO ERROR.

Cited: Norton v. McDevit, 122 N. C., 755; *Russell v. Hill, ib.,* 773.

STATE v. MARY HARRIS.

Indictment for Larceny—Indictment, Sufficiency of—Negativing Exception in Statute—Defense.

1. The act of 1895 (ch. 285) does not make it necessary that an indictment for the larceny of a sum less than $20 should charge the taking from the person or from a dwelling house in the daytime.

2. The general rule as to the form of statutory indictments is that it is not requisite, where they are drawn under one section of the act, to negative an exception contained in a subsequent distinct section of the same statute.

3. On a trial for larceny in the Superior Court the fact that the amount stolen was less than $20, and that the taking was neither from the person nor a dwelling-house, is matter of defense which it is incumbent on the defendant to show in diminution of the sentence.

4. Where, in the trial of an indictment for larceny, there is a dispute about the value of the thing taken, it is incumbent on the defendant to demand a finding upon that subject by the jury.

5. The hand is a part of one's person, and the exception in sec. 2 of ch. 285, Laws 1895, is not restricted to cases of taking something concealed about the body.

INDICTMENT, tried before *McIver, J.*, and a jury, at Fall Term, (812) 1896, of GUILFORD. The defendant was indicted for highway robbery, alleged to have been committed by snatching a purse from the hand of the prosecuting witness. When the evidence was closed the solicitor for the State abandoned the action for highway robbery, but stated to the court he would insist upon a verdict for larceny. The court charged the jury that, the State having abandoned the charge of robbery, they would consider the question of larceny only; and if, upon consideration of all the evidence, they had a reasonable doubt of the defendant's guilt, they would render a verdict of not guilty, otherwise they would render a verdict of guilty. The jury returned the verdict, "We find the defendant guilty." Motions for a new trial and in arrest were overruled, and the court sentenced defendant to imprisonment in the State Prison for a term of two years, to which judgment and sentence defendant excepted and appealed. Among others, defendant assigned as errors the following: "(1) That the court erred in not holding that the bill should have charged that the 'taking was from the person,' etc. (3) That the court erred in not instructing the jury to render one of the following verdicts, and no other: First, guilty of larceny from the person; second, guilty of larceny; third, not guilty. (4) That the court erred in not holding that the snatching from the hand (813) (simply) of the pocketbook of the prosecuting witness was not 'larceny from the person.' (6) The court erred in sentencing defendant to two years imprisonment, the amount stolen being less than $20."

Attorney-General for the State.
A. B. Andrews, Jr., and W. L. Watson for defendant.

AVERY, J. That the charge of highway robbery ordinarily includes that of larceny was not contested. 1 Bishop Cr. Law, sec. 795. The defendant was convicted upon testimony tending to show that he snatched a purse containing a sum of money out of the hands of the prosecuting witness, when he was standing under a city lamp counting his money, and fled with it.

Laws 1895, ch. 285, does not make it necessary that an indictment for the larceny of a sum less than $20 should charge the taking from the person or from a dwelling-house in the daytime. *S. v. Bynum,* 117 N. C., 749; *S. v. Downs,* 116 N. C., 1064. The general rule as to the

form of statutory indictments is that it is not requisite, where they are drawn under one section of the act, to negative an exception contained in a subsequent distinct section of the same statute. But such indictments might be maintained upon another familiar and well-settled principle, the application of which is more readily comprehended, when, as in the case at bar, the conviction for larceny is only possible because the charge of the higher crime includes that of the larceny.

The Superior Court has general jurisdiction of larcenies. The presumption is in favor of its jurisdiction, and where a defendant relies upon the fact that the amount stolen was less than $20, and that the taking was neither from the person nor a dwelling-house, the fact (814) that a sum less than $20 was taken neither from the person nor a dwelling-house is a matter of defense which it is incumbent on him to show in diminution of the sentence. The consequences of the conviction of the felony are in all respects the same, except that the law has given him the opportunity to ask for a smaller punishment when certain facts appear. Where there is a dispute about the value of the thing taken, it is likewise incumbent on the defendant to demand a finding upon that subject by the jury.

There was no exception to the charge of the court, and the question whether the proof of snatching from the hand of the prosecutor would be a taking from the person could not be raised by the motion in arrest of judgment. But we deem it proper to say that we think the hand is a part of one's person, and it was not contemplated by the Legislature that the exception in section 2 of the act should embrace only cases of taking something concealed about the body.

NO ERROR.

Cited: S. v. Davidson, 124 N. C., 844; *S. v. R. R.,* 125 N. C., 671; *S. v. Dixon,* 149 N. C., 464; *In re Holley,* 154 N. C., 170.

STATE v. SOUTHERN RAILWAY COMPANY.

Indictment for Running Freight Trains on Sunday—Interstate Commerce—Defenses—Evidence.

1. Sec. 1973 of The Code, making it a misdemeanor to run freight trains on Sunday, contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any intent other than to prescribe a rule of civil conduct for persons in the territorial jurisdic-

tion of the Legislature; and, although to some extent and indirectly affecting interstate commerce, so far as it relates to trains engaged in carrying freight from one State to another on Sunday, it is not unconstitutional.

2. Such a law will remain valid unless and until it shall be superseded by an act of the United States Congress, which has the right to replace all State legislation affecting interstate commerce by express congressional enactment affecting all railways engaged in interstate commerce. While the State may not interfere with transportation into or through its territory, "beyond what is absolutely necessary for self-protection," it is authorized in the exercise of police power to provide for maintaining domestic order and for protecting the health and morals of its people.

3. Sec. 1973 of The Code, providing that freight trains shall not run later than 9 o'clock Sunday morning, was violated *prima facie* when defendant's train arrived at Greensboro at 10:25 o'clock a. m. on Sunday, and if the defense relied upon, to an indictment for running trains on Sunday, was that it was necessary to run later than the hour fixed by the statute in order to preserve the health or save the lives of the crew, it was incumbent upon the defendant to prove that the unlawful act was done under the stress of such necessity.

4. Where the only evidence offered in support of such defense was that water could not be obtained from a tank at a station passed by the train before reaching Greensboro, and that it could not have been obtained by pumping (the well being empty), and it appeared that food and water could have been obtained at any other station passed by the train: *Held*, that such evidence was insufficient, and the authorities of the railway company should have ordered the train to a siding at a time early enough to preclude all possibility of a necessity for violating the statute.

ACTION, tried before *Coble, J.*, and a jury, at February Term, (815) 1896, of GUILFORD, on the following indictment:

"The jurors for the State, upon their oath, present: That the Southern Railway Company, being a railroad company late of the county of Guilford, on 15 December, 1895, it being Sunday, with force and arms, at and in the county aforesaid, unlawfully and willfully did permit a car, train of cars, and a locomotive to be run on its railroad in Guil- (816) ford County, between the hours of sunrise and sunset, and after 9 o'clock a. m., the said car, train of cars and locomotive not being run for the purpose of transmitting the United States mail either with or without passengers, nor for carrying passengers exclusively.

"Nor was said car, train of cars and locomotive run for the purpose of transporting fruits, vegetables, live-stock or perishable freights exclusively, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

F. M. Keith, witness for the State, testified:

"On Sunday, 15 December, 1895, in company with Mr. Cooper I was going from Greensboro, in Guilford County, to a church in the country

to attend religious services, when outside of Greensboro we met a freight train on the Southern Railway between Pomona and Greensboro. It was 10 o'clock a. m. Sunday morning, and the train was running fifteen or twenty miles an hour. It was some two miles from Greensboro, between the latter place and Pomona. Pomona is about three miles from Greensboro, between Greensboro and Jamestown, on the railroad from Greensboro to Charlotte. The train was drawn by a locomotive, and had eighteen or twenty freight cars and caboose behind. Two of the cars were open. Saw lumber in one of these, coal in the other, I think. Took out my watch and saw that it was 10 o'clock. Don't know what was in the other cars. They were closed and sealed up. Heard the train coming some distance before we met it. It was coming from the direction of Jamestown."

N. M. Cooper, witness for the State, testified in substance to the same facts, and the State closed.

(817) J. R. Royall was introduced for defendant, and testified:

"Was conductor of the train which witnesses Keith and Cooper met between Pomona and Greensboro on Sunday morning, 15 December, 1895. The train was a through freight from Charlotte, North Carolina, to Danville, Virginia. It started from Charlotte at 8:30 p. m. Saturday, 14 December, and was due in Danville at 7 a. m. Sunday following. It was a freight train loaded with general freight—some eighteen or twenty cars for Danville and other points beyond Danville, in Virginia, and other States north of Virginia.

"We left Charlotte on time, and would have reached Danville at 7 a. m. Sunday but for delays which occurred. We arrived (after leaving Charlotte at 8:30 p. m., as before stated) at Salisbury, N. C., at 12 midnight. Here we took on some cars from the Western North Carolina Railroad loaded with freight for Danville, Virginia, and other points north of Danville. We left Salisbury at 12:50 a. m. and arrived at Lexington about half after 1. We were delayed at Lexington in order to let the train for Atlanta pass going south. It was a passenger train and had the right of way, and I had to take the side track with my train. I left Lexington at 3:57 a. m., arrived at Thomasville at 4:25 a. m. Left Thomasville at 5:26 a. m., having been detained there for another train which had the right of way. Arrived at High Point at 5:50 a. m.; left High Point at 5:55 a. m.; arrived at Jamestown, ten miles from Greensboro, at 6:15 a. m. At Jamestown my train was again sidetracked to allow passenger trains having right of way to pass, and I was compelled to remain at Jamestown until 9:25 a. m.

"It was during the Atlanta Exposition, and there were many extra passenger trains being run on the road.

"Left Jamestown at 9:25 a. m.; arrived at Pomona at 9:57 (818) a. m. and at Greensboro at 10:25 a. m.

"I could not remain at Jamestown during Sunday because I could not get water or coal there for the locomotive, nor could I get subsistence there for the train crew. Greensboro was the nearest point where water and subsistence could be had, so I went to Greensboro and stopped for the day. If the locomotive had stood all day the water would exhaust, and it would be necessary to have water to start again. It is 144 miles from Charlotte to Danville, and from 8:30 p. m. to 7 a. m. is plenty of time for the trip."

Upon cross-examination this witness said that there was a tank of water at Jamestown which is ordinarily used by trains, but on this occasion there was no water in it; that at Jamestown there are several stores and dwelling-houses, and that most of the crew carried their own provisions with them; that they had no provisions that day; that this train was hauling cars loaded as described by the witness F. M. Keith, and that Greensboro was a more preferable and convenient place for him to stop on Sunday than Jamsetown.

This concluded the testimony.

The defendant then requested the court to charge the jury:

"1. That if the train was a through freight train from Charlotte, N. C., to Danville, Va., carrying freight from one State to another, the North Carolina statute would not apply, and the defendant would not be guilty.

"2. That the North Carolina statute does not apply to trains running on Sunday carrying interstate freight or commerce, and if from the evidence the jury was satisfied that such was the character of the train in question, the defendant would not be guilty.

"3. That if the train in question was started at 8:30 p. m. on (819) Saturday from Charlotte, destined for Danville, Va., where it was due at 7 a. m. Sunday, and by reason of unexpected and unavoidable circumstances the train was delayed so that it ran from Jamestown to Greensboro, ten miles, after 9 a. m. Sunday, the defendant would not be guilty.

"4. That in order to constitute guilt in this case the violations of the terms of the statute must be willful, and unless it was the defendant would not be guilty.

"5. If the train started, as testified by Royall, from Charlotte at 8:30 p. m. Saturday, for Danville at 7 a. m. Sunday, and was delayed as testified by Royall, that such delay was unavoidable, and as further testified by Royall, it was necessary to reach Greensboro in order to get water and coal and subsistence for the crew, then the running from

Jamestown to Greensboro after 9 a. m. Sunday morning was not willful and the defendant would not be guilty."

The court refused these instructions, and instructed the jury if they believed the testimony the defendant was guilty. Defendant excepted to the court's refusal to give instructions as asked. There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General and Shepherd & Busbee for the State.
F. H. Busbee for defendant (appellant).

AVERY, J. The statute (The Code, sec. 1973) under which the indictment is drawn is not unconstitutional. Although it affects interstate commerce to some extent, there is nothing in its provisions which suggests a purpose on the part of the Legislature to interfere with
(820) such traffic, or indicative of any other intent than to prescribe in the honest exercise of the police power a rule of civil conduct for persons within her territorial jurisdiction. Such a law is valid and must be obeyed unless and until Congress shall have passed some statute which supersedes that act by prescribing regulations for the running of trains on the Sabbath on all railway lines engaged in interstate commerce. *Hunnington v. Georgia,* 163 U. S., 299. While the State may not interfere with transportation into or through its territory "beyond what is absolutely necessary for its self-protection," it is authorized in the exercise of the police power to provide for maintaining domestic order, and for protecting the health, morals, and security of the people. *Railway v. Van Husen,* 95 U. S., 470, 473. Congress is unquestionably empowered, whenever it may see fit to do so, to supersede by express enactment on this subject all conflicting State legislation. But, until its powers are asserted and exercised, the statute under which the indictment is drawn may be enforced and will constitute one of the many illustrations of the principle that the States have the power, at least in the absence of any action by Congress, to pass laws necessary to preserve the health and morals of their people, though their enforcement may involve some slight delay or disturbance of the transportation of goods or persons through their borders. *Morgan v. Louisiana,* 118 U. S., 455, 463; *Hunnington v. Georgia, supra,* at page 314; *Smith v. Alabama,* 124 U. S., 465, 474, 479, 482; *Bagg v. R. R.,* 109 N. C., 279.

The statute (Code, sec. 1973) declares the running of any such train as that in question is admitted to have been, after 9 o'clock on Sunday morning, to be a misdemeanor. It is not denied that the train arrived at Greensboro at 10:25 a. m. on Sunday. The State, therefore,
(821) established *prima facie* the guilt of the defendant. If the defense relied upon was that it was necessary to run after the hour fixed as the limit by statute in order to preserve the health or to save the lives

of the crew employed on the train, or relieve them from severe suffering, it was incumbent on the defendant to show to the satisfaction of the jury that the act was done under the stress of such necessity in order to excuse it as not in violation of the spirit though in conflict with the letter of the law. *S. v. Brown,* 109 N. C., 802; *S. v. McBrayer,* 98 N. C., 619. The evidence is not sufficient in any aspect of it to excuse the running of the train after 9 o'clock. Admitting that it was impossible to procure water at the tank at Jamestown (though the fact shown was not that the tank could not have been filled by pumping, but that it was empty) or supplies of food for the crew, *non constat,* but that both food and water could have been obtained in sufficient quantity at any town or station on the road west of Jamestown. In fact, the testimony tends rather to show that those who directed the movements of the train had abundant reason for anticipating further delays, and ought, therefore, to have ordered it to lie over sooner. The authorities of the road ought to have been aware that in such a busy time, when so many trains were in motion, they ought, in the exercise of ordinary care, to have ordered the train to move onto the siding in time to avoid any risk of violating the law. The proof offered falls very far short of excusing the act, denounced as a violation of law, by showing that it could not have been obeyed by the exercise of due precaution without imminent risk of endangering the lives or health of the crew on board the train. For the reasons given the judgment of the court below is

AFFIRMED.

Cited: S. v. Rogers, ante, 796; *S. v. R. R.,* 145 N. C., 550, 573, 575; *S. v. R. R.,* 149 N. C., 476; *Davis v. R. R.,* 170 N. C., 600.

(822)

STATE v. JAMES GROVES ET AL.

Indictment for Killing Cattle—Goats—Construction of Statute—Trial—Demurrer to Evidence—Instructions.

1. The object of a trial being to ascertain the truth of the matter in controversy, the trial judge may in his discretion permit a witness to be recalled after the party has rested his case, or even after all the evidence has closed.
2. The word "cattle," as used in sec. 1003 of The Code, embraces all domestic quadrupeds, including "goats."
3. Where, at the conclusion of the prosecution's case on a trial, the defendant demurs to the evidence, it is proper for the court, upon overruling the demurrer, to refuse permission to the defendant to offer any testimony, and to charge the jury on the state of facts admitted by the demurrer.

4. When a defendant desires the benefit of a demurrer to the evidence, he should first introduce his testimony, and then ask an instruction that there is not sufficient evidence to go to the jury.

5. A mere omission to charge the jury on a particular aspect of the case is not ground for an exception unless an instruction is asked and refused.

INDICTMENT, under section 1003 of The Code, for willfully and unlawfully killing cattle, tried before *Coble, J.*, and a jury, at Fall Term, 1896, of DUPLIN.

At the trial, after the solicitor had rested his case and the defendant demurred to the evidence as being insufficient to go to the jury on a certain point, the State was allowed to recall a witness on such point, and defendants excepted. The defendants then offered to introduce testimony, but the court refused to permit them to do so, and charged the jury on the facts testified to by the State's witnesses.

(823) The defendants were convicted and appealed.

Attorney-General and Perrin Busbee for State.
Stevens & Beasley for defendants.

CLARK, J. The court in its discretion promptly permitted the witness to be recalled, and indeed might have done so even after the evidence had closed. *Olive v. Olive,* 95 N. C., 485. The object of a trial is to ascertain the truth of the matter in controversy. The Code, sec. 1003, makes it a misdemeanor to willfully and unlawfully kill or abuse any "horse, mule, hog, sheep, or other cattle," etc. The word "cattle" has a restricted sense which applies only to the bovine species, and also a broader meaning which includes all domestic animals. That it is used here in the latter and broader sense is apparent from the context, "horse, mule, hog, sheep, or other cattle." Indeed, the broader sense is the more usual one. 3 A. & E. Ency., 43. Worcester's definition, "a collective name for domestic quadrupeds, including the bovine tribe, also horses, asses, mules, sheep, goats, and swine," was approved by this Court in *Randall v. R. R.,* 104 N. C., 410. To same effect are the Standard, Webster, and Century dictionaries.

In the Scriptures the word "cattle" ordinarily and usually embraces goats, notably in the contract between Laban and Jacob. Genesis, ch. 30, v. 32.

In *Bank v. Bank,* 21 Wall., 294, the word "cattle" is held to be broad enough to include even swine. In England the Stat. 9 Geo. II, ch. 22 (commonly called the Black Act), made it punishable with death without benefit of clergy "to maliciously and unlawfully kill any cattle." Under this is was held that the statute embraced domestic animals other than

the bovine species, as a mare, 2 East Pl. of Crown, 1074; *King* (824) *v. Paty,* 2 W. Bl., 721, and "pigs" in *Rex v. Chapple,* 1 Crown Cases, 77.

The demurrer to the indictment therefore on the ground that "other cattle" did not include goats was properly overruled.

The defendant demurred to the evidence, and the court, after overruling such demurrer, properly refused to allow the defendant to introduce further evidence, and charged the jury upon the state of facts admitted by the demurrer. *S. v. Adams,* 115 N. C., 775, 784, and cases there cited. As stated in that opinion, if the defendant has evidence he should give the jury the benefit of it, and (unless his own evidence proves the case against him) it will be still open to him to ask an instruction that there is not sufficient evidence to go to the jury. But if he demurs on that ground the court will not permit him to "take two bites at a cherry" by fishing for the opinion of the court and afterwards introducing testimony if the demurrer is overruled.

There is nothing to show that the court was prayed and refused to charge that if the defendants killed the goats by mistake they would not be guilty. A mere omission to charge on a particular aspect of the case is not ground of exception, unless an instruction is asked and refused. *S. v. Varner,* 115 N. C., 744, and numerous cases cited in Clark's Code, page 382. Besides, there is no evidence set out tending to show that such state of facts was in proof, and the court in fact charged the jury that they must be satisfied beyond a reasonable doubt that the defendants willfully and unlawfully killed the goats in an enclosure not surrounded by a lawful fence, thus excluding the idea of a killing by mistake.

NO ERROR.

Cited: S. v. Harris, 120 N. C., 579; *S. v. Hagan,* 131 N. C., 803; *S. v. Worley,* 141 N. C., 768; *S. v. Yellowday,* 152 N. C., 797; *S. v. Davenport,* 156 N. C., 611; *S. v. Fogleman,* 164 N. C., 460; *S. v. Davidson,* 172 N. C., 945.

(825)

STATE v. B. J. BROWN.

Indictment for Unlawfully Performing Marriage Ceremony—Personating Ordained Minister.

1. A private citizen who personates an ordained minister and, with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offense known to the common or statute law.

2. Query as to the validity or effect of the action of the parties.

STATE *v.* BROWN.

ACTION, tried before *Starbuck, J.,* and a jury, at the March Term, 1896, of PENDER, upon bill of indictment as follows:

"The jurors for the State upon their oath present that B. J. Brown, late of said county, on 14 March, 1895, in said county, not then and there being an ordained minister of any religious denomination or a justice of the peace of said county, and not being by law authorized so to do, did unlawfully, willfully, and corruptly celebrate and solemnize a marriage between Joseph W. Smith, a male person, and Mary E. Newkirk, a female person, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said B. J. Brown, in said county, on the day and year aforesaid, not then and there being an officer authorized by law to celebrate a marriage, to wit, an ordained minister of any religious denomination or a justice of the peace of said county, did unlawfully, willfully, corruptly, and falsely presume to act as an ordained minister of the Missionary Baptist denomination; and so presuming to act as such officer, did then and there in said county celebrate and solemnize a

(826) marriage between Joseph W. Smith, a male person, and Mary E. Newkirk, a female person, and then and there pronounce them man and wife, not being by law authorized so to do, contrary to the statute in such cases made and provided and against the peace and dignity of the State. And the jurors aforesaid, upon their oath aforesaid, do further present that the said B. J. Brown, in said county, on the day and year aforesaid, not then and there being a public officer, duly authorized by law to celebrate a marriage, to wit, an ordained minister of any religious denomination or a justice of the peace of said county, did unlawfully, willfully, corruptly, falsely and fraudulently personate an ordained minister of the Missionary Baptist denomination, and so unlawfully, willfully, corruptly, falsely and fraudulently personating an ordained minister of the Missionary Baptist denomination, a public officer authorized by law to celebrate a marriage, did then and there in said county celebrate and solemnize a marriage between Joseph W. Smith, a male person, and Mary E. Newkirk, a female person, and then and there pronounce them man and wife, to the great perversion of public justice, to the evil example of all others, contrary to the statutes in such cases made and provided, contrary to law, and against the peace and dignity of the State."

The jury returned a verdict of guilty against the said defendant. The solicitor for the State prayed judgment. Refused, and the solicitor for the State excepted. The defendant moved the court to arrest the judgment upon the grounds that the bill charged and the facts set forth therein constituted no indictable offense. The motion was allowed, and the solicitor appealed.

Attorney-General and Stevens & Beasley for the State. (827)
No counsel contra.

FAIRCLOTH, C. J. The indictment contains three counts: 1. Charging that defendant, not being an ordained minister or a justice of the peace, and not being by law authorized so to do, did unlawfully, willfully, and corruptly solemnize a marriage between a male and female, etc. 2. Charging that defendant, not being authorized by law to celebrate a marriage, did unlawfully, etc., presume to act as an ordained minister and celebrate a marriage between a male and female person, and to pronounce them man and wife, contrary to the statute, etc. 3. Charging that defendant, not being a public officer nor an ordained minister or justice of the peace, did unlawfully, etc., personate an ordained minister, and so celebrate a marriage between a male and female person and pronounce them man and wife, contrary, etc.

The jury rendered a verdict of guilty, and on motion of the defendant, judgment was arrested, and the solicitor excepted and appealed. The record discloses no evidence by the State or the defendant, nor any exception, except as above stated. Assuming, however, every fact alleged to be true, we are unable to discover any criminal offense known to the law. We are referred to no authority for the position of the State. We were referred to Code, sec. 1812, which only prescribes what is a valid marriage; also to Code, sec. 1112, which imposes a penalty, and declares it to be a misdemeanor for any officer to fail to return process, etc., or for any person who is not authorized by law to presume to act as any such officer.

So the case is that of a private citizen, unofficial, celebrating a marriage between a man and woman with their consent, and they are not complaining and are presumably satisfied and enjoying their new relation. We are not aware of any statute or principle of the (828) common law declaring the action of the defendant to be a criminal offense. We are not considering the validity or invalidity or effect of the action of the several parties.

AFFIRMED.

Cited: S. v. Wilson, 121 N. C., 657.

STATE v. HAYWOOD LEACH.

Indictment for Highway Robbery—Evidence, Sufficiency of—Practice.

1. Where a defendant introduces no evidence and excepts neither to the evidence introduced by the State nor to any ruling of the court, it is too late after verdict to move for a new trial on the ground that the testimony did not warrant the verdict.

2. Where, on a trial for robbery, the evidence was that the prosecutor had shown his money in a barroom where defendant was; that when he started home defendant and another followed him and defendant pretended to help him on his horse, and put his hand in his pocket and was accused of trying to rob him; that prosecutor then rode toward home and about one-half mile from town he was struck from behind and rendered unconscious, and upon regaining consciousness his money was gone; that across fields it was nearer from the barroom to the place where he was robbed than by the road, and that when prosecutor started homeward by the road, defendant started across the field, and that next morning tracks which defendant's shoes fitted were found in the road where prosecutor was robbed: *Held*, that the evidence was not only sufficient to be submitted to the jury, but clearly supported the verdict.

(829) INDICTMENT for highway robbery, tried before *McIver, J.*, and a jury, at Fall Term, 1896, of CHATHAM. The evidence was as follows:

H. H. Henderson testified: That he lives about seven miles north of Pittsboro. Was in Pittsboro 25 September, and frequently during the day in the barroom of A. P. Terry, and was drinking some, but was not drunk. Took four drinks during the day. Came to Pittsboro about 9 in the morning. Knows what happened and was able to attend to his business. Left the barroom about 8 or a little before. That he had about $40 or $45 in his pocket, in greenbacks, and a few dollars in silver. Pulled this money out of his pocket while in the barroom, and had it out several times during the day. Defendant was present when he had the money out and knew he had it, and saw it. That he came to town on horseback and left his horse hitched behind the store of O. S. Poe & Son, about 75 or 80 yards from the barroom. When he left the barroom for his horse, it being about dark, the defendant and another party (Will Baldwin) followed him to his horse. He did not need their assistance, and did not ask them to go with him. He had a bundle of socks and a bundle of shoes in his arms. They followed him to his horse. Baldwin held the horse by the bridle. Defendant Leach pretended to assist him on his horse, and after he was on the horse the defendant, with his hands still on him, attempted to take the money from his pocket. The money was in a left-hand front pants pocket, and the defendant saw him put it

there before he left the barroom. That he said to him: "Never mind my pocket, I will attend to my pocketbook myself. Take your hand out of my pocket. You are trying to take my money"; and defendant replied, "I will see you later." He then rode off in a walk, and did not see him any more. The road toward his home was west about one-fourth mile, and then turned at right angles north. He rode along in a (830) walk till he reached the corner of Hal London's, which was the corner of the right angle, and rode down the north road about one-fourth mile, and as he was in a few yards of the Taylor place he was struck from behind and knocked from his horse. Remembered no more until about daybreak next morning, when he was aroused by the mail rider and others, who came out from town for him, to wit: Mr. Clark, Mr. Hill, and Aaron Degraffenreidt. His money was gone, and the shoes and socks and his knife were lying by him in the road.

T. B. Fowler testified: That he lived in Pittsboro and saw Henderson in town on the day he was struck—Friday, 25 September. Saw him late in the evening. He was drinking but not drunk. He was well acquainted with the road leading out to Henderson's home, and it runs west after leaving Poe's store, about one-fourth mile, and then turns north at right angles. That leaving Poe's store, where Henderson's horse was hitched, and going through the field to the point where Henderson was struck is about one-fourth mile nearer than going around the road. That the way to go through the field, and a direct line to the said point after leaving Poe's store, is to go up by the postoffice and down the alley at Exline's Hotel, out by the old schoolhouse in the field, or go down by Lineberry's house, at the corner of the block, and go up to the schoolhouse, meeting the alley from Exline's, and that the distance from Poe's store to the schoolhouse is the same either way. The schoolhouse is at the opposite corner of the block from Poe's store—a few yards beyond. The direct way from the schoolhouse to the point on the main road (the Snow Camp road) is through an old field, crossing a creek, and some old straw fields—some cultivated land. He went out this way the morning after the robbery, and just after he crossed the creek he (831) found tracks alongside an old hedge and followed these tracks, and they went directly to a large tree on the road, or a few yards above where Henderson was found next morning after the robbery. Tracks made by a number 10 shoe on left foot, which was run down on the heel. Right foot apparently straight. After describing the route through an old field the witness stated that he followed the tracks, and that they left an old dim path soon after crossing the creek, and that by going that way from Poe's store it was a quarter of a mile nearer than by going around the road, but leaving the place where Henderson was found, where there was a large quantity of blood on the ground, he found the

same tracks going away, but crossing the fence between the points where they came into the road and where the blood was found. They came into the path of the tracks going out about 50 yards from the road, and in coming this way they passed through an open field, and were made by some one while running. All these tracks were evidently made the day or night before, and were nearly fresh. On the following day (Haywood having been arrested and placed in jail that evening), the day of his first search, he, in company with others, took the shoes found on the defendant when arrested and carried them to these tracks, and tried them in those which were the plainest, and they fit exactly, and the run-down shoe settled exactly in the track of that foot. That, besides the run-down part of it, the left shoe had a broken place in the sole, near the toe, and on the right side. That he noticed this in the track—peculiarity in the track—and when the shoe was placed in it he found that this peculiar rough place, which he had noticed in the track, fit exactly. On the right-hand track, at the heel, he observed a rise in the middle
(832) of the track—a small mound—as if the dirt in the middle of the heel had been pressed down even with the remainder of the bottom of the heel. When he saw the right shoe of defendant at the trial he noticed that there was a smooth hole in the middle of the right heel as if it had been burned by a hot iron. When placed in the track this cavity in the heel fit the mound of the track. Witness was convinced that the shoe made the track. The shoe was half-soled, and the track showed it was made by a shoe which had been half-soled. "I went and got defendant's shoes. He did not object to giving them up. He was in jail."

F. C. Poe testified that he is a member of the firm of O. S. Poe & Son. Saw Henderson on 25 September. He was frequently in his store, and was in there just as he was closing his store. He was not drunk, but had been drinking. Saw him have a roll of money, and he paid him some just as he was leaving his store. Knows the point where Henderson is said to have been found. Saw a large quantity of blood there on the ground. Went with witness Fowler, and saw track, as testified to by Fowler. This witness testified substantially as did Fowler.

Will Baldwin testified: That he was with defendant on the night of 25 September. Went with him to Henderson's horse. Defendant had his arm partly around Henderson when he got on his horse, and after he got on the horse he heard Henderson say to him: "Take your hand out of my pocket, you damned thief. You are trying to steal my money. I know what you are doing." Defendant replied, "I am not trying to take your money." I did not hear defendant say, "I will see you later." Think I could have heard it if it had been said. Henderson rode off, and he and some other colored boys, who had come up, started over to Sheriff Brewer's corn-shucking. That Brewer's was directly east from

the store. That Henderson rode off on the road going directly (833) west, and the postoffice was north. That they said to defendant, "Come on; let's go on over to the shucking," and he replied, "I am not going now; I may come later." That defendant immediately left them, and went toward the postoffice, and to the corn-shucking. That they all left where the horse was hitched as soon as Henderson left, and defendant left the witness as soon as he reached the corner of the store. That he knows where the old schoolhouse is, as testified to by Fowler, and to go there from Poe's store it is the same distance to go down by Lineberry's or to go up by the postoffice and down the alley at Exline's Hotel. Did not see defendant any more until late that night when he came over to the corn-shucking, and that the distance from the store, where they parted, to the point where the robbery was said to have been committed is about one-fourth mile, and that the distance to Sheriff Brewer's from the store is nearly half a mile, making the distance from the place of the robbery to Brewer's nearly a mile, one direction from the store; the other, the other direction.

A. P. Terry testified: That he is the keeper of the barroom at Pittsboro, and knows Henderson. That he was in his barroom several times during the day 25 September, 1896. Was drinking a little, but not drunk. Had some money, in greenbacks, and had it out several times, treating different parties. He last saw him between 7 and 8 o'clock at night and when he left he was not drunk. Witness states that he was at his barroom very early next morning, and that defendant Leach came down there very early, and that his pants legs were nearly covered with "beggar lice." The witness Fowler had already testified that in going through the old field described by him his clothing became nearly covered with beggar lice, and that in following the tracks described he went through these old fields. (834)

A. B. Clark testified: That he lived in Pittsboro, and that early in the morning of 25 September he was informed that Henderson was seriously injured and was found in an unconscious condition on the Snow Camp road, leading north from Hal London's. That he went there in a hack to see him, and found him lying on the side of the road a few yards below the Taylor place and just beyond the oak tree testified to by Fowler, and that there was a large quantity of blood in the road. Henderson was on the other side of the road, lying coiled up, with the back of his head badly bruised in two places and bleeding. The rim of his hat, which was lying near by, was cut. Two small holes or torn places through the hat at the edge of the rim, as if made by some stroke. Henderson was barely conscious. Witness and others picked him up, placed him in the hack and brought him to his hotel, where he remained till the day of the trial. That the bruises or wounds were just below the right

ear—a little toward the middle of the back of the head. That he found the articles—shoes and socks—and also found his pocketknife and a half-pint bottle nearly full of whiskey lying side by side, as if drawn out of the pocket together, and that he was informed by the mail rider that Henderson was out there, and of his condition.

The defendant introduced no evidence, nor did he except to any of the evidence offered by the State or to any rulings of the court. There was a verdict of guilty, and defendant thereupon moved for a new trial on the ground that the testimony did not warrant the verdict. The motion was refused, and defendant appealed.

(835) *Attorney-General and Shepherd & Busbee for the State.*
No counsel contra.

FURCHES, J. The defendant was indicted for highway robbery; verdict of guilty and judgment thereon, from which he appealed.

The defendant introduced no evidence on the trial, nor did he except to any introduced by the State, nor did he except to any ruling of the court. But after the verdict had been rendered he moved for a new trial "on the ground that the testimony did not warrant the verdict." If this motion is to be taken to mean that there was no evidence, or not sufficient evidence to authorize the submission of the case to the jury, it was made too late. *S. v. Kiger,* 115 N. C., 746; *S. v. Keath,* 83 N. C., 626; *S. v. Hart,* 116 N. C., 976. But as this ruling is regarded as somewhat technical, we have carefully examined the whole of the testimony in the case and consider it not only sufficient to authorize its submission to the jury, but if believed, and that was a question for the jury, we do not see how they could have found otherwise than they did.

There is no error, and the judgment is

AFFIRMED.

Cited: S. v. Wilson, 121 N. C., 657.

---

(836)

STATE v. D. I. WOODWARD.

Indictment for Forcible Trespass—Evidence, Sufficiency of.

1. Where, in the trial of an indictment for forcible trespass, it appeared that the prosecutor's mill was placed on land leased by the defendant, with the consent and under contract with the latter that the defendant was to furnish logs to be sawed by the prosecutor at a specified price; that the defendant and his laborers destroyed the mill in the presence of the

prosecutor, who protested against it; that no notice had been given to prosecutor of defendant's intention to remove the mill, and that defendant, when asked why he did not let the prosecutor know that he was going to tear down the mill, said: "It would not have done," the owner "was in possession and would have been bad to get out": *Held*, that it was proper to leave to the jury the question whether the defendant was guilty after determining in whom was the possession.

2. The gist of the offense of a criminal forcible trespass is that there be such an offer of violence or demonstration of force as is calculated to bring about a breach of the peace, and this may be implied, even if there be no actual violence or any fear inspired by those committing the trespass, if the person whose possession is invaded be present at any time during the commission of the act and forbidding it.

INDICTMENT for forcible trespass, tried before *Coble, J.*, and a jury, at August Term, 1896, of DUPLIN.

The defendant was convicted and appealed. The facts appear in the opinion of *Associate Justice Furches.*

Attorney-General for the State.
Stevens & Beasley for defendant.

FURCHES, J. The defendant is indicted for forcible trespass in tearing down and moving the prosecutor's steam sawmill. The mill was standing on land upon which the defendant had a lease; but it (837) was put there with the consent of the defendant and under a contract between him and the prosecutor that he, the defendant, was to log the mill and the prosecutor was to saw the logs at specified prices. The prosecutor had quit sawing on Thursday before the mill was torn down Wednesday morning following, and was not present when the defendant and his force entered and commenced tearing down the mill. But the prosecutor came while the work of tearing down the mill was going on, and forbade defendants "touching another splinter." And the only recognition the defendant gave this order of the prosecutor was to order the hands at work tearing down the mill to "go on," which they did, tearing up the foundation upon which the mill and engine rested, after the prosecutor got there and forbade the tearing down his mill. The defendant had four hands besides himself (three colored men and one white man) engaged in tearing down the mill when the prosecutor got there. The prosecutor said he left while the work was going on, because he was unable to do anything more, owing to the number of persons engaged in tearing down the mill. That he was not afraid of their doing him personal injury.

There was evidence that the defendant started out to get up hands at 2 o'clock in the morning to take down the prosecutor's mill, and that

defendant had not demanded possession or notified the prosecutor to move the mill; nor had the defendant given the prosecutor notice of his purpose to tear down and move the prosecutor's mill. And one Blanchard, a witness for the State, testified that he asked the defendant why he did not let Swinson, the prosecutor, "know he was going to move the mill from the shelter," when defendant replied, "It would not
(838) have done. Henry (meaning the prosecutor Swinson) had possession and would have been bad to get out."

The court charged the jury fully, and in our opinion fairly, the law bearing upon the facts in the case. The charge left it to the jury to find from the evidence whether the defendant or the prosecutor Swinson was in possession when the defendant entered and tore down the mill, and instructed them that if the defendant was in possession he should be acquitted. He then charged the jury that if they found that the possession of the mill was in Swinson, they would then find from the evidence whether the defendant had committed the offense of forcible trespass; that to constitute this offense "there must be such force as is calculated to provoke resistance. The gist of the offense of forcible trespass is the high-handed invasion of the possession of another, he being present forbidding the same. If the mill was in the possession of the prosecuting witness, and if the defendant invaded the possession of the prosecuting witness in a high-handed way, and if, while the defendant was tearing down the mill and before he was through tearing it down, the prosecuting witness came and forbade the defendant, and the defendant, notwithstanding, continued to tear down the mill, and did it in a high-handed way, and used such force as was calculated and tended to provoke resistance and to excite the fears of the owner; and if the evidence in the case satisfied the jury of these facts beyond a reasonable doubt, then they will find the defendant guilty, and if not, they will acquit the defendant."

We can see no ground for the defendant's objecting to this charge. *S. v. Davis,* 109 N. C., 809; *S. v. Wilson,* 94 N. C., 839; *S. v. Gray,* 109 N. C., 790; *S. v. McAdden,* 71 N. C., 207.

There are but two exceptions: First, that the evidence did not
(839) warrant the charge given; and second, that there was no evidence of force, fear, intimidation, or any show of either. Neither one of these exceptions can be sustained.

There is no exception to the charge, and the only question raised by the exceptions is as to whether there was any evidence, or any such evidence as authorized the court to submit the case to the jury. And as to this it seems to us there can be no doubt. It is admitted that the prosecuting witness was the owner of the mill. And while it was on land that defendant held under the lease, it was admitted that it was put there with the consent of the defendant and under a contract that the defendant was

to furnish the prosecutor with logs which the prosecuting witness was to saw for the defendant at a specified price per thousand. This at least made the prosecutor a tenant at will and entitled him to the possession until the tenancy was terminated by notice to quit, which defendant admitted he had never given the prosecutor. But more than this, when asked by the witness Blanchard why he did not let the prosecutor know that he was going to tear down the mill, "he said it would not have done as Henry, the prosecutor, was in *possession* and would have been bad to get out."

So it seems that there was evidence tending to show, if not absolutely establishing the fact, that the prosecuting witness was in possession. It may be, as this evidence was not contradicted, that the court would have been authorized to instruct the jury that if they believed this evidence the prosecutor was in possession. But be this as it may, the judge submitted the question of possession to the jury, and left it to them to say whether the defendant or the prosecutor was in posses- (840) sion, and they said the prosecutor was.

It is sometimes not easy to draw the line of demarkation between what are criminal trespasses and what are only civil trespasses. It is said that to make a forcible trespass (criminal and indictable) "there must be actual violence used, or such demonstration of force as is calculated to intimidate or *tend to a breach of the peace.* It is not necessary that the party be actually put in fear." *S. v. Davis, supra.* This may be done by demonstration of force as by the use of weapons or by numbers, as three or more. *S. v. Davis, supra.* The party must be present forbidding or, rather, objecting to the unlawful acts. But it is not necessary that he should be present all the time. It is sufficient if he is present before the trespass is completed. *S. v. Gray* and *S. v. McAdden, supra.* The reason of this is that the gist of the offense is that it *tends to the breach of the peace,* and it would be as likely to produce bad blood and a breach of the peace for the prosecutor to go upon the defendant, engaged in the act of tearing down his mill, as it would have done if he had been present when it was commenced.

And we find evidence in this case at least tending to show all these requirements—the presence of the prosecutor before the work of tearing down the mill was completed, forbidding the defendant; the defendant's refusing to desist, "telling his hands to go on" with the work; the number required by the law to constitute a multitude, four in number besides the defendant. What could the prosecutor do but leave the defendant and his hands engaged in their work of destruction? And yet the defendant says there was no evidence to go to the jury that he is guilty of the offense of forcible trespass. We do not see the matter as the (841)

defendant sees it, and in our opinion there was such evidence as made it the duty of the court to submit the case to the jury and to authorize a verdict of guilty.

NO ERROR.

Cited: S. v. Childs, post, 860; *S. v. Webster,* 121 N. C., 589; *S. v. Lawson,* 123 N. C., 743; *S. v. Conder,* 126 N. C., 988; *S. v. Davenport,* 156 N. C., 603; *S. v. Jones,* 170 N. C., 756.

STATE v. STEPHEN TURNER ET AL.

Judge — Appointment — De Facto Judge—Conspiracy—Evidence—Co-conspirator, Acts and Declarations of—Indictment—Proof of Incorporation of Foreign Corporation.

1. The inhibition contained in sec. 11, Art. IV of the Constitution applies neither to the holding by any judge of the Superior Court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor, nor to the holding of special terms under the order contemplated in said provision.

2. A judge of the Superior Court who presides in another district by appointment of the Governor is a *de facto* judge of the court so held, and all his acts in that capacity are valid.

3. Where the unlawful act, in furtherance of a conspiracy to defraud, is done in the State where the indictment is found, the conspirators who participated only in the design may be tried without joining in the indictment the perpetrator of the overt act.

4. Where, in a prosecution of several defendants for conspiring to defraud, evidence of a common design is shown, testimony tending to prove the unlawful acts of persons not indicted, in furtherance of such design, is competent.

5. In a prosecution for conspiracy to defraud insurance companies, a witness for the State testified that he was the agent of defendants to fraudulently obtain insurance on the lives of diseased or aged persons, and find purchasers for the policies who would keep the premiums paid; that one B., who was not on trial, "was also the agent of the defendants; that they all said he was"; and that witness saw B. offer to sell a policy on the life of one M.: *Held,* that the declarations of B. made after the entry of defendants into the conspiracy and up to the time when the overt act was committed were admissible against defendants.

6. Where an indictment alleges the ownership of property by a corporation, it is sufficient to show that the corporation carried on business under the corporate name set out in the indictment, without producing the certificate of incorporation, or a copy thereof, in the private acts published by authority of the State.

7. A copy of the charter of a foreign corporation, certified by the Secretary of the State where it was incorporated, under his official signature and the State seal, is admissible in North Carolina to prove the fact of incorporation. *Barcello v. Hapgood*, 118 N. C., 712, followed.

INDICTMENT for conspiracy to defraud, tried before *Graham,* (842) *J.,* and a jury, at December, 1895, Special Term of JONES, to which it had been removed from Carteret.

When the case was called for trial the solicitor entered a *nol pros.* as to the defendants Stephen I. Turner and W. H. Turner. The defendants objected to the trial of the said action by his Honor, *Judge Graham,* upon the ground that he was not authorized to hold said special term of court, for the reason that he had held the regular term of said Superior Court in October, 1895, upon assignment of the Governor upon an exchange of courts with *Judge Green,* who was regularly riding the Sixth District, and that no judge could be assigned to hold court in any district oftener than once in four years. The objection was overruled, and the defendants excepted.

The defendants thereupon objected to the trial of said action upon the ground that the transcript from the Superior Court of Carteret County was defective. The judge and solicitor requested the (843) defendants to assign the grounds of objection. The defendant's counsel stated that they had none to assign at that time as they had had no opportunity to inspect the transcript carefully. The objection was overruled, and the defendants excepted.

Upon the trial the State offered David Parker as witness. Upon his examination he gave a full, detailed account of his connection with the defendants for a number of years previous, and of their plans and methods of together cheating and defrauding the insurance companies, in which the said David Parker explained that he was the agent of the said defendants, to work up their business for them, and that when a policy had been fraudulently obtained upon the life of diseased or aged persons, he, the said David Parker, should procure a purchaser for it, who would take it and keep the premiums paid on it. He then stated that William (Bill) Fisher was also the agent of the defendants; that they all said he was. Among other things he testified as follows: "I saw Bill Fisher offer to sell a policy in the Massachusetts Life Association on the life of Melissa Guthrie." The defendants objected to this testimony. The objection was overruled, and defendants excepted.

The said witness also testified among other things as follows: "Fisher said afterwards he sold a policy on Melissa Guthrie to Moore, and got money for it." The defendants objected to this testimony. The objection was overruled, and defendants excepted.

The State also introduced one Rebecca Ivey as a witness, who among other things, testified as follows: "Bill Fisher first told me down town about the insurance on my life." The defendants objected to this testimony on the ground that it was hearsay and incompetent and a
(844) statement by Fisher, who was not a defendant. The objection was overruled, and defendants excepted.

The State offered in evidence a certified copy of Articles of Incorporation of the Mutual Benefit Life Association and of the other companies which the defendants were alleged to have conspired to cheat. Defendants objected to this evidence on the ground that it was not properly certified and authenticated under the acts of Congress. The objection was overruled, and defendants excepted.

The State offered Mr. Ripley as a witness, who testified as follows among other things: "Live in Boston. Am traveling inspector for the Bay State Mutual Benefit Association. They hold themselves out to be an insurance company, and do a regular business. I know the officers." Objection by the defendants. The objection was overruled, and defendants excepted.

"The National Life Insurance Company holds itself out to be an insurance company and do business." Objection by the defendants. The objection was overruled, and defendants excepted.

"Know the Massachusetts Benefit Association. They hold themselves out as an insurance company, and do business."

Upon the conclusion of the testimony, by consent of the counsel for the State and the defendants, the case was submitted to the jury without argument. The judge in charging the jury, after recapitulating testimony and instructing them upon the law, proceeded to state to the jury at length certain contentions of companies as contentions made by the State, and followed it by explaining the defendants' counter contentions and plea of not guilty, and instructed the jury upon the doctrine of reasonable doubt in favor of the defendants.

The defendants assigned as error, error in the judge in presenting to the jury an argument of facts on behalf of the State, when none
(845) had been made by the State's attorney. The jury returned a verdict of guilty, and from a refusal of a motion for a new trial the defendants appealed.

The certificate of incorporation of the Massachusetts Benefit Association, one of the prosecutors, was signed by the Secretary of the Commonwealth of Massachusetts in his official capacity and sealed with the seal of the Commonwealth.

Attorney-General for the State.
Clark & Guion for defendants.

AVERY, J. The inhibition contained in the Constitution (Art. IV, sec. 11) applies neither to the holding by any judge of the Superior Court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor, nor to the holding of special terms under the order contemplated in section 913 of The Code. *S. v. Lewis,* 107 N. C., 967; *S. v. Monroe,* 80 N. C., 373; *S. v. Speaks,* 95 N. C., 689. The intent of the framers of the Constitution was to change the then existing system under which all of the courts of a district were generally held by a resident judge, so that the regular ridings of a whole district or circuit by any given judge would not occur oftener than once in four years. In case of holding specified terms by exchange or special terms by assignment, it is left to the Chief Executive to give or withhold his assent, and it must be assumed that he will exercise his discretionary power of selecting and assigning those who shall hold special terms with an eye to the best interest of persons directly interested, but if there were any grounds for doubting the authority of the Governor to issue a commission to the judge who presided, and to thereby constitute him a *de jure* officer in the discharge of that duty, the fact that the Governor appointed him and the public (846) submitted to his authority constituted him *de facto* judge of the court which he held, and rendered all of his acts in that capacity as binding and valid as if he had acted *de jure*. *S. v. Lewis, supra.* Were it otherwise, the public would be subjected to the hazard of having all of the adjudications of a court presided over by an incumbent judge acting by virtue of a commission declared invalid in all cases where, after a course of litigation, the lawful right to his office is declared to be in a contestant. An illustration could be found in our own judicial annals in a case where Judge Wilson was commissioned as judge of the Superior Court, but was ultimately, and after holding a number of courts, ejected from the office under the decision of this Court in *Cloud v. Wilson,* 72 N. C., 155.

David Parker, a witness for the State, "gave a full and detailed account of his connection with the defendants for a number of years previous, and of their place and methods of together cheating and defrauding the insurance companies." He explained "that he was the agent of the defendants to work up their business for them, and that when a policy had been fraudulently obtained upon the life of diseased or aged persons, he, Parker, was to procure a purchaser for it, who would take it and keep the premiums paid up on it." Parker then testified *"that William* (Bill) *Fisher was also the agent of the defendants, that they all said he was."* Among other things Parker was allowed to testify as follows: "I saw Bill Fisher offer to sell a policy in the Massachusetts Life Association on the life of Melissa Guthrie." The defendants excepted

to the admission of that testimony after objection to its competency. The defendants were charged in the indictment with combining and conspiring to cheat the Massachusetts Benefit Life Association and
(847) others of divers large sums of money. William Fisher was not a defendant, and the defendants contend that his declarations were erroneously admitted as evidence against them.

The same rules of evidence that govern the trial of other criminal offenses apply when the indictment is for conspiracy. But there is a marked distinction growing out of the manner of their application. Ordinarily it is incumbent on the prosecution to prove participation in an act, but on trials for conspiracy the State must show participation in a design, and the facts in issue are:

(1) Whether there was an agreement for an alleged purpose.

(2) Whether a defendant charged participated in the design, and

(3) Whether the common purpose was carried into execution.

Here the testimony tended to prove an agreement between the defendants to constitute Fisher (who is not indicted) their agent to do the same unlawful and fraudulent acts that the witness Parker had been doing in furtherance of a common purpose to cheat certain insurance companies, and to show that the agreement, which they *"all said"* they had made with Fisher, culminated in similar covinous acts. All who aid, abet, counsel, or procure others to commit misdemeanors are principals. 1 Roscoe Cr. Ev. Star, p. 189. Conspiracy is under the law of North Carolina a misdemeanor. *S. v. Jackson,* 82 N. C., 565. When once evidence of a common design is shown, and two or more of the conspirators are indicted and on trial, testimony tending to prove the unlawful acts of a person not on trial or not indicted, in furtherance of such purpose, is clearly competent. Those who aid, abet, counsel or encourage, as well as those who execute their designs, are conspirators, and certainly where the unlawful act is done within the limits
(848) of the State in whose courts the indictment is found, as in our case, the conspirators, who only participated in the design, may be tried and punished without joining in the indictment the perpetrator of the overt act shown.

There was evidence reasonably sufficient, if believed, to warrant the inference of a conspiracy, and it was properly left to the jury to pass upon its sufficiency. *S. v. Matthews,* 80 N. C., 417; *S. v. Patterson,* 78 N. C., 470. Meantime, it was the province of the court, upon hearing it, to decide that it rendered competent not only proof of the acts done in pursuance of the common design by a coconspirator, even though not on trial (*S. v. George,* 29 N. C., 321), but his declarations made after the entry of the defendants into the combination, and up to the time when the offense was committed. *S. v. Anderson,* 92 N. C., 732. When

the common design has been proved, the act of any one of the conspirators in furtherance of it may be shown by any competent evidence. *S. v. George, supra.* It is competent to show a criminal act by confession of a party as well as by means of direct proof by the testimony of others. While the declarations of Fisher as to the participation of the defendants, either in the purpose to commit the offense or the act of selling the policies, if made after the sale, would have been clearly inadmissible (*S. v. Dean,* 35 N. C., 63), the State was not precluded, after laying the foundation by showing the declarations of the defendants that he was their agent for that purpose, from proving his naked confession of the act of selling certain policies, as, according to the testimony of Parker, he had agreed to do, for the benefit of the defendants, and had subsequently attempted in his presence to do.

It has been held that for the purpose of proving the ownership (849) of property by a corporation, when charged in an indictment, it is not necessary to produce the certificate of incorporation or a copy of it in the private acts published by the authority of the State, but that it is sufficient to show that the corporation carried on business under the corporate name set forth in the indictment. *S. v. Grant,* 104 N. C., 908; *S. v. R. R.,* 95 N. C., 602. But if it were conceded that the testimony of the witness Rippy, that the companies mentioned held themselves out as insurance companies, was insufficient, we hold that the certificates of incorporation were clearly competent under the rule laid down in *Barcello v. Hapgood,* 118 N. C., 712, 730. For the reasons given the judgment of the court below is affirmed.

AFFIRMED.

Cited: S. v. Noe, post, 850, 852; *Clerk's Office v. Comrs.,* 121 N. C., 129; *S. v. Register,* 133 N. C., 749; *S. v. Foster,* 172 N. C., 963.

STATE v. LEVI T. NOE ET AL.

Indictment for Forgery—Proof of Handwriting—Comparison.

1. When the genuineness of a paper, or of a signature to a paper, which it is proposed to make the basis of a comparison of handwriting, is not denied nor cannot be denied, an expert may, in the presence of the jury, compare it with another paper or signature, the genuineness of which is questioned.

2. A bond given by a defendant for his appearance to answer a criminal charge, and constituting a part of the record, is admissible on his trial for the purpose of comparison, by an expert, with a signature whose genuineness is questioned, the presumption being that the signature to the bond is genuine.

STATE *v.* NOE.

(850) INDICTMENT for forgery, tried before *Graham, J.*, and a jury, at December, 1895, Special Term of JONES.

On the trial the same objections were entered to the jurisdiction of the court as were made in the case of *S. v. Turner,* 841. The objections were overruled, and defendant excepted.

L. A. Garner, a witness for the State, testified that he was a clerk of the Superior Court of Carteret County and that a bond shown him was the bond of William Fisher for his appearance at Fall Term, 1895, of Carteret Superior Court, taken before the justice of the peace at the preliminary trial at Morehead City and filed in the records of the cause. The solicitor stated that he introduced the bond as one of the papers signed by the defendant, and he proposed to introduce expert testimony to show the writing alleged to be forged was signed by the same person. The defendant objected on the ground that at the trial before the justice of the peace he was not charged with forgery for which he was now on trial and that the same does not constitute part of the record in this case, and that the signature was not conceded to be in the handwriting of the defendant. The objection was overruled, and defendant excepted. There was a verdict of guilty, and defendant appealed.

Attorney-General for State.
Clark & Guion for defendants.

AVERY, J. The objection to the jurisdiction and the exception to the ruling of the court in admitting the proof of the incorporation of the insurance companies are fully discussed in *S. v. Turner, ante,* 841. It is therefore needless to repeat the reasons for holding as we did upon assignments of error which are identical with those relied on in

(851) this case.

Where the genuineness of the paper or the signature to a paper, which it is proposed to make the basis of a comparison of handwriting, is not denied, or cannot be denied, in the trial of the action, an expert witness may, in the presence of the jury, compare with it another paper or signature whose genuineness is questioned. *Tunstall v. Cobb,* 109 N. C., 316; *Croom v. Sugg,* 110 N. C., 259; *S. v. DeGraff,* 113 N. C., 688. Under this rule the signature to affidavits or pleadings filed in the cause by a party, or to a paper offered in evidence by the person whose signature is in question, and that of a testator to a will purporting to have been signed by him, in an action brought against the executor appointed and qualified thereunder, or a written contract, the execution of which by the testator is denied, have been held to be proper standards of comparison to be used by such witnesses in their testimony before the jury. *Tunstall v. Cobb* and *S. v. DeGraff, supra.* The paper-writing admitted as a standard of comparison was the bond, constituting a part

of the record in the case, for the appearance of the defendant Fisher to answer this charge. The bond constituted a part of the record, was presumed to be genuine, and a judgment *nisi* on his default could have been rendered against him and his sureties on it, and made final on his failure to take the burden upon himself and show it spurious on the return of notice to show cause. Until the presumption of its genuineness is satisfactorily rebutted, the signature to it must be treated like that of a party to a pleading in a civil action.

The other exceptions are without merit, and we must assume were not seriously relied upon. The judgment is

AFFIRMED.

Cited: S. v. Hassell, post, 852; *Ratliff v. Ratliff,* 131 N. C., 431.

---

(852)

STATE v. C. R. HASSELL ET AL.

Indictment for Conspiracy—Practice—Appeal—Assignment of Error.

The overruling of an objection to a transcript of the record, sent from the county from which a case has been removed, cannot be assigned as error if the objector refused to specify in what respects the transcript was defective; certainly, where there is no contention that the record is not sufficient to show that the court below had jurisdiction.

INDICTMENT for conspiracy, tried before *Graham, J.,* and a jury, at December Special Term, 1895, of JONES, on removal from CARTERET. The same objections to the jurisdiction were made as were interposed in the case of *S. v. Turner, ante,* 387.

The defendants objected to the trial on account of defects in the transcript of the case from Carteret County. The court then requested the defendants to point out the defects complained of. Defendants replied that their counsel had not time to inspect the record carefully and could not do so. The objection was overruled, and defendants excepted.

There was a verdict of guilty, and defendants appealed.

Attorney-General for the State.
Clark & Guion for defendants.

AVERY, J. The assignments of error are substantially the same as those discussed in *S. v. Turner, ante,* 841, and *S. v. Noe, ante,* 849. It may not be improper to add, however, that one exception, which was

made in all of the cases, seemed to be so clearly untenable that we
(853) have forborne in other appeals to discuss it, but in deference to the opinion of counsel it may be well to pass upon it here.

Objection was made to the transcript of the record from the county of Carteret, sent under the order of removal. But counsel declined, when requested to do so, to point out or specify in what respects the transcript was defective and insufficient. The court may require counsel to state the grounds of objection to testimony of any kind, and if counsel refuse to comply with this reasonable requirement, they do so at the peril of forfeiting the right to insist upon an exception to the ruling of the court, admitting or rejecting it. *S. v. Wilkerson,* 103 N. C., 337. It was the duty of defendants' counsel to point out the defects in the record, and failing to do so, they are deprived of the right to insist that it is insufficient. It is not contended that the record is not sufficient to show that the court below had jurisdiction. If that proposition could be maintained, the duty might devolve upon this Court of passing upon it even *ex mero motu.*

JUDGMENT AFFIRMED.

STATE v. HENRY HORNE.

Costs in Criminal Action—Acquittal—Liability of County.

1. While this Court will not entertain an appeal to determine who shall pay the costs of an action in which the subject-matter has been disposed of, yet, where the question is whether a particular item is properly chargeable as costs, or, taking the case as rightly decided, whether the costs are properly adjudged, the case is reviewable on appeal.
2. The rule that the costs follow final judgment applies in criminal cases as in civil cases; hence, where a prisoner was convicted but afterwards was acquitted on a new trial, the payment of his witnesses in both trials was properly taxed against the county.

(854) The defendant having been convicted of murder at October Term, 1894, of ROBESON, appealed and was granted a new trial. After several continuances, he was again tried and acquitted at April Term, 1896, of the Criminal Circuit Court of ROBESON. At July Term, 1896, his Honor, *Meares, J.,* taxed the costs of the defendants' witnesses for the term at which he had been convicted as well as for the terms at which the continuances had been granted, and the Board of County Commissioners appealed.

Attorney-General for the State.
McNeill & McLean for County Commissioners.

CLARK, J. The objection that this appeal does not lie because only a matter of costs is involved, is founded upon a misconception of the decisions. When the subject-matter of an action has been disposed of by compromise, destruction of the property, or otherwise, this Court on appeal will not pass upon the merits of the original matter in litigation to ascertain which side in law ought to have won, in order merely to decide who shall pay the costs, for the Court will not waste its time upon an abstract question. Clark's Code, p. 560 (2 Ed.). But when the question is whether a particular item is properly chargeable as costs (*Mills Co. v. Lytle,* 118 N. C., 837; *Elliott v. Tyson,* 117 N. C., 114; *S. v. Byrd,* 93 N. C., 624), or whether, taking the case below as rightly decided, the costs are properly adjudged, these questions are reviewable on appeal. *S. v. Shuffler, post,* 867; *Blount v. Simmons,* 118 N. C., 9; Code, sections 525, 527 and 737, 748. (855)

The defendant was convicted of murder, and on appeal a new trial was granted, upon which trial the defendant was acquitted. The county commissioners appealed from so much of the order, as to costs, which taxes the county with the payment of defendant's witnesses at the term at which he was convicted, and, indeed, at any term, except that at which he was acquitted. The prisoner having been acquitted, the payment of his witnesses devolves upon the county. Code, sec. 739. There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment.

In *S. v. Massey,* 104 N. C., 877, the subject of taxation of costs in criminal cases is reviewed, and the attention of trial judges called to the fact that "the scrutiny and approval of bills of costs by them, is not a mere matter of form, but is required by the statute for the protection of the public and defendants." There is no complaint here upon that score, and, in adjudging that the county pay the prisoner's witnesses for attendance at the terms prior to his acquittal, including that at which he had been convicted, there was

NO ERROR.

Cited: Blount v. Simmons, 120 N. C., 23; *Guilford v. Comrs., ib.,* 28; *Wikel v. Comrs., ib ,* 452; *S. v. Hicks,* 124 N. C., 838; *Herring v. Pugh,* 125 N. C., 439; *Williams v. Hughes,* 139 N. C., 19; *Smith v. R. R.,* 148 N. C., 335; *Van Dyke v. Ins. Co.,* 174 N. C., 81.

(856)

STATE v. JOHN G. SMITH.

Indictment for Perjury—Perjury—Denial of Partnership—Defense—Estoppel.

1. On a trial for perjury alleged to have been committed in the trial of a civil case by defendant swearing that he had never been a member of a certain firm, the defendant may show, as a matter of defense that no such firm existed.

2. The fact that some of the State's witnesses testified that defendant had told them that he was a member of the firm, as was sought to be shown in the civil case, did not estop defendant from showing that he was not a member, and that his statement to such witnesses was not correct.

INDICTMENT for perjury, tried before *Meares, J.*, and a jury, at April Term, 1896, of the Circuit Criminal Court of ROBESON. The defendant was convicted and appealed. The facts sufficiently appear in the opinion of *Chief Justice Faircloth.*

Attorney-General and McNeill & McLean for the State.
John D. Shaw & Son for defendant.

FAIRCLOTH, C. J. The defendant is indicted for perjury committed on the trial of a civil action wherein S. P. McNair was plaintiff, and John G. Smith and W. B. Smith, partners, doing business under the firm name of W. B. Smith & Co., were defendants, by falsely asserting on oath that he, the defendant, had never been a member of the firm of W. B. Smith & Co., knowing the same to be false, etc. The defendant testified on trial on the present action that he had never been a member of the firm of W. B. Smith & Co., and that he so testified at the former trial. A number of other witnesses were examined for the defend-
(857) ant and the State, and a verdict of guilty was rendered.

His Honor instructed the jury that the State must satisfy them beyond a reasonable doubt that the defendant was a member of the said firm, and charged them as he understood the rule of evidence in a civil action. His Honor then referred to the bill of indictment and told the jury, "And the defendant can not show that, as a fact there was no such copartnership at the time, by way of defense. But, nevertheless, it is incumbent upon the prosecution to satisfy the jury beyond a reasonable doubt that the defendant was a member of the firm of W. B. Smith & Co., at the time that the alleged false oath was taken." Defendant excepted. In the first sentence of the above quotation there is error. Whether the defendant was a member of the firm was a material question, and much of the evidence on both sides was directed to it. The

State was allowed to show the affirmative, and we can conceive of no reason why the defendant should not be allowed to show the negative, and know of no authority denying the privilege of doing so.

The effect of the charge was to withdraw from the jury the defendant's evidence on that material question. Some of the State's witnesses testified that the defendant had told them he was a member of the firm of W. B. Smith & Co. Assuming that he had so told the witnesses, he was still at liberty to show on the trial that he was not a member, and that his statement to the witnesses was not correct. To refuse this privilege would be to establish a very high grade of estoppel in criminal proceedings.

ERROR.

Cited: *Daniels v. Fowler,* 120 N. C., 17; *Lee v. Thornton,* 171 N. C., 213.

---

(858)

STATE v. A. E. CHILDS.

Indictment for Forcible Trespass—Possession—Instruction.

1. In the trial of an indictment for forcible trespass, it appeared that defendant purchased the lease of a stone quarry from B., the lessee, and entered into possession and began to work it; that thereafter B. acquired the fee-simple title to the quarry and in the interval between working hours, and while defendant was absent, entered and moved out defendant's "things" from the quarry. The next morning defendant, with several employees, with show of force but without a breach of the peace, went to the quarry and entered: *Held,* that it was error to refuse to charge that, if defendant entered into possession under a contract of sale of B's interest, and afterward B. purchased the fee and entered in the nighttime, and when defendant came to work the following day he was forbidden to enter, defendant's entry, under such circumstances, would not be forcible trespass, defendant being in possession of the land.

2. In such case it was error to charge that, if the jury believed the evidence, B. "was in possession—what the law calls 'possession.'"

INDICTMENT for forcible trespass, tried before *Norwood, J.,* and a jury, at Spring Term, 1896, of FORSYTH. The defendant was convicted and appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

Attorney-General, Perrin Busbee, and Watson & Buxton for State.
Jones & Patterson for defendant (appellant).

MONTGOMERY, J. The prosecutor Bennett was lessee of a quarry on the lands of Evans. As rent, Bennett was to pay Evans a certain price for each load of stone quarried and removed. By agreement be-
(859) tween Bennett, Evans and the defendant, the defendant bought Bennett's "lift" or right for $20, Bennett to pay to Evans for each load of rock the price agreed upon between Bennett and Evans. The defendant went into possession of the quarry with such implements and tools as were necessary for the business, opened it and began to get out stone and to sell it. It appears that Evans received payment for all the stone that was quarried. While the defendant was absent from the quarry between the hours of work, the prosecutor entered with a force of hands and moved out of the quarry all the "things" of the defendant except some that were in the shop. Bennett had, after the defendant had gone into possession of the quarry and had commenced to get stone, bought in fee simple from Evans the land on which the quarry was situated and had notified the defendant to keep away. The defendant with a force of hands returned to the quarry on the morning after the prosecutor had entered, with show of force, but without any breach of the peace, however.

The indictment is for forcible trespass. The defendant's counsel asked the Court to charge the jury: "That if the jury believed the defendant entered into possession as testified to by the prosecutor under a contract of sale of the prosecutor's interest, and that afterwards the prosecutor purchased the fee in the lands and entered in the nighttime, and when the defendant came to work the following day and was forbidden to enter, that his entry under these circumstances would not be forcible trespass because such entry of the prosecutor would not support an action for forcible trespass, the defendant being in possession of the land." His Honor declined to give this instruction, and the defendant excepted. The Court charged the jury: "If you believe the evidence, prosecutor Bennett was in possession, what the law calls possession." The
(860) defendant excepted to this part of the charge. The evidence in the case is somewhat confused but taking it as it appears the defendant was entitled to the instruction asked; and we are further of the opinion that there was error in that part of the charge of his Honor to which exception was made by the defendant. The possession which the prosecutor had was not such a possession as the law will respect. He took advantage of the interval between the working days or hours of the defendant and made secret entry. His having the fee-simple title to the land makes no difference. The title is not in question. The defendant was in possession under a proper lease. The possession of this quarry was in law in the defendant. It is not necessary for a person who

has a right to the possession to be at all times personally present on the premises in order that he may be considered in law, as in actual possession. *S. v. Bryant,* 103 N. C., 436; *S. v. Shepherd,* 82 N. C., 614; *S. v. Woodward, ante,* 836. And in *S. v. Caldwell,* 47 N. C., 468, it is said: "If a man leave his dwelling house for a mere temporary purpose . . . he can not be said, in law, to have left it so as to make the unlawful entry of a trespasser an entry in his absence." The same principle applies to the facts in the case before the Court. The defendant had full and complete possession of the premises—the quarry. The nature of the property—a pit from which stone was quarried—would admit of no other kind of possession. He could not be expected to live there, to sleep there or to be there except in working hours. There was error, and there must be a new trial.

NEW TRIAL.

Cited: *S. v. Conder,* 126 N. C., 988.

---

(861)

STATE v. T. L. HARRIS.

Indictment for Assault with Deadly Weapon—Self Defense—Trial—Instructions.

1. The question whether a defendant, indicted for assault with a deadly weapon, has reason to believe that the person attacked intended to assault him, is a question for the consideration of the jury, and not for the defendant or the trial judge, who should submit the case with appropriate instructions.

2. Where defendant and prosecutor, unfriendly for some time, had words, after which the defendant testified the prosecutor followed him, with his hand at his hip pocket, as he went to his cart; and that, fearing the prosecutor and fearful of assault, he then shot him: *Held,* that the court erred in charging the jury that if they believed the evidence, in any aspect, the defendant was guilty.

INDICTMENT for assault with deadly weapon, tried before *Norwood, J.,* and a jury, at Spring Term, 1896, of STOKES. The defendant was convicted and appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

Attorney-General and Perrin Busbee for State.
Jones & Patterson for defendant (appellant).

FAIRCLOTH, C. J. The defendant stands indicted for an assault with a deadly weapon upon P. B. Kirby. The defendant and Kirby had been

unfriendly for a year or more. After some words, the defendant walked away to his cart and Kirby followed, and was advancing, twenty or thirty yards off, toward the defendant with his hand on his hip pocket when the defendant shot him. This is defendant's testimony, which is in some respects denied by Kirby, the prosecutor and other eye witnesses. The defendant also said he was afraid of the prosecutor
(862) and thought he was going to attack him, when he shot.

His Honor charged the jury that if they believed the testimony the defendant was guilty, that the defendant was guilty on his own testimony. Whether the defendant had reasonable ground to believe that the prosecutor was going to attack him, was a question of fact for the jury to consider, and not for the defendant or his Honor, who committed error in his instruction to the jury. The case should have been submitted to the consideration of the jury with appropriate instructions by the Court. We express no opinion on the evidence. The rule governing the proper instructions is well laid down in *S. v. Harris,* 46 N. C., 190, and *S. v. Dixon,* 75 N. C., 275. As the case must be tried again, we deem it unnecessary to repeat the reasoning in those cases.

NEW TRIAL.

Cited: *S. v. Kimball,* 151 N. C., 710; *S. v. Johnson,* 166 N. C., 396.

STATE v. G. W. ISLEY.

Indictment for Cruelty to Animals—Policeman—Presumption—Trial—Directing Verdict of Guilty.

Where, in the trial of an indictment for cruelty to animals, it appeared that the defendant was a policeman, and in the attempt to stop a runaway horse on the streets of a town, struck it with a large stone and caused it to fall: *Held,* that it was error to direct a verdict of guilty, it being the province of the jury to determine whether the presumption that the policeman acted in good faith in the discharge of his duty, was overcome by proof of a "willful" purpose to injure the horse.

(863) INDICTMENT for cruelty to animals, tried before *Norwood, J.,* and a jury, at Spring Term, 1896, of WILKES.

It is admitted that the defendant was the acting chief of police of Wilkesboro, an incorporated town, which had an ordinance against animals running at large.

The State introduces the following witnesses:

J. J. Bently testified that the horse injured ran from the lot into the street, and started down the street; that the defendant ran into the street and picked up a rock weighing about five pounds, and that as the horse turned to run on the sidewalk, to pass the defendant, he threw the rock, struck the horse between the ears and knocked him down; that he fell as he started to the sidewalk, then got up and ran off; that it was court week and many people were on the street.

There was other evidence to the same effect.

The defendant testified that he was chief of police; that the horse got loose in town and was running wild, that it was court week and many people on the street; that he went up the street; that he saw the horse running *violently* down the street; that he picked up a board in one hand and a rock in the other; he attempted to head the horse, when he started to the sidewalk to pass him that he threw the rock, struck the horse on his head; he got up and turned back and ran off; that there were many people on the street and he thought he had a right to stop the horse; that he had no feeling against the horse or its owner; that he told owner afterwards that the horse's mouth was bleeding and needed attention, and offered to care for him; that he told the owner he would have killed the horse to stop him, as he thought he had a right to do, to keep him from running down the street.

Upon this testimony the judge charged the jury that the defendant was guilty and directed them to so return their verdict. There was a verdict accordingly, and from the judgment thereon defendant appealed, assigning as error his Honor's charge to the jury. (864)

Attorney-General and Perrin Busbee for the State.
Glenn & Manly for defendant.

FAIRCLOTH, C. J. The defendant is indicted for cruelty to animals. Code, 2482. Upon the evidence his Honor directed a verdict of guilty to be entered. This was error. The defendant, being a policeman, is presumed to have acted in good faith, and until this presumption is overcome by proof of a "willful" purpose to injure the horse, he stands excused. It was the province of the jury to hear and determine the question and return their verdict according to their conclusion, with proper instructions from the Court. *S. v. Pugh,* 101 N. C., 737; *S. v. Tweedy,* 115 N. C., 704.

NEW TRIAL.

STATE v. W. H. CALLOWAY AND FINLEY LOUDERMILK.

Indictment for Trespass—Defense—Bona Fide Claim of Right—Public Land—Entry.

1. An alleged entry of public lands without survey or grant from the State is insufficient ground upon which to base a claim thereto.
2. Where, in the trial of an indictment under section 1070 of The Code, the defendant, in support of his defense that he had entered upon the land under a *bona fide* claim of right, introduced in evidence an entry of public lands, reciting that he had entered and located "640 acres in C. County on the headwaters of W. Creek, beginning on a pine * * * and runs southeast 40 poles, thence northeast and various other courses so as to include 640 acres." No survey was ever made and no grant ever obtained from the State: *Held*, that the entry was insufficient to support a claim to the land.

(865) CRIMINAL ACTION, tried before *Norwood, J.*, and a jury, at Fall Term, 1896, of CALDWELL, for the willful and unlawful entry upon the land of another and carrying off or being engaged in carrying off any wood or any other property whatsoever growing or being thereon.

It was shown in evidence that the defendant, Loudermilk, made an entry on 24 April, 1890, for 640 acres of land, making two calls, then saying various courses to the beginning. He never perfected said entry by obtaining a grant; nor was the entry ever surveyed. He testified that this entry joined the land of the prosecutor, Webb, and it was not contradicted.

His Honor charged the jury that the entry was not sufficient ground upon which to predicate a *bona fide* claim on the part of defendant Loudermilk, the defendants excepted. There was a verdict of guilty and defendants appealed from the judgment thereon.

Attorney-General for the State.
No counsel contra.

MONTGOMERY, J. The defendant was indicted under section 1070 of The Code (no felonious intent being charged) for the willful and unlawful entering upon the lands of the prosecutor and carrying off wood. In his defense and to show that he entered under a *bona fide* claim to the land, he introduced an entry expressed as follows: "Entry No. (866) 5545—F. T. Loudermilk enters and locates 640 acres of land in Caldwell County, N. C., on head waters of Wilson's Creek, beginning on a pine, F. T. Loudermilk's corner, and runs southeast 40 poles, thence northeast, and various other courses so as to include 640 acres. Entered 24 April, 1890, at 9 a. m. "F. T. LOUDERMILK."

No survey was ever made under the alleged entry, and no grant made by the State. The defendant admitted that the land on which he entered adjoined those of the prosecutor. The Court instructed the jury "that the entry was not sufficient ground upon which to predicate a *bona fide* claim on the part of the defendant." There was no error in the giving of this instruction to the jury. There was no sort of compliance by the defendant with the law in regard to the entry of public lands. The exception to the ruling of his Honor on the question of evidence becomes immaterial. The defendant had no defense.

No ERROR.

Cited: *S. v. Durham,* 121 N. C., 550.

STATE v. SHUFFLER.

Costs in Criminal Actions—Liability of County.

Where, on appeal to the Superior Court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a *nol pros.* was entered by the solicitor, it was error to tax the county with the costs accrued in the Superior Court.

This was a warrant before a justice of the peace of BURKE for entering on land after being forbidden, and was carried by appeal to Fall Term, 1895, of BURKE.

At Fall Term, 1896, the solicitor entered a *nol pros.,* and *Norwood, J.,* rendered judgment against the county of Burke for costs incurred in the Superior Court, but not for costs in the justice's court, to which judgment against the county of Burke for costs in the Superior Court the State and county commissioners of Burke excepted and appealed.

J. T. Perkins for Board of Commissioners of Burke County.
Avery & Erwin for defendant.

FURCHES, J. This is a prosecution commenced before a justice of the peace, in a matter where the justice had final jurisdiction (for entering on land after being forbidden) and carried to the Superior Court by appeal. In the Superior Court the solicitor for the State entered a *nol pros.,* and the judge entered judgment against the county for the costs

that had accrued in the Superior Court after the appeal, but not for what had accrued before the justice of the peace. To this judgment the commissioners excepted and appealed.

(868) It was contended in support of the judgment of the Court, that sections 739, 740, 743, 744 and 745 of The Code should be considered in connection with section 895, relied on by the counsel for the commissioners, in support of their contention that the judgment was erroneous, and it was contended that when considered together they sustained the judgment of the Court appealed from. And upon an examination of these sections, we find there is an apparent inconsistency in them. But they have all been considered and construed in *S. v. Massey,* 104 N. C., 877, and in *Merrimon v. Commissioners,* 106 N. C., 369. And as there construed, it was error to tax the county of Burke with any part of this cost. There is error, and the judgment appealed from, so far as it taxes the county of Burke with any part of this cost, is reversed.

JUDGMENT REVERSED.

Cited: *S. v. Horne, ante,* 855; *Guilford v. Commissioners,* 120 N. C., 27; *S. v. Morgan, ib.,* 565; *Clerk's Office v. Commissioners,* 121 N. C., 30; *Garner v. Worth,* 122 N. C., 255.

STATE v. ISAAC GROSS AND ANDREW JOHNSON.

Indictment for Obstructing Highway—Highways, What Are.

A road used for 60 years as a neighborhood road by persons going to and from church, and to mill during high water, but never established as a public road by legal proceedings, dedication, or by user, accepted and recognized by competent authority, being kept up by voluntary labor on the part of those using it, and always under the exclusive control of the owners of the land over which it passes, is not a public highway.

(869) INDICTMENT for obstructing a road, tried before *Bryan, J.,* and a jury, at Fall Term, 1895, of WATAUGA. The jury returned a special verdict, the principal facts of which are set out in the opinion of *Chief Justice Faircloth.* His Honor held that, upon the special verdict, the defendants were not guilty and the solicitor appealed.

Attorney-General for the State.
No counsel contra.

FAIRCLOTH, C. J. This is an indicement for obstructing a road traveled by citizens going to a church. The facts are found by the jury

as follows: That about sixty years ago the road described in the indictment was first used as a neighborhood road by the public in passing to and from church, and to mill during high water and in ice. No proceeding was ever had declaring it a public road and establishing it as such. No overseer or hands were ever assigned to said road. The road had been kept up by voluntary labor on the part of the neighbors interested in it. It extends in part over the lands of defendants. About eighteen years ago the defendants cleared land on either side of the road on their own premises, enclosing the same by a fence and placing bars at either side of the field where the road enters the field. The public continued to use the road, passing through the field and the bars without interruption, up to about April, 1894, and on or about said time the defendant, Johnson, obstructed the road leading through said field, providing a passway around the field, but not so good as the road through the field, and of a little greater distance. If upon these facts the Court be of opinion that the defendant is guilty, then the jury find him guilty; but if otherwise, then the jury find him not guilty. His Honor held that the defendant was not guilty, and so adjudged, and the solicitor for the State excepted and appealed.

There was no error in the conclusion of the Court. A public highway is one under the control of, and kept up by the public, and must be established by a regular proceeding for that purpose, or generally (870) used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities of the county, and for the maintenance and repair of which they are responsible. However it may originate, it must be a public charge, and of necessity have an overseer and hands to work it, to erect and keep bridges in repair at the public expense. The law, however, will not allow a private citizen to dedicate a public highway on his own motion without the sanction of the authorities. The road before us, then, is not a public road. *S. v. McDaniel,* 53 N. C., 284; *Kennedy v. Williams,* 87 N. C., 6; *S. v. Fisher,* 117 N. C., 733.

The facts here show that the road has not been established by any legal proceedings, nor by dedication, nor by user accepted and recognized by any competent authority, the obstruction of which is forbidden by law. These facts show only a neighborhood road, for the goers and comers to the church and mill, all the time under the exclusive control of the defendants, stopping at the church and mill, and constitute only what Frenchmen call a *cul de sac.*

NO ERROR.

Cited: *S. v. Lucas,* 124 N. C., 806.

(871)

STATE v. S. B. PEARSON.

Indictment for Burglary—Evidence, Sufficiency of—Accessory—Counsel, Address to Jury—Discretion of Trial Judge.

1. Where one aids and abets the commission of a burglary, although he does not go within 40 feet of the house that is broken, he is equally guilty with the one who actually enters.
2. The facts recited in the opinion of the court held to be sufficient to be submitted to the jury on the question of defendant's guilt, the credibility and weight of such evidence being exclusively for the jury.
3. Where counsel for defendant in his argument addressed his remarks to certain members of the jury individually, instead of collectively, it was not error in the judge to interrupt him, such matters being in the sound discretion of the trial judge.

INDICTMENT for burglary, tried before *Brown, J.*, and a jury, at Spring Term, 1896, of BURKE. The facts appear in the opinion of *Chief Justice Faircloth*. The defendant was convicted and appealed.

Attorney-General, I. T. Avery, and S. J. Ervin for the State.
John G. Bynum and W. C. Newland for defendant.

FAIRCLOTH, C. J. The defendants were indicted and charged with breaking and entering with a felonious intent, in the nighttime, the storehouse, warehouse and building, the property of Collet & Jeter, then in the occupation and possession of J. H. McNeely, containing beer, wines and spirituous liquors, and of stealing and carrying away some of said property willfully and feloniously. The second count was withdrawn.

Poteat was acquitted and defendant, Pearson, was convicted, who (872) excepted and appealed.

The eleventh prayer for instructions, to wit, "Upon the whole evidence in the case there is not sufficient to convict Pearson," raises the principal question, which prayer was declined by the Court.

It is admitted or proved that the basement in which the liquors were kept was broken into and entered during the night, and that some of the liquors were gone, and that much of it was poured out on the floor. Several witnesses were examined. J. W. Campbell testified that McNeely occupied the east end of the basement; that the bars and wooden grating were sawed in two, and that the day afterwards, Pearson came to him and said, "Let us go and see the break in the basement." We did so and he said, "That's a damn sharp trick." He asked if McNeely had lost anything. I said yes. He said, "If this don't stop them, I have enough against them to stop them; McNeely shall not sell liquor in Mor-

ganton, they have done me dirty." I stated I had lost about $300. Pearson said, "Old fellow, if I had known that you had anything to do with this concern, I would not had it done for anything in the world." A few days before the breaking, Pearson told me "McNeely had not done him right and that he would have revenge." Pearson was bar-tender for McNeely, and quit ten or fifteen days before the basement was broken into. I had no interest in the liquor or the business.

C. G. Cain testified that on Sunday evening of the night of the breaking he saw Poteat and Pearson walking together near the railroad—no one with them.

Garrison said that about sun-up Sunday morning he was at Pearson's when Poteat came, and Pearson got out of bed, and went out to see Poteat, and they appeared very friendly.

Queen testified: "The night the bar was broken into I was (873) near the postoffice about 10 o'clock Sunday evening and saw three men come up in front of McNeely's bar. I know that Pearson was one; he stopped in front of the bar, had a sack with something in it, and something like a pistol in the other hand; one went down to the basement and was gone about a minute and reported to Pearson; could not hear what they said; heard Pearson say, 'That's all right, by God.' While one went down to the basement, one stood near the corner. I recognized Pearson's voice distinctly; didn't know the others. I also recognized Pearson by his looks."

Sterling Avery testified: "Sunday night the bar was broken into I saw Pearson at 9 o'clock, standing about forty feet from McNeely's barroom, and he had something in his hand."

Without reciting any more of the evidence, we think the above was competent and sufficient to be submitted to the jury on the question of Pearson's guilt or innocence. The credibility and weight of the evidence were exclusively for the jury. *S. v. Kiger,* 115 N. C., 746. The declaration of Poteat, found in the evidence of John McNeely, was carefully guarded by his Honor, who told the jury that the declaration was admitted only against Poteat and not against Pearson.

The exception that counsel was interrupted in his argument when addressing some of the jury individually instead of collectively can not be sustained. Such matters are discretionary with the judge, unless his discretion is abused, and it does not appear to have been so in this instance.

If A and B agree to commit burglary or other offense, and A breaks and enters, and B stands guard near by—on the lookout—in aid of the agreed offense, then both are guilty. Here, if it was true that (874) Pearson was aiding and abetting the burglary and larceny charged, although he did not go within forty feet of the house broken into, he is equally guilty with the one who did enter. Whether or not

he was there, and with what intent and object, was for the jury to consider and decide. We can not see that the defendant was prejudiced by the answers of the witness, Beach, as to the character of the witness, Queen, for reasons given in *S. v. Dove,* 32 N. C., 469; *Brown v. McKee,* 108 N. C., 387.

NO ERROR.

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

Cited: *S. v. Foster,* 129 N. C., 706.

STATE v. R. Z. YANDLE.

Working Convicts on Public Roads—Power of Commissioners of County.

1. The county commissioners have authority under sec. 3448 of The Code to provide for the working upon the public roads, etc., any one legally convicted of any crime or misdemeanor, or upon failure of one to enter into bond to keep the peace, etc., or to pay or properly secure the payment of cost or fines.
2. The order of the commissioners directing the employment of a convict upon the public roads, and committing him to the custody of a superintendent of such public works, is not an additional sentence or judgment pronounced by the commissioners but an incident to the sentence proper imposed by the court in contemplation of which the prisoner committed the offense.

PETITION for the writ of *habeas corpus.* The defendant having been tried and convicted at August Term, 1896, of UNION, of an assault (875) and battery with a deadly weapon, and sentenced to ninety days imprisonment in the county jail, was put by the County Commissioners into the custody of James Howie, Superintendent of the "chain-gang" of Union County, to be employed upon the public roads of the county. In order to test the legality of his imprisonment in the chain-gang instead of the county jail to which he had been sentenced by the Court, the defendant petitioned for a writ of *habeas corpus,* which was granted, and return thereto made before his Honor, *Starbuck, J.,* at chambers at Rockingham, N. C., on 23 September, 1896. The return of the respondent, James Howie, was as follows:

"I. That the Board of County Commissioners of Union County, North Carolina, have regularly established according to law a chain-gang for

the purpose of working the convicts of said county on the public roads of the said county; that your respondent is the superintendent of the said chain-gang for Union County, and as such superintendent he has in his custody and under his control the said Richard Z. Yandle.

"II. That the said Richard Z. Yandle is retained in custody by your respondent and worked upon the public roads of said county with other prisoners under authority as follows:

"That the Board of Commissioners of said county, in pursuance of law, as your respondent is advised and believes, have made provision for the employment on the public highways of Union County of all persons imprisoned in the jail of said county upon conviction of any crime or misdemeanor, and who fail to pay all the costs which they are adjudged to pay, or to give good and sufficient security therefor; and the said board of commissioners have appointed your respondent superintendent of such work, and charged him with the duty of (876) working such convicts upon the public roads of said county. That the said Richard Z. Yandle, as your respondent is informed and believes, was convicted of some crime or misdemeanor at the last term of Union County Superior Court, and sentenced by the presiding judge to imprisonment in the county jail of Union County for a period of three months, or ninety days. That the said Richard Z. Yandle, as your respondent is informed and believes, failed to pay the costs of said prosecution, or to give good and sufficient security therefor. That the said Richard Z. Yandle, being imprisoned in the jail of said county under said sentence of the Court, was delivered by the board of commissioners of said county to your respondent as superintendent of said chain-gang with instructions to work him upon the public roads of said county as other prisoners are worked.

"III. That the said Richard Z. Yandle is not detained by virtue of any writ, warrant or other written authority, except the judgment and sentence of the Court in which he was convicted, and a copy of said judgment and sentence is hereto attached, marked 'A' and asked to be taken and considered as a part of this return.

"IV. That the said Richard Z Yandle, having been convicted of a crime as aforesaid, and being in jail under said sentence of the Court, was placed in the custody of your respondent to work him upon the public roads of said county, and the said Yandle is now retained by your respondent under the authority of said order of the commissioners of said county, and under no other authority."

The respondent offered the certificate of J. M. Bivens, Register of Deeds, as follows: "It is ordered by the board of commissioners that chapter 194, Acts 1895 (for the improvement of public roads in North Carolina), be adopted and accepted by the county of Union, and,

(877) with all its provisions, is hereby declared to be of full force and authority in said county. The board finds as a fact that the revenue of the county for ordinary purposes, and within the limitations prescribed by the Constitution, is insufficient to meet the necessary expenses of improving the public roads, and that, to meet said expenses, it is necessary to levy a special tax on the polls and property of the county not exempt from taxation. It is therefore ordered that a special tax be levied at the regular meeting of the board on the first Monday in June, 1896, not to exceed 15 cents on $100 worth of property and 45 cents on each poll, for the purpose of improving the public roads, and that the amount of tax on each poll and upon each $100 worth of property be fixed at the regular meeting on first Monday in June, 1896, and that in fixing the same the equation prescribed between the poll and property by the county commissioners shall be observed, and that the special levy aforesaid be placed in a separate column of the tax books, under the heading of 'Special Road Tax.'" This certificate was admitted without objection.

"The cause coming on to be heard, and upon consideration of the certificate, and the return thereto by James Howie, and the evidence offered, the Court finds that he facts set forth in the return are true, and that the commissioners failed to enter on the minutes a record of their proceedings in regard to the working of convicts on the public roads, except as appears in the certificate of J. M. Bivens, Clerk of the Board, introduced in evidence. And the Court, being of opinion that the detention complained of by the petitioner is legal, it is ordered that the petitioner, Yandle, be remanded into the custody of the said James Howie. H. R. STARBUCK, *Judge.*"

(878) Defendant excepted to the findings of fact and conclusions of law by his Honor, and assigned as grounds therefor: "(1) That he erred in finding the answer of Howie to be true, there being no proof in support of the facts therein set forth. (2) That his Honor erred in finding the evidence adduced that the commissioners of Union County had made provision according to law for working prisoners in jail. (3) That his Honor erred in holding, as a matter of law, that petitioner, Yandle, was in the rightful custody of Howie, and in remanding him to the custody of Howie, to be worked on the public roads. (4) That his Honor erred in failing to hold that the commissioners had no right to work petitioner on the public roads, and that he is in the unlawful custody of the respondent, Howie. (5) For such other and further errors as are apparent upon the face of the record."

Attorney-General and Jerome & Williams for the State.
Shepherd & Busbee for defendant (appellant).

AVERY, J. The boards of commissioners of the several counties have power to provide for employing on the public streets, public highways or public works, of persons committed to jail by any magistrate or judge of a Superior or Criminal Court having jurisdiction to try the accused upon conviction of any crime or misdemeanor, or upon their failure to enter into bond to keep the peace or for good behavior, or to pay or properly secure the payment of costs or fines. That the authority to make the order complained of was granted by section 3448 of The Code, and was not withdrawn by any subsequent act, is settled in the well-considered opinion of *Justice MacRae,* in *Myers v. Stafford,* 114 N. C., 234, 237. There is no force in the contention of the defendant (879) that the order of the commissioners was in the nature of a sentence subsequently imposed and was vaid, because they had no judicial authority, and because if they had been competent to try and sentence originally, a sentence had been already pronounced, and no additional sentence could be imposed after the term when it was entered. The principle upon which the defendant relies is a familiar and fundamental doctrine, which was not disputed by the prosecution. The working of the defendant on the public highway was not in pursuance of a judgment pronounced by the commissioners. It was an incident to the sentence proper, imposed by the Court, which the law had declared before conviction, and before the offense was committed, should follow. The order of the commissioners was therefore no more an additional judgment than is an order of the Superintendent of the State Prison that a prisoner confined in a cell at the penitentiary shall be taken to one of the farms now cultivated under his direction. The commissioners were for this purpose only the ministerial agents provided by law for the purpose of managing economically the business of the counties and protecting the people as far as possible against unnecessary cost in the punishment of criminals. A person who commits an assault and battery knows, or is presumed by law to know, the probable legal as well as the natural consequences of his own act. Knowing the law (as we must assume), he knows that the Court has the power to imprison upon conviction, and that as an incident the commissioners of the county may, for the protection of the county, order him to be taken out and worked upon the public roads.

The principle governing this case is in no sense analagous to that upon which the decision hinged in *ex parte* Lange, 18 Wall., 163, 175. The order to work the defendant upon the public roads was in no proper sense a second sentence, imposed after a part of the punishment provided for by an original judgment had been inflicted, but was an (880) incident to the punishment, in contemplation of which he committed the offense. It has been expressly held also, that the provision of

section 3448 of The Code, which forbids the hiring out of convicts except under order of the Court embodied in the sentence, applied only to farming out convicts to individuals or corporations, and did "not extend to labor employed upon public works, and under the supervision and control of public agents." *S. v. Sneed,* 94 N. C., 806. The answer of the respondent was sufficient to show that the prisoner was detained by lawful authority, and we are of opinion, therefore, that there was no error in the order remanding him to the custody of James Howie.

NO ERROR.

Cited: S. v. Nelson, ante, 801; *Herring v. Dixon,* 122 N. C., 425; *S. v. White,* 125 N. C., 683; *S. v. Young,* 138 N. C., 573; *S. v. Morgan,* 141 N. C., 732.

STATE v. DOCK DEYTON.

Indictment for Carrying Concealed Weapon—Criminal Actions—Appeal—Failure to Docket—Duty of Clerk—Neglect of Duty by Public Officer.

1. An appeal by the State in a criminal action not docketed in the Supreme Court until two terms have elapsed will be dismissed.
2. It being the duty of a clerk of the Superior Court to send up the transcript of a record in a criminal action, whether the fees are paid or not, *it seems* that he would be indictable for neglect of duty.
3. A mere servant or hireling who carries concealed weapons on the premises of his employer is indictable.

INDICTMENT for carrying concealed weapons, tried before *Bryan, J.,* and a jury, at Fall Term, 1895, of YANCEY. The jury rendered a special verdict as follows:

(881) "The jury find that the defendant carried the pistol concealed about his person in Yancey County, N. C., during the summer of 1894, as alleged in the bill. They further find that at the time he carried the pistol, he was engaged by the day to work for one M. P. Honeycutt, on his (Honeycutt's) possession; that he had worked some 4 or 5 days when the pistol was seen on his person at said Honeycutt's; that he worked some 25 or 30 days in all; that Honeycutt gave the defendant board and lodging during the time he was so engaged in said work and paid him fifty cents per day for his services. The jury is not apprised as to the law. If the Court be of the opinion that defendant was off his own premises while at work for Honeycutt, they find him guilty

as charged in the bill; but if the Court be of opinion that the defendant was not off his own premises while working for Honeycutt as alleged, they find him not guilty."

His Honor holding that defendant was not off his own premises, a verdict of not guilty was entered and the State appealed. The appeal not having been docketed until this (September, 1896) Term of this Court, the defendant moved to dismiss.

Attorney-General for the State.
No counsel contra.

CLARK, J. This is an appeal by the State upon a special verdict at Fall Term of YANCEY, October, 1895. It might readily have been docketed here at Fall Term, 1895, and should have been at the latest during Spring Term, 1896, or if the failure to do so was not the negligence of the appellant, a writ of *certiorari* should have been asked at Spring Term, and as neither was done it is too late to docket (882) the appeal at this term. Rule 5 of this Court; *Porter v. R. R.*, 106 N. C., 478; *Hinton v. Pritchard,* 108 N. C., 412. The rule applies in both civil and criminal cases, and there is no reason why public officials should not be held to due diligence as well as other people. There is no excuse shown, and there is no suggestion that the case was held back for improper motives, which would justify the Court now ordering it to be docketed to prevent a default of justice. There is no blame attaching to the Attorney-General, as he could not have applied for a *certiorari* in ignorance of the fact that such an appeal had been taken. It is possible, but not probable, that the solicitor was negligent in not directing the case sent up, or in notifying the Attorney-General that it had not been, so that he might apply for a *certiorari.* If the solicitor had learned in time that it had not been sent up, he could, and doubtless would, have had it done. It has been suggested here that it was the negligence of the clerk, for it is his duty to send up the judgment roll and the "case on appeal" in twenty days after the case is filed in his office (Code, secs. 551 and 1234), and here there being no "case on appeal" but only the judgment roll, including the special verdict and judgment, which were filed, of course, during the term, it was the clerk's duty to have sent the transcript up within twenty days after the court adjourned.

Attention was called in *S. v. Hatch,* 116 N. C., 1003, to the fact, which sometimes is lost sight of, that public officers are public servants, and for willful negligence in the discharge of a public duty are liable to indictment (Code, sec. 1090), except only such officials as are subject to impeachment.

It is true that the clerk is not compelled to send up the transcript in any civil case unless paid his just and legal fees therefor. (*Speller* (883) *v. Speller, ante,* 356, and cases there cited), but it is otherwise as to appeals in criminal actions, both as to the defendant (whether appealing *in forma pauperis* or not), and the State. *S. v. Nash,* 109 N. C., 822. The transcript sent up is very informal, but the Court, *ex mero motu,* could send down a *certiorari* to correct these defects if the appeal had been docketed in time.

In this case the defendant escapes punishment for his crime (fortunately not a grave one) by the negligence of a public servant in not sending up the transcript of the record in the time required by law; for the only point raised by the special verdict, to wit, the liability of a mere servant or hireling for carrying a concealed weapon on the premises of his employer, was incorrectly decided against the State by his Honor. *S. v. Terry,* 93 N. C., 585. But the appeal having been docketed too late, the defendant, appellee, has a right to have it dismissed.

APPEAL DISMISSED.

Cited: Speller v. Speller, ante, 358; *Caldwell v. Wilson,* 121 N. C., 424; *Fain v. R. R.,* 130 N. C., 30; *Clegg v. R. R.,* 132 N. C., 293; *Turner v. McKee,* 137 N. C., 254; *S. v. Telfair,* 139 N. C., 556; *Hewitt v. Beck,* 152 N. C., 759; *S. v. Bridgers,* 169 N. C., 310.

STATE v. MONROE JOHNSTON.

Indictment for Burglary—Indictment, Sufficiency of—Discretion of Jury.

1. Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized by ch. 434, Laws 1889, which provides that when the crime charged is burglary in the first degree, the jury may render a verdict in the second degree, since a felonious entry under such circumstances is, by said statute, made burglary in the first degree.

2. An allegation that defendant, "having so burglariously as aforesaid broken and entered said dwelling-house, * * * then and there, on the said S., in the said dwelling-house then and there being, unlawfully, maliciously, secretly and feloniously did make an assault with a deadly weapon * * * and him, the said S., did shoot * * * with intent him, the said S., * * * then and there, feloniously, of his malice aforethought, to kill and murder," etc., is a good and sufficient count for burglary.

STATE *v.* JOHNSTON.

INDICTMENT for burglary, tried before *Meares, J.*, at April (884) Term, 1896, of the Circuit Criminal Court of MECKLENBURG.

Before the jury was empaneled the prisoner submitted a motion for a continuance based on an affidavit to the effect that he had not had time to prepare his case, and that he could not safely go on trial on account of the absence of certain witnesses, viz.: Lee Hunter and Baxter Brown and Calvin Reid, and others not named; that some of these witnesses had been subpœnaed and others had not, and that he expected to prove by these witnesses that the most damaging statements of the State's witnesses were false. During the discussion of this motion the statement was made that the three witnesses above named all lived near the town of Matthews, situated on the Carolina Central Railroad, 12 miles from Charlotte, and could be brought to court by the next morning. The court refused the motion to continue the case. Prisoner excepted. The court then ordered *instanter* subpœna to be placed in the hands of an officer, and gave instructions that the officer proceed immediately to the vicinity of Matthews, or elsewhere, if necessary, and find all of the absent witnesses of the prisoner and have them in court by next morning. The prisoner was arraigned on Wednesday forenoon of the Special Term which was held on the first Monday in April, and this cause was set for trial on Monday of the second week in April, which was a regular term. When court opened on Tuesday morning the officer made (885) his return, and the witnesses above named were all in the court-room before the State had begun the examination of the State's witnesses, and prisoner was not deprived of the benefit of the testimony of any of his witnesses.

The State put on the stand the following witnesses:

A. C. Shields testified: "I am 69 years of age. Live in two-storied house with two rooms on each story. One of the rooms on the first story is occupied as a bedroom, while the other is a parlor. There is also a dining-room and kitchen attached to the house. The entrance from the dining-room to the main body of the house would be through the dining-room door, which opens on the piazza, and then through the back door of the house, which also opens on the piazza." That the parlor is on the opposite side of the passage from his bedroom, and that there is a small room, off this parlor, which also has a door opening on the piazza on the rear side of the house. That the witness went to bed about half past 8 o'clock on the night of 8 January, and about 12 o'clock at night he was awakened by the screams of his daughter who, together with her mother, was sleeping upstairs. The witness heard, almost simultaneously with his daughter, two pistol shots and a noise like something had fallen. Witness hallooed out, "What is the matter up there?" and then started to pick up the poker, and a man in the room said, "Stand back!" and

immediately the man fired a pistol shot, and quickly fired a second shot, and the bullet struck the witness on the right breast and passed through and came out on the other side of his breast, and then passed through his left arm, and then the man fired a third pistol shot and then jumped out of the window onto the piazza and escaped. That when witness retired this window was down, but when he was awakened by the screams
(886) and when the man in question jumped through his window it was raised. The front door and the back door of the house were both locked, and all the windows downstairs were down when he went to bed. Some one had entered the dining-room on the same night and had eaten some honey and some articles of food, and a pistol and a watch were stolen that night out of his bureau drawer. When the witness hallooed and gave the alarm his son, Lemley Shields, came to his house in a few minutes, and he unlocked the back door to let him in. State's witness M. W. Vance came in 10 or 15 minutes, and witness unlocked the front door to let him in. The witness testified that he had been acquainted with Monroe Johnston, the prisoner, for 12 years, and he swore most positively that the prisoner is the man who shot him in his house on the night of 8 January last, as described by him; that he saw the prisoner by the flash of the pistol, and saw something like a white handkerchief around his neck, and he knew the prisoner by his voice when he said, "Stand back!" He is certain that the prisoner is the man. Witness asked State's witness Vance if he knew whether Monroe Johnston had been released from the chain-gang; that if he had been released then he was the man. By prosecuting attorney: "Where are your wife and daughter, and why are they not attending court?" Objected to by prisoner as irrelevant and tending to prejudice his case before the jury. Allowed by the court, and defendant excepted. Witness answered that his wife and daughter were both at home and sick, and unable to attend court, and had been sick ever since the occurrence."

The other testimony is fully rehearsed in the charge of his Honor, *Judge Meares.*

The court granted all the prayers for instructions offered by the
(887) prisoner, and then instructed the jury that the crime of burglary was constituted or made up of certain constituent elements, and that it was incumbent upon the State to establish the coexistence of all of these elements. "In the first place, the crime can only be committed in a man's castle or dwelling-house. A dwelling-house is one in which one or more persons habitually sleep. In the next place, the crime of burglary can only be committed in the nighttime. When it is so dark in the evening that a man's features cannot be distinguished, it is considered by the law to be nighttime; and when it is so light in the morning that a man's features can be distinguished, the night has ceased, and it is

daytime. In the next place, there must be a breaking and entry. No great amount of force need be used to constitute a breaking. Where a door is unlocked and merely closed and bolted, and one places his hand upon the knob of the door and turns the bolt and enters, although very slight force is required in turning the bolt, it constitutes a breaking. So, where the sash of a window is down, and there is no fastening above the sash, and one lifts or raises the sash, it constitutes a case of breaking. And where wooden blinds are used, and the blinds are secured by a latch, and the blinds are closed and latched, and one lifts the latch with his finger and opens the blinds and enters, it is a case of breaking. In the next place, the breaking and entry must be made with a felonious intent, that is to say, with the intent to commit some one of the several felonies known to the laws of this State. The State's witness, A. C. Shields, has testified that the alleged burglary was committed in a dwelling-house in which he and his wife and daughter resided at the time. The same witness also testified that the alleged burglary was committed about 12 o'clock on the night in question. The same witness has (888) also testified that the front and back doors of the house were locked, and the window sashes of all the windows were down when he went to bed, which was about 8:30 o'clock. And his son, Lemley Shields, testified that when he heard the alarm he ran over to his father's house and his father, A. C. Shields, unlocked the back door of the house, which opens on the piazza, to let him in, and also that he found that the door of the little room adjoining the parlor, which opens on the piazza, was locked. And State's witness Vance testified that he reached the house in a short time after the firing, and that A. C. Shields unlocked the front door to let him in. And the witness A. C. Shields also testified that, when he was waked up by the firing of a pistol and the screaming of his daughter upstairs, he immediately sprang out of bed, and then discovered that the sash of one of the windows of his bedroom, which opened on the piazza, was raised up, and that this window sash was down when he went to bed. This is the substance of the testimony relied on to show that the house in question is a dwelling-house, and that the crime of burglary was committed in the nighttime, and that the doors of the house had all been locked, and the window sashes had all been let down, and that the breaking and entry was made at the window in the bedroom of A. C. Shields, which, he testifies, was raised and open when he was aroused from his sleep. The bill of indictment in this case contains two counts. The first count charges that the breaking and entry was made by the prisoner with the intent to commit the crime of larceny, which is a felony. The witness A. C. Shields testified that some one had stolen his watch and pistol, which were kept in a bureau drawer in his bedroom on that night. The other count charges that the breaking and en-

(889) try was made by the prisoner with the felonious intent to commit the crime of murder. The witness A. C. Shields testified that the prisoner fired three pistol shots at him, and that on the second shot the bullet struck him in the right breast and came out at the left breast and passed through his arm. The State also introduced Dr. Craven, who testified that he examined the wound, and described the wound. It is incumbent upon the prosecution to satisfy the jury beyond a reasonable doubt that the breaking and entry was done with the intent to commit a felony, but it is not incumbent upon the prosecution to show that a felony was actually committed. The crime of burglary has been graded by the law of our State into burglary in the first and second degrees. Burglary in the first degree is committed when one or more of the occupants of the house are actually present in the house at the time that the burglary is committed. In this case the State charges the prisoner with the commission of the crime of burglary in the first degree, and alleges that the witness A. C. Shields and his wife and daughter were actually present in the house at the time that the alleged burglary was committed. The State's witness A. C. Shields testified that at the time of the alleged burglary he and his wife and daughter were occupying the house; that he was sleeping in a room on the first floor, and his wife and daughter were sleeping in a room upstairs. If the jury should be satisfied beyond a reasonable doubt that the crime of burglary in the first degree was committed in the house of A. C. Shields, and at the time alleged, by some one, then a highly important question arises in this case, and that is, are you satisfied beyond a reasonable doubt, from the testimony in the case, that the prisoner, Monroe Johnston, is the man who committed the burglary, as charged by the State? The prisoner has set up the defense of (890) an *alibi;* that is to say, that at the time the State charges the burglary was committed in the house of Shields the prisoner was sleeping in the house of Harriet Mills, which is about 16 miles distant from the house of Shields, and that, therefore, it was impossible for him to have committed the crime. When this defense is set up by a defendant it is incumbent upon him to satisfy the jury of the truthfulness of the defense; and if the jury are satisfied of the truthfulness of this defense in this case, of course the prisoner is entitled to an acquittal, and if the jury should not be satisfied of the truthfulness of this defense in this case it is incumbent upon the State to satisfy the jury, beyond a reasonable doubt from other testimony in the case, that the prisoner is the man who committed the burglary as charged in the bill," etc. The court recapitulated all of the testimony of the case, and called the attention of the jury to the testimony offered by the prisoner to establish his defense of an alibi. The court said to the jury that "the prisoner has sworn that on the night of the alleged burglary (8 January last) he stayed all

night at the house of Harriet Mills, in the vicinity of Matthews." The prosecution has denied the truthfulness of this statement of the prisoner, and assailed it upon the ground that he is an interested witness, and has argued that he ought not to be believed for this reason. It is true that when a defendant charged with a crime on his trial takes the witness stand and testifies in his own behalf, the law does pronounce him to be an interested witness. A cloud of suspicion, as it were, rests upon his statements, owing to the fact that he is interested. His testimony does not stand upon that high and unsuspicious level or plane where it would stand were he not interested. The law, therefore, requires the jury to weigh and criticize and consider such testimony with great caution and care and deliberation. The law, however, does not go so far as to say that a jury must not believe an interested witness. On the (891) contrary, an interested witness can tell the truth, and if the jury believe the statements of an interested witness to be true, then they must act accordingly. The statements of an interested witness, if believed by the jury to be true, are entitled to the same weight as they would be were he a disinterested witness. The prisoner also offered Harriet Mills as a witness, and she testified, as he did, that the prisoner stayed all night, being Wednesday night, the night of the alleged burglary, at her house, in the vicinity of Matthews. The prosecution assailed the general character of this witness, and argued that her statements ought not to be believed by the jury, while the prisoner, on the other hand, asserts that her statements are true. The prosecution introduced three witnesses who testified that the general character of Harriet Mills is bad. A question of veracity is entirely within the province of the jury. It is for the jury, and not the court, to pass upon the credibility to be attached to the statements of the witness. Prisoner also introduced the colored boy, Robert Mills, son of Harriet, about 11 years old, as a witness, and he testified, in substance, as his mother did, and also that his mother had told him what to say as a witness on this trial. The prisoner also introduced the witnesses Reid and Brown, and Hunter and others, who testified in substance, that the prisoner was in the neighborhood of Matthews and of Harriet Mills's house on Monday and Tuesday and Thursday and Friday of the week in question. It is charged, and you will remember, that the burglary was committed on Wednesday night, 8 January. Calvin Reid testified that the prisoner was at his house Monday evening and on Tuesday, and he told him to come back, and he did come back, on Thursday. The witness lives eight miles east of Charlotte, and four miles from Matthews. Hunter testified that the prisoner came to his house about 10 or 11 o'clock on Thursday and picked cotton for (892) the balance of the day, and also picked cotton for him on Friday, and Smith testified that he saw the prisoner going to Hunter's about 8

o'clock on Thursday, 9 January, to pick cotton. The prisoner testified that he picked cotton for Baxter Brown on Wednesday all day. The witness Baxter Brown testified that the prisoner did pick cotton for him a portion of one day during the week in question but he did not remember which day it was. This testimony on the part of the prisoner, as to his picking cotton at the places mentioned and as to his whereabouts for several days before and several days after the night of 8 January, was offered to corroborate and strengthen his testimony, and that of Harriet Mills and Robert Mills, viz., that he stayed all night on the night of 8 January, when it is charged that he committed the burglary at A. C. Shields on that night. The testimony offered to show that the prisoner is the man who committed the burglary in question is that of the witness A. C. Shields who testified that he has known the prisoner for more than 12 years; that the prisoner fired at him in his bedroom three times; that he recognized the features of the prisoner and saw his beard, and also a white cloth around his neck, by the flash of the pistol; that he was familiar with the prisoner's voice; that it was a low, soft voice, and when the prisoner said to him, 'Stand back!' he recognized his voice. He swore positively to the identity of the prisoner. The testimony of Stewart, the mail carrier, was that he saw a man, before sunrise on Thursday morning, on the Statesville road, walking very fast, about four miles from Charlotte. He had a white cloth or towel around his
(893) neck, and he thought the man was the prisoner. He was acquainted with the prisoner but he would not swear positively that the man was the prisoner. Winders saw prisoner on 27 December, and he was wearing a white towel around his neck. Pucket testified that he overtook a negro man wearing a brown coat, before sunrise on the morning of 9 January, on the Statesville road, going toward Charlotte, about four miles from Charlotte, and met Stewart (mail carrier) about the same time. Hunter and Allison testified that the prisoner was at Hunter's store at Derita after 9 o'clock on Monday night, 6 January, about six miles from the house of A. C. Shields. The object of the State in offering the testimony of Stewart and Pucket and Hunter and Allison and Finger was to show that the prisoner was at Hunter's store on Monday night, the 6th, and not at the house of Harriet Mills, and that between daylight and sunrise on the morning of the 9th he was on the Statesville road going toward Charlotte. When the testimony is contradictory in any respect, and cannot be reconciled, it is the duty of the jury to sift the truth from the testimony to the best of their ability. If the jury is satisfied, beyond a reasonable doubt, that the prisoner is guilty, they ought to convict him; but if they are not satisfied beyond a reasonable doubt of his guilt, they ought to acquit him."

The defendant excepted to the charge of his Honor, and assigned the following grounds as error therein: (1) For that the judge failed to instruct the jury in accordance with the act of Assembly (Laws 1889, p. 418, ch. 434, "that when the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict in the second degree if they deem it proper to do so." (2) For that the judge charged the jury that there were two counts in the bill of indictment in this case—the one charging that the breaking and entry was done (894) with a felonious intent to commit the crime of larceny, and the other one charging a felonious intent to commit the crime of murder; meaning thereby to charge and in fact charging that the bill of indictment contains two counts for burglary, whereas, in truth and in fact, the first count was for burglary and the second for felonious assault, under the act of Assembly, charged to have been committed after the commission of the burglary charged in the first count. (3) For that the judge, in charging the jury, failed to comply with the statute (Code, sec. 413), "to state in a plain and correct manner the evidence given in the case and declare and explain the law arising therein." The prisoner excepted, and assigned as error that the court did not in charging the jury eliminate the material facts of the case, array the state of facts on both sides, and apply the principles of law to them, so that the jury might decide the case according to the credibility of the witnesses and the weight of the evidence, as required by the many decisions of the Supreme Court of North Carolina.

The jury came into court, and all answered to their names, and were asked by the clerk, "Are you agreed on your verdict?" The jury answered "Yes"; and on being asked by the clerk, "Who shall say for you?" the jury answered, "Our foreman, A. H. Rhyne." The clerk then said to the prisoner, " . . . Hold up your right hand," which being done, the clerk said to the jury, "Look upon the prisoner, you that are sworn. What say you? Is he guilty of the felony and burglary whereof he stands indicted, or not guilty?" The foreman says, "Guilty!" Counsel for prisoner asked that the jury be polled, which was done, the clerk saying to each juror: "Look upon the prisoner, you that are sworn. What say you?" etc. Each juror said for himself, (895) "Guilty." The clerk said to the jury, "Hearken to your verdict as the court recordeth it. You say that Monroe Johnston is guilty of the felony and burglary whereof he stands charged. So say you all?" They said "Yes." The defendant objected to the form of the question propounded in both instances. Overruled. Exception. Motion in arrest upon the grounds: "That the bill of indictment contained two counts, charging two offenses, burglary and felonious assault, under the statute, said offenses being punishable in different degrees. The verdict of the

jury is a general verdict, and under decisions of the Supreme Court said verdict is null and void, and sentence cannot be pronounced. If it be contended that the verdict was limited to the first count, then it is void for inconsistency, for the defendant, under the evidence, cannot be guilty under the first count and not guilty under the second—the facts showing one whole and continuous transaction." Motion overruled, and defendant excepted. Motion for new trial overruled. Sentence of death was pronounced. Defendant appealed.

Attorney-General and Maxwell & Keerans for the State.
W. R. Henry for defendant.

MONTGOMERY, J. The special instructions which were asked by defendant's counsel were all given by the court. The first exception to the charge was in these words: "For that the judge failed to instruct the jury in accordance with the act of Assembly of 1889, ch. 434, p. 418, that when the crime charged in the bill of indictment is burglary in the first degree the jury may render a verdict in the second degree if they deem it proper to do so." That statute provides that "if the crime be committed in a dwelling-house or in a room used as a sleeping apart-
(896) ment, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of said crime, it shall be burglary in the first degree." Shields, a witness for the State, testified that at the time of the burglary he and his wife and daughter were occupying rooms in the house; that he was sleeping in a room on the first floor and his wife and daughter were sleeping in a room upstairs. Upon this testimony, if the jury believed it, the defendant was guilty of burglary in the first degree. There was no proof tending to show that the burglary might have been committed under circumstances which would make it burglary in the second degree under the statute. If his Honor had charged as he was requested it would have been error. In *S. v. Alston,* 113 N. C., 666, the court charged the jury "that although the evidence was that the family were present in the house at the time of the commission of the crime" they might find the prisoner guilty of burglary in the first degree or guilty of burglary in the second degree. This Court held that the charge was erroneous, and said: "The court should have charged the jury that if they believed from the evidence that the family were present in the house at the time of the felonious entry, as charged, they should convict the defendant of burglary in the first degree. Under such circumstances the jury are not vested with the discretionary power to convict of burglary in the second degree." In *S. v. Fleming,* 107 N. C., 905, the Court, in construing the act of 1889, said: "The jury are sworn to find the truth of the charge,

and the statute does not give them a discretion against the obligation of their oaths. The meaning of this provision evidently is to empower the jury to return a verdict of guilty of burglary in the second degree upon a trial for burglary in the first degree, if they deem it proper so to do from the evidence, and to be the truth of the matter." His (897) Honor charged the jury that there were two counts in the bill of indictment, one for the breaking and entry with the intent to commit larceny, the other with the intent to commit murder. The defendant excepted to that part of the charge because, as he alleged, the second count was not for burglary but for a felonious assault, after the commission of the burglary charged in the first count. We are of the opinion that the second count is a good one for burglary. It avers that the defendant, etc., having *so burglariously as aforesaid* broken and entered the said dwelling-house of the said A. C. Shields, then and there upon the said Shields, in the said dwelling-house, then and there being unlawfully, maliciously, secretly, and feloniously did make an assault with a deadly weapon, to wit, a pistol, and him the said Shields did shoot, etc., with intent him the said Shields, by the means aforesaid, then and there feloniously of his malice aforethought to kill and murder, contrary," etc. This is not the form in common use in North Carolina, but it is one approved by most of the standard writers on criminal law. The intent must usually be stated, and it must be to commit a felony; and if a felony has been actually committed in the house, the intent may be and usually is stated to have been to commit that felony. "But it seems that an indictment for burglary may in this respect be drawn in three ways: Stating the breaking and entry to be with intent to commit a felony, or stating the breaking and entry and a felony actually committed, or stating the breaking and entry with intent to commit a felony, and also stating the felony to have been actually committed. The latter is the preferable mode and that always adopted in practice, for if you fail to prove the felony committed you may still convict of the burglary, or if you fail to prove the intent, etc., you may convict of the felony." 2 Archbold Cr. Prac. & Pl., 1076. And to the same effect is section 818 of 1 Wharton Criminal Law, 2 East P. Law, 2 East P. C., (898) 514; 2 Russell on Cr., 44; 1 Hale P. C., 559; Code sec. 1183.

The defendant's third exception to the charge was that his Honor failed to comply with the requirements of section 413 of The Code. We have examined carefully the charge, and we think that the testimony was orderly and plainly and correctly set forth and the law applied as the statute requires. It is a very clear charge, and quite as full as is usually given. The defendant had his case clearly and fairly committed by his Honor to the jury. We have examined each and every exception to the evidence, and they cannot be sustained.

The exception to the manner of polling the jury and the one to the overruling of the motion in arrest of judgment need not now be discussed, for they are of no consequence after our decision sustaining the sufficiency of the second count in the bill of indictment.

NO ERROR.

(899)

STATE v. GREEN.

Indictment for Secret Assault With Intent to Kill—Principal and Accessory—Practice in Criminal Cases.

1. Under an indictment for an assault with intent to kill, charging defendant as principal, he cannot be convicted as accessory.
2. Under chapter 205, Laws 1891, which authorizes a conviction of a lesser degree of the crime charged in the indictment, a defendant charged as principal in an indictment for an assault with intent to kill cannot be convicted as accessory.

INDICTMENT for secret assault upon one Barrett with intent to kill, etc., tried before *Bryan, J.*, and a jury, at Spring Term, 1896, of POLK.

His Honor in his charge read the statute under which defendant was indicted, and construed the same, and then instructed the jury that if the State had satisfied them beyond a reasonable doubt that the defendant, in a secret manner, concealed in the bushes on the roadside, did shoot Barrett with a gun, with intent to kill him, or if the defendant was present, aiding and abetting in the shooting, then it was their duty to convict him. Defendant excepted to the latter part of his Honor's charge, to wit, "Or if defendant was present, aiding and abetting the shooting, they should convict him," because there was no evidence upon which the case should have been left to the jury on the question whether the defendant was present, aiding and abetting. No special instructions were requested. The jury returned a verdict of "guilty as accessory." Motion for new trial was refused, and defendant appealed from the judgment rendered.

(900) *Wm. J. Montgomery for defendant.*
Attorney-General for the State.

FURCHES, J. This is an indictment for a secret assault with a deadly weapon (a gun), with intent to kill, under chapter 32, Laws 1887. Under instructions from the court the jury found the defendant "guilty as accessory," and upon this verdict the court pronounced judgment, and the defendant appealed.

There was evidence tending to show that defendant and another were together when the assault was made. And the defendant relied upon an *alibi,* and introduced evidence tending to establish this defense. It is not contended but that the defendant might be convicted as an accessory upon a proper bill of indictment and evidence to sustain such an indictment. But it is contended that he could not be convicted as accessory under this indictment charging him as the principal. And, upon investigation of the authorities, we are of the opinion that this is so. *S. v. Dewer,* 65 N. C., 572. If he was present, aiding, abetting, and encouraging another to do the shooting, he might have been found guilty as a principal. *S. v. Chastain,* 104 N. C., 900.

The statute of 1891, ch. 205, does not apply in this case. That act provides "that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or an attempt to commit a lesser degree of the same crime." That is, that the defendant under this indictment, for a secret assault, might have been convicted of a simple assault or assault and battery.

We have no means of knowing from this indictment and verdict whether the defendant was convicted as accessory before or after the fact. But neither of these offenses is the same offense as that charged in the bill of indictment, nor is either one of them a less (901) degree of the *same* offense as that charged in the bill.

There were other matters discussed in the argument before us that we do not consider and pass upon as they are not likely to arise again upon a new trial.

ERROR.

Cited: S. v. Bryson, 173 N. C., 806.

STATE v. J. COY.

Indictment for Larceny—Larceny—Felonious Intent.

Where, on the trial of one charged with larceny, it appeared that the offense was committed in the known presence of the owner of the property, and the defendant claimed that his offense was only a forcible trespass, it was error to refuse to submit to the jury the question of felonious intent.

INDICTMENT for larceny, tried before *Bryan, J.,* and a jury, at Spring Term, 1896, of POLK.

On the trial, Andrew Erwin, the prosecutor, testified that about a month before Christmas, 1895, he lost three chickens. His wife told him somebody was among his chickens. "I was rocked, and my house was

rocked, in the nighttime. I saw Jake Coy and Henry Holbut take the chickens. They knocked them out of the cedar trees. I never got the chickens back. I ran them to the fence. Holbut told Jake to get the axe. I spoke to them. Jake Coy said, 'Don't blame this on Henry. He is at home in bed.' My wife awoke me and said, 'Somebody is running your chickens.' They were after the chickens when I went out. (902) I was well acquainted with Jake Coy and Henry Holbut. When I went to the door they were throwing rocks at my chickens in the cedar trees. I had a light when I went to the door. I spoke to them and called them by name, and told them not to take my chickens." On cross-examination the witness testified that he was well acquainted with Coy and Holbut, and they knew him well; that when he went to the door they were throwing rocks at his chickens in the cedar trees near his house. He had a light and spoke to them, and called them by name, and told them not to take his chickens. They rocked him. He stood in the door and forbade them to take his chickens; saw them knock his chickens out of the trees; ran after them to catch them. "They knew me, and knew I saw them taking the chickens." Defendant asked no written instructions, but insisted that from the testimony he was not guilty of larceny but of forcible trespass. The court ruled otherwise, and charged the jury that if they believed the evidence the defendant was guilty of larceny. The defendants excepted to the charge and appealed from the judgment pronounced, which was that the defendant be imprisoned in the State penitentiary for 12 months.

Attorney-General for the State.
Wm. J. Montgomery for defendant.

FAIRCLOTH, C. J. Indictment against the defendant for stealing chickens of Andrew Erwin. The prosecutor testified that he saw defendant and Henry Holbut take and carry off his chickens. They knocked them out of cedar trees. He went to the door with a light. They rocked him and his house. He ran them to the fence and ordered them not to take his chickens. He said he was well acquainted with both the parties and called them by name. He said on cross-examination that they (903) knew him well. He saw them knock his chickens out of the tree. They knew him and knew that he saw them taking the chickens. On trial the defendant insisted that he was not guilty of larceny but of forcible trespass. His Honor held otherwise, "and charged the jury that if they believed the evidence the defendant was guilty of larceny." Exception, and an appeal by defendant.

The defendant's argument is that the court ought to have submitted the evidence on the question of a felonious intent to the jury, with instructions as to the law arising upon the evidence, taken as true. It has

been held since the time of Sir Matthew Hale to the present that to constitute the crime of larceny a felonious intent is an indispensable ingredient. The distinction between larceny and forcible trespass is clear as a legal proposition, but sometimes it is somewhat difficult to draw the line upon a given state of facts. In this case the offense was committed in the known presence of the owner. In all cases, secrecy *clam et secrete* is evidence of a felonious intent, and in many it is held to be indispensable to establish larceny as distinguished from trespass. What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say. *S. v. Sowls,* 61 N. C., 151; *S. v. Powell,* 74 N. C., 270; *S. v. Ledford,* 67 N. C., 60; *S. v. Gaither,* 72 N. C., 458.

In *S. v. Powell,* 103 N. C., 424, this Court held that secrecy is evidence of a felonious intent, but is not the only evidence of such intent. There may be various circumstances which so complicate the question that the question of intent must be left to the jury under instructions from the court, upon the principle of resolving reasonable doubt in favor of the defendant. While there is no conflict in the evidence, and assuming it to be true, the question of intent is an important and (904) material one, to be ascertained by the jury, and we think the evidence should have been submitted to the jury as to whether the defendant had a felonious intent at the time of taking the property.

The unlawful intent cannot be presumed from the undisputed evidence of the State in criminal actions. The plea of not guilty denies its credibility, and the presumption of innocence can be overcome only by the verdict of a jury. *S. v. Riley,* 113 N. C., 648.

NEW TRIAL.

Cited: S. v. Holbut, post, 904; *S. v. Neal,* 120 N. C., 621; *S. v. Barrett,* 123 N. C., 754; *S. v. Hopkins,* 130 N. C., 649; *S. v. Blackley,* 131 N. C., 733; *S. v. Foy, ib.,* 806; *S. v. Clark,* 134 N. C., 709.

STATE v. HENRY HOLBUT.

Indictment for Larceny—Larceny—Felonious Intent.

(For syllabus, see *S. v. Coy, supra.*)

INDICTMENT for larceny, tried before *Bryan, J.,* and a jury, at Spring Term, 1896, of POLK. The facts are the same as those stated in the report of the case of *S. v. Coy,* at this term. The defendant was convicted and appealed.

Attorney-General for the State.
Wm. J. Montgomery for defendant (appellant).

FAIRCLOTH, C. J. Indictment for larceny. This case is governed by *S. v. Coy, ante,* 901.

NEW TRIAL.

(905)

STATE v. JOHN RHYNE.

Indictment for Peddling Without License—Peddlers—Selling Articles of One's Own Manufacture—Selling by Agent.

The permission given in sec. 23, ch. 116, Laws 1895, to sell articles of one's own manufacture without taking out peddler's license is personal to the manufacturer and does not extend to an agent employed by the manufacturer to sell his goods.

INDICTMENT for peddling without license, tried before *Brown, J.,* and a jury, at Fall Term, 1896, of LINCOLN. The defendant was convicted and appealed. The facts are stated in the opinion of *Associate Justice Montgomery.*

Attorney-General for the State.
Jones & Tillett for defendant (appellant).

MONTGOMERY, J. The defendant was indicted for peddling harrows and cultivators without the license required by law, the wares being not of his own manufacture. The special verdict set out that the defendant had carried a wagon with him, exhibiting and delivering the wares which were manufactured by the American Harrow Company, of Detroit, Mich.; that he sold and at once, at the time of sale, delivered one of the harrows, taking the note of the purchaser to the company; that the defendant was employed by the company to sell the harrows, and was paid fifty dollars per month and nothing more for his services; that the harrows were shipped by the carload from Detroit, where they were manufactured, to Gastonia, N. C., consigned to G. W. Irwin, foreman of the company in North Carolina; that eight other persons were
(906) engaged in the same business and in the same manner as was the defendant, and that neither the defendant nor the company has ever been licensed to peddle.

The court was of the opinion that the defendant was guilty, and the jury so rendered their verdict. There was judgment, from which the defendant appealed. We are of the opinion that upon the special verdict his Honor made the proper decision and judgment. Section 23 of the

Revenue Act (chapter 116, Laws 1895) provides that "Every person authorized to do business in this State who, as principal or agent, peddles drugs, nostrums, medicines, or goods, wares or merchandise of whatever name or description shall pay a license tax as follows: . . . Every person mentioned in this section shall apply in advance to the board of county commissioners of the county in which he proposes to sell for a license, and the board of county commissioners may issue the license upon the payment of the tax to the sheriff, which shall expire at the end of twelve months from its date: *Provided*, it shall be discretionary with the board of county commissioners whether they issue license or not. . . . Any person may sell under this section, without payment of tax as peddlers, salt, vegetables, chestnuts, peanuts, fruits, or other products of the farm or dairy; oysters, fish, books, printed music, *or articles of his own manufacture.*"

The question before the Court is, What is the legal meaning of the words in the above-quoted section, "Articles of his own manufacture?" We have no hesitancy in declaring that the words mean things made by the person who *actually* does the peddling—not things made by the *principal* and sold by his *agent*. The definition of the word "own" in the Century Dictionary is, "Belonging to one's self; peculiar, particular; individual; following the possessive (usually a possessive pronoun) as an intensive to express ownership, interest, or indi- (907) vidual peculiarity with emphasis, or to indicate the exclusion of others, as my own house, his own idea." So, when the law allows a person to sell articles of his own manufacture it must refer to ownership in a sense peculiar and intensive as to the owner. Moreover, the peddling of goods falls under the police regulation of the State as well as being a means of revenue. *Morrell v. S.*, 38 Wis., 28. To peddle is not a matter of right under our laws, which any person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the applicant, and is not assignable. He is on the footing of an applicant for the sale of liquor by retail. The public convenience to some extent and the character of the applicant can be considered by the commissioners. Mr. Cooley, in his work on Taxation, takes this view of the matter, and in the first volume, at page 579, he says: "Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it." 51 Miss., 13. If it be said that under this view corporations cannot peddle, because they cannot show character and fitness before the commissioners, the answer may be, neither can a corporation be licensed to sell liquor by retail. It will be

observed in this connection that in section 23, chapter 116, Laws 1895, peddling is not referred to in connection with corporations; the word "person" is invariably used.

NO ERROR.

Cited: S. v. Morrison, 126 N. C., 1126.

---

(908)

STATE v. GEORGE CODY ET AL.

Practice — Amendment of Indictment — Special Venire — Escape of Prisoner Pending Appeal—Dismissal of Appeal.

1. Where a prisoner convicted of a capital felony escapes from custody and is at large when his appeal is called for hearing, this Court may in its discretion either dismiss the appeal or hear and determine the assignments of error or continue the case.
2. It is not error in the trial judge when ordering a special *venire* to direct the sheriff to summon only freeholders who have paid their taxes for the preceding year, who had not served on the jury within the last two years, who had no suits pending and at issue in the court, and who were not under indictment in the court.

INDICTMENT for burglary, tried before *Boykin, J.,* at Fall Term, 1894, of MADISON. The defendants were convicted and appealed. Before the appeal was called for trial they had escaped from custody and were at large. The case was continued from term to term, and they are still at large.

Attorney-General for the State.
J. M. Gudger for defendants (appellants).

CLARK, J. In *S. v. Anderson,* 111 N. C., 689, it is held, approving *S. v. Jacobs,* 109 N. C., 772, that "where a prisoner who had been convicted of a capital felony escapes from custody and is at large when his appeal is called for trial, this Court may, in the exercise of a sound discretion, dismiss the appeal, or hear and determine the assignments of error, or continue the case," and in that case the appeal was dismissed. In the present instance we have heretofore pursued the latter of the three courses indicated, having continued the cause till this the fifth term. The prisoners not yet having returned after the lapse of
(909) more than two years indulgence, we now adopt the first course and dismiss the appeal. Besides, upon looking into the record,

we find there were only two assignments of error, neither of which is a valid objection. The first is that when the court ordered a special *venire* the judge directed the sheriff "to summon, as far as possible, only freeholders, men who had paid their taxes for the preceding year, who had not served on the jury within the last two years, who had no suits pending and at issue in the court, and who were not under indictment in the court." The order was unobjectionable, for the classes named were subject to challenge for cause, and the *venire* as far as possible should consist of men qualified to serve. To encumber the *venire* with those thus specified would simply restrict the number of *legales homines* from whom the jury was to be taken. The very object of a special *venire* is to get a body of men less liable to these and other causes of challenge than would be *tales* jurors picked up in the court-room.

At the instance of the defendants and with their consent in open court, acting under the advice of their counsel, an amendment was made in the indictment. They subsequently pleaded to the indictment and went to trial without objection, till after verdict. This action is binding on them, and it would be a fraud on the court if it was not. *McCorkle v. State,* 14 Ind., 39; *Shiff v. State,* 84 Ala., 454. We would not, however, be understood as calling in question the decisions which deny the right of the court, either of itself or on motion of the solicitor (*S. v. Sexton,* 10 N. C., 184), to make amendments, except in certain cases, and then only as to matters of form and not of substance. 1 Chitty Cr. Law, 292; *Cain v. State,* 4 Black (Ind.), 512; *Hawthorn v. State,* 56 Md., 530.

APPEAL DISMISSED.

Cited: S. v. McDowell, 123 N. C., 767; *S. v. Dixon,* 131 N. C., 813; *S. v. Register,* 133 N. C., 750; *S. v. Keebler,* 145 N. C., 561, 562; *S. v. DeVane,* 166 N. C., 282.

(910)

STATE v. KING.

Practice—Appeal—Case on Appeal—Exceptions to Appellant's Statement of Case on Appeal.

The exceptions to the appellant's statement on appeal should be specific; and, where they are so general as to leave the case indefinite, it will be remanded to the court below in order that it may be settled by the judge.

INDICTMENT for assault with deadly weapon with intent to kill, tried before *Robinson, J.,* at Fall Term, 1895, of GRAHAM. The defendant was convicted and appealed.

Attorney-General for State.
Shepherd & Busbee for defendant.

CLARK, J. If the appellee does not accede to the appellant's statement of the case on appeal, The Code, sec. 550, prescribes that the respondent shall return it with specific amendments thereto. It has been held that a counter-case is a sufficient compliance with this requirement. *McDaniel v. Scurlock,* 115 N. C., 295. The same section further provides that on receiving the appellee's exceptions the appellant "shall immediately request the judge to fix a time and place for settling the case before him." If the appellant does not do this, his statement as modified by the appellee's exceptions will be taken as the "case on appeal." *Russell v. Davis,* 99 N. C., 115; *Owens v. Phelps,* 92 N. C., 231. Or if this would leave the matter too complicated, the court would remand the case to be properly settled by the judge. *Arrington v. Arrington,* 114 N. C., 115; *Hinton v. Greenleaf,* 115 N. C., 5.

The exceptions filed by the appellee strictly ought to be specific (or a counter-case), so that the appellant, if he sees fit, may accept
(911) them and modify his case accordingly. In the present instance the solicitor's exceptions to appellant's case are: "1. For that the evidence is not correctly stated. 2. For that the instructions of the judge are not correctly stated." This practice has been so long and generally recognized that, though it is not strictly a compliance with the law, we are loath to open up a new source of controversy over the details of the settlement of "cases on appeal" (matters which are apart from the merits of the controversy) by drawing the line as to what would be sufficiently specific amendments in different cases. It is clear that to take the appellant's statement of the case as amended by the exceptions would leave the case on appeal so indefinite as to be a nullity. The appellant will not be taken as having accepted them, but he should have called on the judge to settle the case. In view of the general nature of the appellee's exceptions, following the course taken in *Hinton v. Greenleaf, supra,* and *Mitchell v. Tedder,* 107 N. C., 358, the case is remanded that it may be settled, on notice to both sides, by the trial judge. If the appellee's exceptions shall be too bare in any given case, or if the appellant shall in any case too rashly deem the appellee's exceptions too general to send the case to the judge to settle, this Court has the right in the first instance to take the appellant's case, disregarding the appellee's exceptions or, in the latter, to disregard the appellant's case for not having referred the case to the judge. Each case must stand on its own basis. The safe rule is for the appellee to make his exceptions (or counter-case) specific, and on the other hand the appellant, if there is any doubt whatever as to the exceptions being specific, should refer the case to the judge to settle. It

is enough to debate and decide the case on the merits. Collateral (912) disputes as to the manner of "settling the case" should always be avoided if possible.

REMANDED.

Cited: Gaither v. Carpenter, 143 N. C., 241.

STATE v. W. H. BAKER, MAT ROSE, AND SERGE REEDER.

Indictment for Murder—Trial—Evidence.

1. On the trial of defendant for murder he testified that as he and his co-defendants approached the deceased and other Indians the deceased threw a rock at him and the other defendants (one of whom was struck), and that he, the defendant, thereupon assaulted and cut the deceased with a knife, and that he thought he was right in doing so, as he was afraid of the Indians. Upon cross-examination the State was allowed to ask him if he considered himself justified in jumping on the deceased and cutting him with a knife, when one of the other defendants was already upon him: *Held,* there was no error in permitting the question.

2. The declarations of a defendant charged with murder, made a few hours before the homicide, and tending to show animosity against the deceased, were properly admitted as evidence on the trial.

INDICTMENT for murder, tried at Spring Term, 1896, of SWAIN, before *Timberlake, J.,* and a jury.

The evidence in the trial was very voluminous. It appeared therefrom that the prisoners and deceased, with others, were at a distillery, all more or less drunk, and some of them quarrelsome and disposed to "pick at" and annoy the deceased, who was lying down on the floor, half drunk. About dusk the deceased (a Cherokee Indian) started homeward, with others, and was overtaken by the defendants. As the latter (913) approached, one of the Indians threw a rock which struck the defendant Baker in the breast. The defendants accused the deceased of throwing the rock, and, led by the defendant Rose, all seized the deceased and pulled him down, and in the scuffle the latter received five stabs or cuts, one of which caused his entrails to protrude, and death ensued the next morning.

During the cross-examination of the defendant Rose, who was a witness on behalf of himself and the other defendants, he stated that he was afraid of the Indians and thought himself justified in doing as he did, to wit, cutting the deceased. He was asked by the State whether he con-

sidered himself justifiable in jumping upon the Indian and cutting him when the defendant Reeder was on him. The question was allowed, under objection, and defendants excepted.

The State proposed to ask a witness whether he heard the defendant Baker say anything about an Indian while the crowd was at the distillery. The question was allowed, under objection, and the witness answered: "Baker said, 'If I had the d—d Indian out I would cut his d—d throat.' The deceased at that time was right there and was an Indian. Baker further said, 'Watch me get an Indian before I leave.' "

There were no other objections to the testimony, and no exceptions were made to the judge's charge. There was a verdict of manslaughter. A motion for a new trial was refused, and from the judgment sentencing each of them to imprisonment in the State penitentiary for fifteen years the defendants appealed.

The transcript discloses no assignments of error.

Attorney-General for the State.
No counsel contra.

MONTGOMERY, J. The case on appeal is signed neither by the (914) judge nor by counsel. There were no exceptions made to the charge of the court. Special instructions were asked by the defendants, but it does not appear whether they were given or refused. Only two objections were made to evidence, and they were properly overruled by the court. The defendants were convicted of manslaughter (though charged with murder), and each one of them sentenced to serve a term of fifteen years in the State's Prison. There was a motion made for a new trial, but on what grounds does not appear, and from the overruling of the motion by his Honor an appeal was prayed and allowed.

Notwithstanding the irregularities in the making up of the case on appeal, if it may be so called, we have, on account of the seriousness of the judgment, examined the case. The trial was fair, the charge of his Honor full and just, covering every phase of the case.

It would seem from the reading of the testimony in this case that the defendants should be forever grateful to the jury for the verdict of manslaughter, that is, if they regard a not very long term in the penitentiary as preferable to capital punishment. There is no error, and the judgment below is

AFFIRMED.

Cited: S. v. Wilson, 121 N. C., 658.

APPENDIX

The following opinion of *Associate Justice Clark* at Chambers, construing the election law, is of sufficient interest to be added here, as no appeal was taken:

N. B. BROUGHTON v. JAMES H. YOUNG.

Election Law—Recount Ordered.

1. Under the election law, Acts 1895, ch. 159, the ballots are preserved in the duplicate boxes as evidence, and can be used in a *quo warranto* proceeding, or before a commissioner to take deposition in a contest for seat in the General Assembly or in Congress.
2. The commissioner cannot order the production of the ballots, but this must be done by a judge of the Superior or Supreme Court.
3. The ballot boxes must remain in the custody of the clerk, and be again sealed by him after the recount.

Douglass & Holding, Shepherd & Busbee and W. W. Jones for contestant.

J. C. L. Harris for contestee.

In the contest for a seat in the House of Representatives from WAKE, between N. B. Broughton, contestant, and James H. Young, contestee, J. C. Marcom, J. P., the commissioner to take depositions, applied to D. H. Young, Clerk Superior Court of said county, for the duplicate ballot boxes, that he might make a recount of the ballots. This being refused, application was made to *Mr. Justice Clark* for a rule on the clerk to show cause why he should not grant the application.

CLARK, J. Upon hearing counsel for and against the motion I am of opinion that the object of the statute in requiring the preservation of the ballots in duplicate ballot boxes, duly sealed up, is that they may be kept as evidence to verify or correct the election returns when impeached.

If a *quo warranto* was being tried in the Superior Court, cer- (916) tainly the judge presiding might order said ballot boxes brought into court and a recount made in the presence of the Court and jury. In contested elections for members of the General Assembly and members of Congress the evidence is taken, not before a jury, but before a commissioner and submitted upon depositions. Therefore, if the same benefit of the recount of the ballots is to be had, as on the trial of a *quo warranto,* there must be an order to have the examination of the ballots made before the commissioner and the result reported to the legis-

lative body. It is not possible that the Legislature intended that the clerks of Cherokee or Dare or any other county should attend with their numerous ballot boxes before the General Assembly in Raleigh or before the Congressional Committee on Elections.

I am of opinion that the clerk properly declined to permit the boxes to be opened and a recount made on the motion of a commissioner to take depositions, and that this should only be done upon the order of a judge of the Superior or Supreme Court under the supervisory powers conferred by chapter 159, Laws 1895. The powers thus conferred do not cease on election day, but cover all matters pertinent to the scope of that act, including the election and the returns. The act by its tenor is to be liberally construed with a view of effectuating its purposes of securing both a "free ballot" and "a fair count." The effect of the recount, as well as of the original returns, is for the General Assembly, who are to judge of the qualification and election of their own members, but that honorable body is entitled to have the result of such recount laid before them upon their assembling—especially since, their sessions being limited to sixty days, it is due that body and the public as well that there may be means of speedily determining the rights of contestees and contestants to seats.

The ballot boxes should not be taken out of the custody of the
(917) clerk nor the place designated for their deposit. Therefore, be it ordered:

That on 30 December, 1896, at 10 o'clock, D. H. Young, clerk of the Superior Court of Wake County, will, in the office of said clerk, in turn open each and every ballot box, containing votes for the General Assembly, from the precincts designated in section 8 of the contestant's complaint or notice of contest, and in the presence of the commissioner and the parties and their counsel count and certify the number of ballots in each cast for N. B. Broughton and the number cast for James H. Young, till each and every box designated has been opened and counted, which certificate, countersigned by the commissioner, shall be certified in the evidence submitted to the General Assembly. As the vote of each box is counted, the ballots shall be immediately replaced in the box by the clerk, and the box shall again be sealed up and replaced by him in the same place of deposit till further authority is given to open the same. The recount thus authorized extends only to the names of the contestant and contestee in this action.

Cited: Cozart v. Fleming, 123 N. C., 557, 558.

APPENDIX 2.

The Court directs that the opinion rendered by *Hon. R. P. Dick,* U. S. Judge for the Western District of North Carolina, in *J. S. Bradley, Admr., etc., v. The Ohio River and C. Railway Company,* on motion to remand to the State Court, be printed in this volume of the Reports. The case is the same as that reported 912, *ante.* His Honor, *Judge Simonton,* of the United States Circuit Court, concurred in the opinion of *Judge Dick.*

WESTERN DISTRICT OF NORTH CAROLINA,
IN THE CIRCUIT COURT, AT GREENSBORO.

(*Opinion filed 15 January, 1897.*)

J. S. BRADLEY, Admr.
v.
THE O. R. & C. RY. Co. } MOTION to remand to the State Court.

DICK, J. This action was instituted in the State Court for the county of McDowell to recover damages for personal injuries occurring in this State, and defendant availed itself of the right given by the act of Congress of 13 August, 1888, to nonresident defendants to remove an action pending in a State Court to the United States Circuit Court on the grounds of local prejudice, etc.

The application was received and considered, and this Court adjudged that local prejudice did exist in said county as alleged and proved by evidence, and an order was made for the removal of this case from the State Court to this Court at Charlotte.

In the said order leave was granted to plaintiff to file a motion to remand at the next term of this Court, and such motion was duly made and is now before this Court for determination.

This order was not recognized and observed by the State Court, which declined to relinquish jurisdiction on the grounds insisted (919) upon by the plaintiff:

"1st. That the O. R. & C. R. R. Co. is a corporation and citizen of North Carolina.

"2d. That this fact also appears in the record and pleadings."

From this order in the State Court the defendant prayed an appeal, which was allowed, and the clerk was directed to send up a full transcript of the record and all papers filed in the case.

On a hearing in the Supreme Court in the term just closed the Court affirmed the order of the court below, not upon the grounds stated in the

order appealed from, although fully presented in the record, briefs, and argument before the Court, but upon a defect that appeared in the proceedings of this Court for the removal of the cause.

I concur in this decision of the Supreme Court founded upon the fact that "it does not affirmatively appear, either in the petition or in the order of removal, or anywhere else in the record, that the diverse citizenship of the parties existed also at the time of the commencement of the action."

This decision is not important if the substantial grounds set forth in the order of the State Court are not well founded, for as the case was properly retained and is still pending in the State Court, and this Court acquired no jurisdiction, by reason of its defective proceedings, the defect mentioned could be remedied by the defendant filing a new petition, alleging the facts omitted by inadvertence, and obtaining a correct and legal order of removal, for common justice would require that the defendant should not be deprived of a substantial legal right by the nonobservance of his counsel and the Court of a matter that is to some extent often refined and technical.

The material question of law for this Court to decide on the
(920) pending motion to remand is whether the defendant is a foreign or domestic corporation before allowing a new petition to be filed.

It is insisted on the part of the plaintiff that defendant is a domestic corporation for the purposes of this action, because in its answer it did not specifically answer to a positive allegation in the complaint that "it is a corporation incorporated under the laws of North Carolina, owning and operating a railway and doing business in said State as a common carrier of passengers and freight," etc.

To this allegation the defendant made answer that it "has not sufficient knowledge or information to deny or admit this allegation of the complaint, and denies the same."

This Court is of opinion that this general denial by the defendant of the allegation of its legal existence as a domestic corporation is sufficient, and the only matters of fact admitted were due service of process and that it was an organized association acting as a corporation within this State. The plaintiff, on objection to this general denial of matter of law as indefinite and uncertain, could not on motion have obtained an order on defendant to make the answer more specific as to the legality of its domestic corporate existence, for the allegation contains matter of law. Matters of law, or mere inferences of law, are questions to be judicially noticed and determined by the court, and such matters which are not proper subjects of traverse are not taken as admitted by pleading over. This matter of law was distinctly presented in the order of the State

Court appealed from, and was the material point in the case; and the fact that the State Supreme Court, after full argument of counsel, failed to make adjudication of the point, tends strongly to show that the Court regarded the question of law as a matter of some difficulty and importance.

A railroad corporation is an artificial person, created by positive law and invested with franchises involving specific powers (921) and privileges conferring some of the attributes of sovereignty, to be exercised primarily for the benefits and advantages of the public. Such corporate franchise can never arise and be invested by any kind of implication.

If the defendant is not a domestic but a foreign corporation, its failure in its answer to make specific denial of a direct and positive allegation of matters of law in the complaint did not estop it from claiming a right of removal of this case from the State Court to this Court, under the provisions of the act of Congress of 13 August, 1888.

The chief ground for the motion to remand—strongly insisted upon by counsel of plaintiff—is that the defendant, at the time of the injury sustained by plaintiff's intestate, was a domestic corporation duly incorporated under the laws of the State of North Carolina, owning and operating a railway, and doing business in said State as a carrier of passengers and freight, etc.; and, being in fact and in law such domestic corporation, it was not entitled, under the said act of Congress, to the order of removal heretofore made by this Court, which has not now jurisdiction to retain and dispose of this case.

I have examined and considered this question of law with more than ordinary care, as the counsel of defendant in their briefs and arguments insisted that this Court, in *Hudson v. R. R.*, decided "that, for jurisdictional purposes, the C. C. C. R. R. Co. was a foreign corporation within the State of North Carolina, and was a citizen of South Carolina, and that the act of the General Assembly of this State amounted only to a license, and did not create a new corporation."

I have examined such case reported in 55 Federal, 248, and (922) find that the Court decided that said railroad company was a citizen of South Carolina and had a right of removal of the case from the State to the Federal Court. The question as to its citizenship in this State was not presented on the trial, as the injury sued for in the State Court occurred in South Carolina. On a petition of plaintiff to have his judgment declared to be a lien on the property of the defendant under the laws of this State, I referred this question to the Circuit Court of South Carolina, having original and prior jurisdiction of the subject-matter. *Ex parte Hudson,* 61 Fed., 369.

Many motions were made in this Court before the trial, and in some of them I may have expressed views as stated by counsel, and according to my recollection such were my impressions, but the question was not fully argued and decided.

It now appears from documentary proofs before this Court that the General Assembly of South Carolina, by an amendatory act of 22 December, 1885, recognized the preëxisting corporation of the Georgetown and North Carolina Narrow Gauge Railroad Company, and gave it the name of the Charleston, Cincinnati and Chicago Railroad Company. Previous to this date there were existing in the State of North Carolina two duly chartered and organized domestic corporations, respectively known as the Rutherford Railway Construction Company and the Rutherfordton, Marion and Tennessee Railway. These domestic corporations were desirous of consolidating with and merging into the said Charleston, Cincinnati and Chicago Railroad Company, so as to make a continuous line, and to extend the said road into and across the State of North Carolina, and to enable said road to be continued across the States of Tennessee, Virginia, and Kentucky to the Ohio River.

In September, 1886, terms of consolidation were agreed upon
(923) by these respective railroad companies which were duly approved, ratified, and confirmed by an act of the General Assembly of North Carolina of 17 February, 1887 (Laws 1887, chapter 77).

By this act the Charleston, Cincinnati and Chicago Railroad Company was recognized and adopted as one corporation, with its consolidated organization for the purposes of the general management of its property, and conducting its business in the several States through which its railway should be constructed and operated. As it acquired the property and franchises of two domestic railway corporations of this State, and was also in express terms authorized and empowered to have and exercise all the powers, privileges, and franchises to the extent conferred on the North Carolina Railroad Company and other railroads in the chapters of the State Code entitled "Corporations" and "Railroads," it became a domestic corporation, to be governed by the laws of this State as to its property and business situated and transacted therein; and it also became liable to answer for all acts done within such territorial limits as a domestic corporation. *Missouri Pacific Railway v. Mich.*, 69 Rep., 753, and cases cited.

This act was not a mere enabling act, granting a license to a foreign corporation to operate a railroad and transact other business in this State under chartered powers derived from the State of South Carolina, for this legislative grant conferred other important franchises which were accepted and exercised in this State in the construction and opera-

tion of its railway to as full an extent as could have been done by a North Carolina corporation under the most liberal charters ever granted. *Clark v. Barnard,* 108 U. S., 436.

This act expressly authorized this consolidated corporation to mortgage its road and property to secure its indebtedness. In order to carry on the contemplated plans and purposes of consolidation (924) and extension of its railroad in and through the several States mentioned, this corporation, on 9 August, 1887, executed a mortgage in the nature of a deed of trust whereby it conveyed to the Boston Safe Deposit and Trust Company all of its property and franchises, etc., to secure the payment of certain specified first mortgage bonds; and said mortgage was duly delivered and recorded in the manner required by the laws of the several States through which its railroad extended. This corporation having failed to make payment of interest on its bonds at the time and in the manner provided for in the mortgage, the whole debt secured became due and payable. The mortgagee, after reasonable diligence, duly instituted proceedings in the United States Circuit Court in the district of South Carolina to obtain a decree for foreclosure and sale of the property and franchises conveyed as a security for the payment of the bonds mentioned in mortgage; and on 6 February, 1893, a decree was made for the purpose of affording the relief prayed for by mortgagee.

In this decree it was ordered, adjudged, and decreed "That the Charleston, Cincinnati and Chicago Railroad Company is a corporation organized and chartered by the States of North Carolina, South Carolina, Tennessee, and Kentucky for the purpose of constructing, owning, controlling, and operating a railroad, etc.," and the special master appointed was authorized and directed to advertise the premises, property, and franchises of said company, and make sale as provided in decree. This decree was also entered as a decree of the Circuit Court of this district in the ancillary proceedings which had been regularly instituted and conducted. By virtue of this decree the special master made sale on 2 May, 1893, and executed a deed to the purchaser, Charles E. Hillier, of Boston, conveying to him all the property and fran- (925) chises of the Charleston, Cincinnati and Chicago Railroad Company.

The said Charles E. Hillier, after having been put in possession of said property and franchises, determined to form a new corporation in accordance with the laws of the State of North Carolina. 1 N. C., Code, sections 697, 698, and 2005. In compliance with these sections, on 20 June, 1894, he executed under his hand and seal a declaration constituting a new corporation, to be invested with all the rights, powers, privileges, and franchises of the Charleston, Cincinnati and Chicago Railroad Company in this State. For the purpose of effecting a com-

plete working organization he gave this new corporation the name of Ohio River and Charleston Railroad Company of North Carolina; appointed six directors and designated the amount of capital stock and the number of shares into which the capital stock should be divided, and caused a certificate of such organization to be duly filed in the several counties of North Carolina in which the said railroad was situated.

On 13 November, 1894, the said Charles E. Hillier executed and delivered a deed to the Ohio River and Charleston Railway Company of North Carolina, conveying to said company so much of the property and the rights, privileges, and franchises of the Charleston, Cincinnati and Chicago Railroad Company as were conveyed to him as purchaser by the special master, which are situated in the State of North Carolina, or were derived from the laws of said State.

The granting of the rights, privileges, and powers which constitute the franchises of a corporation are matters under the control of the Legislature, and, within the limits of constitutional power, the Legislature may adopt by statute any mode of conferring and investing such corporate franchises or continuing the existence of those franchises pre-
(926) viously granted, which had been acquired by a purchaser under execution sale or under sale made by the decree of a court having authority by virtue of the laws of the State to order sales. Reasons of public policy require the continuance of railroads in a condition of useful and efficient operation, and statutes enacted for such beneficial purposes should be liberally construed in ascertaining the intention of the Legislature for preserving the full accommodations and advantages arising to the public from such corporations. After careful consideration I am of opinion that the said proceedings of Charles E. Hillier were regular, sufficiently specific, and in accordance with the laws of this State; that the former charter of the C. C. C. R. R. Co. has been dissolved in accordance with State laws, and that said company no longer has corporate existence in this State; that the O. R. & C. R. R. Co. is a separate and independent domestic corporation, and has no other connection or relation with the dissolved C. C. C. R. R. Co., except it is legally invested with the property and franchises that formerly belonged to the said dissolved corporation. There can be no doubt as to the power of the Legislature under the present Constitution of North Carolina to repeal and dissolve railroad charters granted since the adoption of said Constitution. *R. R. v. Rollins,* 82 N. C., 523; *Young v. Rollins,* 85 N. C., 485; *Marshall v. R. R.,* 92 N. C., 322.

I have carefully examined and considered the cases cited by counsel of defendant and have the opinion that the principles announced do not conflict with the legal views I have expressed in relation to the facts of

the case before the Court. I will cite only one case mentioned in briefs, as it refers to other cases relied upon by counsel of defendant. *Goodlet v. R. R.*, 122 U. S., 391.

I concur with counsel of defendant in their opinions that the Legislature of this State has, in sections 1932 to 1934 of Code, manifested a clear and positive intention that railroad corporations (927) shall not be *created* by the action of associated persons otherwise than as provided in such sections. Those sections refer only to the mode and manner of *creating* railroad corporations, and not as to the methods of *continuing* the existence and operation of railroad franchises in the hands of purchasers at judicial sales. The property of railroads must be kept in association with their franchises to preserve value, to give credit to such corporations, to secure creditors and keep railroads in operation for the benefit of the public, which was the primary object of the Legislature in bestowing such corporate franchises. Such legislative purpose is clearly manifested in The Code of North Carolina in sections 697, 698, 2005, and other sections. *Gooch v. McGee*, 83 N. C., 59.

The defendant in its petition for removal claimed to be a citizen and resident of the State of South Carolina. It could not found this claim upon any relation which it had to the C. C. C. R. R. Co. for all of the title, estate, interest, and equity of redemption of this company to the mortgaged premises, rights, property, assets, and franchises were barred and forever foreclosed by the decree for sale and foreclosure made in the Circuit Court, which was duly executed by the special master.

In the briefs of counsel, residence and citizenship in South Carolina are founded upon the alleged facts that Charles E. Hillier after his purchase "obtained a charter by special act of the Legislature of Virginia, approved 12 February, 1894, and filed certain articles of incorporation with the Secretary of State of South Carolina under the laws of said State. He, the said Hillier, having conveyed the property and franchises of his said railroad purchase to the Ohio River and Charleston Railway Company."

Conceding these alleged facts to be fully established, I am of opinion that the foreign corporation organized under that act has never been recognized and adopted by the Legislature of this State, and (928) has not superseded or destroyed the domestic corporation organized by the said Hillier under the laws of this State, or absolved the Ohio River and Charleston Railway Company of North Carolina from the discharge of the functions, duties, obligations, and responsibilities which were assumed by its domestic organizations. The said Hillier had no authority or power to dissolve such domestic corporation or transfer its franchises and property without the consent and approval of the Legislature of North Carolina.

As the proceedings for removal of this case were defective and ineffectual, and the case is now rightfully pending in the State Court, I cannot make an order to remand.

It is therefore considered and ordered that the proceedings in this Court for removal be dismissed with costs, to be taxed against the petitioner, the defendant in this case.

Cited: James v. R. R., 121 N. C., 529; *Harrell v. R. R.,* 135 N. C., 604.

RULES OF PRACTICE

IN THE

Supreme Court of North Carolina

REVISED AND ADOPTED

AT FEBRUARY TERM, 1897

APPLICANTS FOR LICENSE.

1. When Examined.

Applicants for license to practice law will be examined on the first Monday of each term, and at no other time.

2. Requirements and Course of Study.

Each applicant must have attained the age of twenty-one years, and must have read—

The Constitution of this State and of the United States.
Ewell's Essentials, 3 volumes.
Angell on Corporations.
Clark's Code of Civil Procedure.
Heard on Pleading.
Toller or Schouler on Executors.
Fetter or Bispham Equity.
Code of North Carolina.
Fishback's Elements of Law.

It is advisable that all students should read Creasy on the (930) English Constitution.

Each applicant must have read law for twelve months at least, and shall file with the clerk a certificate of good moral character, signed by two members of the bar, who are practicing attorneys of this Court.

3. Deposit.

Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

APPEALS—WHEN HEARD.

4. Docketing.

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the

head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the Clerk.

Pitman v. Kimberly, 92—562; Avery v. Pritchard, 93—266; Rollins v. Love, 97—210; Greenville v. Steamship Co., 98—163; Porter v. R. R., 106—478; State v. James, 108—792.

5. When Heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term before 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.
(931) 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, if a civil case, it shall be continued, unless by consent, it is submitted upon printed argument under Rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless for cause or by consent it is continued.

Norman v. Shaw, 94—431; Commissioner v. Steamship Co., 98—163; Walker v. Scott, 102—487; Porter v. R. R., 106—478; *In re* Berry, 107—326; Hinton v. Pritchard, 108—412.

6. Appeals in Criminal Actions.

Appeals in criminal cases, docketed before the perusal of the criminal docket for any district, shall be heard before the appeals in civil cases from said district. Criminal appeals docketed after the perusal of the 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.

7. Call of Each Judicial District.

Causes from the First District will be called on Tuesday of the first week of each term of the Court; from the Second District, on Tuesday of the second week; from the Third District, on Tuesday of the third week; from the Fourth District, on Tuesday of the fourth week; from the Fifth District, on Tuesday of the fifth week; from the Sixth District, on Tuesday of the sixth week; from the Seventh District, on Tuesday of the seventh week; from the Eighth District, on Tuesday of the eighth week; from the Ninth District, on Tuesday of the ninth week;

from the Tenth District, on Tuesday of the tenth week; from the Eleventh District, on Tuesday of the eleventh week; and from the Twelfth District, on Tuesday of the twelfth week. (932)

8. End of Docket.

The call of causes not reached and disposed of during the period allotted to each district, and those put to the end of the docket, shall begin at the close of argument of appeals from the Twelfth District, and each cause, in its order, tried or continued, subject to Rule 6; but at the term of the Court held next preceding the end of the year, no civil cause will be called and tried after the expiration of the twelve weeks designated, unless by consent of parties and the assent of the Court.

9. Call of the Docket.

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the end of the district, by the consent of counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; except by consent or for cause shown, the first call shall be peremptory. At the first term of the Court in the year, a cause may, by consent of the Court, be put to the end of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. Submission on Printed Argument.

When, by consent of counsel, it is desired to submit a case without oral argument, the Court will receive printed arguments, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket, but the court, notwithstanding, can direct an oral argument to be made, if it shall deem best. (933)

Farthing v. Carrington, 116—315.

11. If Orally Argued.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. If Brief Filed by Either Party.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel.

Dibbrell v. Insurance Co., 109—314; Farthing v. Carrington, 116—315.

13. Cases Heard Out of Their Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place in the calendar, or fix
(934) a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or a matter of great public interest, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the Court to discharge him, may make the like assignment in respect to it.

14. Cases Heard Together.

Two or more cases involving the same question may, by leave of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of the argument.

King v. R. R., 112—318.

WHEN DISMISSED.

15. If Appeal Not Prosecuted.

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

Brantly v. Jordan, 92—291; Avery v. Pritchard, 93—266; Briggs v. Jervis, 98—454; Bryan v. Moring, 99—16; Wiseman v. Commissioners, 104—330; Cox v. Jones, 113—276; Aaron v. Lumber Co., 112—189.

16. Motion to Dismiss.

(935) A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with

by writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

Hutchinson v. Rumfelt, 82—425; Barbee v. Green, 91—158; Cross v. Williams, 91—491; Rollins v. Love, 97—210; Bryan v. Moring, 99—16; Rose v. Baker, 99—323; Hughes v. Boone, 100—347; Walker v. Scott, 102—487; Simmons v. Andrews, 106—201; Porter v. R. R., 106—478; Hinton v. Pritchard, 108—412.

17. Dismissed by Appellee.

If the appellant in a civil action shall fail to bring up and file a transcript of the record 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 in this Court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

Sever v. McLaughlin, 82—332; Wilson v. Seagle, 84—110; Cross v. Williams, 91—496; Avery v. Pritchard, 93—266; Rollins v. Love, 97—220; Bowen v. Fox, 99—127; Walker v. Scott, 102—487; *Ibid.*, 104—481; Rose v. Shaw, 105—126; Bailey v. Brown, 105—127; Davenport v. Grissom, 113—38; Paine v. Cureton, 114—606.

18. When Appeal Dismissed.

When an appeal is dismissed by reason of the failure of the (936) appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

Bowen v. Fox, 99—127.

TRANSCRIPTS.

19. Transcript of the Record.

(1) THE RECORD.—In every record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

Green v. Collins, 28—139; State v. Jones, 82—691; Howell v. Ray, 83—553; State v. Butts, 91—524; Broadfoot v. McKethan, 92—561; Spence v. Tapscott,

92—576; Bethea v. Byrd, 93—141; Perry v. Adams, 96—347; Smith v. Fite, 98—517; Jones v. Hoggard, 107—349; Drake v. Connelly, 107—463; Mitchell v. Tedder, 108—266; Durham v. R. R., 108—399; Branch v. Bobbitt, 108—525.

(2) PAGES NUMBERED.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject-matter contained therein.

(937) (3) INDEX.—On some paper attached to the record, there shall be an index thereto, in the following or some equivalent form:

Summons—date ..... page 1
Complaint—First cause of action ..... page 2
Complaint—Second cause of action ..... page 3
Affidavit for attachment, etc. ..... page 4

State v. Butts, 91—524.

20. Insufficient Transcript.

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

Green v. Collins, 28—139; State v. Jones, 82—691; Gordon v. Sanderson, 83—1; Howell v. Ray, 83—558; Moore v. Vanderburg, 90—10; Buie v. Simmons, 90—9; Spence v. Tapscott, 92—576; Bethea v. Byrd, 93—141; State v. Preston, 104—733.

21. Marginal References.

A case will not be heard until there shall be put in the margin of the record, as required in Rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. Of Unnecessary Records.

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal, not needed to explain the ex-
(938) ceptions or errors assigned, and not constituting a part of the record of the action of the Court taken during the progress of the cause, shall, in all cases, be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

Grant v. Reese, 82—72; Clayton v. Johnston, 82—423; Tobacco Co. v. McElwee, 96—71; Durham v. R. R., 108—399; Mining Co. v. Smelting Co., 119—415.

PLEADINGS.

23. Memoranda of.

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Rowland v. Mitchell, 90—649; Daniel v. Rogers, 95—134; Wyatt v. R. R., 109—306.

24. Assigning Two or More Causes of Action.

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. When Scandalous.

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed, and for this purpose the Court may refer it to the Clerk, or some member of the bar, to examine and report the character of the same.

26. Amendments.

The Court may "amend any process, pleading or proceeding, (939) either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe." The Code, sec. 965.

Justices v. Simmons, 48—187; Wade v. New Bern, 73—318; Horne v. Horne, 75—101; Wiley v. Logan, 94—564; Grant v. Rogers, 94—755; Walton v. McKesson, 101—428; Wilson v. Pearson, 102—290; Hodge v. R. R., 108—24.

EXCEPTIONS.

27. How Assigned.

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling or judgment of the Court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the Court at chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the clerk's office. No other exception than those set out, or filed and made part of the case or record, shall be considered by this Court, other than

exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

Swepson v. Summey, 74—551; McNeill v. Chadbourn, 79—149; Lampson v. R. R., 79—404; Turner v. Foard, 83—683; King v. Page, 86—275; McDaniel v. Pollock, 87—503; Neal v. Mace, 89—171; Davenport v. Leary, 95—203; Thornton v. Brady, 100—38; McKinnon v. Morrison, 104—354 (and cases there cited); Pollock v. Warwick, 104—638; Whitehurst v. Pettipher, 105—40; Taylor v. Plummer, 105—36; Helms v. Green, 105—251; Taylor v. Navigation Co., 105—484; Robeson v. Hodges, 105—49; Walker v. Scott, 106—56; Sutherland v. R. R., 106—100; Simmons v. Andrews, 106—201; McMillan v. Gambill, 106—329; Boyer v. Teague, 106—571; Allen v. R. R., 106—515; S. v. Parker, 106—711; Everett v. Williamson, 107—204; Thompson v. Telegraph Co., 107—449; Lowe v. Elliott, 107—718; S. v. McDuffie, 107—885; Smith v. Smith, 108—365; S. v. Brabham, 108—793; Marriner v. Lumber Co., 113—52; McLean v. Bruce, 113—390; Harper v. Pinkston, 112—293; S. v. Caldwell, 112—854; Nash v. Ferabow, 115—305; S. v. R. R., 125—670.

PRINTING RECORDS.

28. What to be Printed.

(940) Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exception, and grounds of error assigned, as appear in the record in each action, shall be printed. Such printed matter shall consist of the judgment appealed from, together with the statement of the case on appeal, and of the exceptions appearing in the record to be reviewed by the Court; or, in case of a demurrer, of such demurrer and the pleadings to which it is entered. If the jury passed upon issues, the issues and findings thereon shall be printed, as likewise all exhibits and pleadings, or parts of pleadings, referred to in the case on appeal as necessary to show the contention of the parties. This will not preclude the parties in the argument from referring to the manuscript parts of the record whenever they may deem it incidental to the argument.

Rencher v. Anderson, 93—105; Witt v. Long, 93—388; Smith v. Fite, 98—517; Bowen v. Fox, 99—127; Horton v. Green, 104—400; Griffin v. Nelson, 106—235; Hunt v. R. R., 107—447; Edwards v. Henderson, 109—83; Finlayson v. Am. Acc. Co., 109—196; Turner v. Tate, 112—457; Wiley v. Mining Co., 117—489; Causey v. Plaid Mills, 118—395.

29. How Designated.

(941) The counsel for the appellant shall designate such parts of the record as are required to be printed and have the same copied for the printer; if he shall fail to do so, the clerk of this Court shall cause the same to be done, if the appellant shall request it and deposit the cost thereof.

Witt v. Long, 93—388; Briggs v. Jervis, 98—454; Turner v. Tate, 112—457.

30. If Not Printed.

If the record in an appeal shall not be printed, as required by this and the next preceding paragraph, at the time it shall be called in its order for argument, the appeal shall, on motion of the appellee, be dismissed; but the Court may, after five days notice at the same term, for good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals: *Provided nevertheless,* that this and the next preceding paragraph shall not apply to appeals *in forma pauperis,* but in all such cases the clerk shall make five typewritten copies of such parts of the record as otherwise would be printed, and furnish same for use of the Court on the argument. Should the appellant gain the appeal, the cost of such typewritten copies shall be taxed against the appellee as a part of the cost on appeal.

Witt v. Long, 83—388; Rencher v. Anderson, 94—661; Briggs v. Jervis, 98—454; Walker v. Scott, 102—487; Horton v. Green, 104—300; Whitehurst v. Pettipher, 105—39; Griffin v. Nelson, 106—235; Stephens v. Koonce, 106—255; Smith v. Summerfield, 107—580; Edwards v. Henderson, 109—83.

31. Costs of Printing.

Costs for printing the record shall be allowed to the successful party in the appeal, at the rate of sixty cents per page of the size of the page in the North Carolina Reports, for each page of one copy of the record printed, not exceeding thirty pages, unless otherwise (942) specially allowed by the Court, to be taxed in the bill of costs, and if the clerk of this Court shall prepare the manuscript copy of the parts of the record to be printed in any appeal, he shall be allowed ten cents per copy sheet for such service, such allowance to be taxed and paid as other fees and charges allowed to the clerk by law.

Durham v. R. R., 108—399; Roberts v. Lewald, *ibid.*, 405.

32. If Record Insufficiently Printed.

If, after a case shall be called for argument, it shall be made to appear to the Court that it can not be heard intelligently until additional parts of the record be printed, the Court may, on motion of appellee's counsel, continue the cause to the end of the district to give appellant time to print such additional portions, and dismiss the appeal if such order be not complied with.

After argument the Court may, *ex mero motu,* if it appear that required portions of the record have not been printed, suspend the further consideration of the questions raised by the appeal, and cause the clerk to notify appellant or his counsel to furnish within a reasonable time a sufficient sum to pay for said printing, or the appeal will be continued or dismissed, at the discretion of the Court.

Bethea v. Byrd, 93—141; Hunt v. R. R., 107—447.

ARGUMENT.

33. Oral Arguments.

1. The counsel for the appellant shall be entitled to open and conclude the argument.

2. The counsel for the appellant may be heard for one hour, in-
(943) cluding the opening argument and reply.

3. The counsel for the appellee may be heard for one hour.

4. The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

5. The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

6. Any number of counsel may be heard on either side within the limit of the time above specified; but, if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

34. Printed Arguments or Briefs.

When the cause is submitted on printed argument under Rule 10, or a brief is filed, whether counsel appear or not, such brief or argument, if of appellant, shall set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exceptions and assignments of error relied upon by the appellant; the authorities relied upon classified under each assignment, and if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent the citation of other authorities in the argument.

35. Copies of Brief to be Furnished.

(944) Fifteen copies shall be delivered to the clerk of the Court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel, when he shall call for the same.

36. Brief of Appellee.

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner.

37. Cost of Briefs.

The actual cost of printing his brief, not exceeding sixty cents per page of the size of the pages in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party to be taxed in the bill of costs.

Emry v. R. R., 105—44.

38. Reargument.

The Court will, of its own motion, direct a reargument before deciding any case, if, in its judgment, it is desirable.

Lenoir v. Mining Co., 104—490; Emry v. R. R., 105—44.

39. Agreement of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

Adams v. Reeves, 74—106; Rouse v. Quinn, 75—354; Walton v. Pearson, 82—484; Scroggs v. Alexander, 88—64; Holmes v. Holmes, 88—833; Office v. Bland, 91—1; McCanless v. Reynolds, 91—244; Short v. Sparrow, 96—348; Mfg. Co. v. Simmons, 97—89; Graves v. Hines, 106—323; Sondley v. Asheville, 112—694; Hemphill v. Morrison, 112—758; LeDuc v. Moore, 113—275; Graham v. Edwards, 114—228.

40. Entry of Appearance.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case mentioned therein. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

Walton v. Sugg, 61—98; Suiter v. Brittle, 90—19.

CERTIORARI AND SUPERSEDEAS.

41. When Applied for.

Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Court below. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

McDaniel v. Pollock, 87—503; Suiter v. Brittle, 92—53; Pittman v. Kimberly, 92—562; S. v. McDowell, 93—541; S. v. Johnston, 93—559; Turner v. Powell,

93—341; Mayo v. Leggett, 96—237; Porter v. R. R., 97—63; S. v. Sloan, 97—499; Briggs v. Jervis, 98—454; Boyer v. Teague, 100—571; Peebles v. Braswell, 107—68; Lowe v. Elliott, 107—718; Guilford v. Georgia Co., 109—310; S. v. Black, 109—856.

42. How Applied for.

(946) The writs of *certiorari* and *supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases, the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

Currie v. Clark, 90—17; Cheek v. Watson, 90—302; Ware v. Nisbett, 92—202; Spence v. Tapscott, 92—576; Mayo v. Leggett, 96—237; Porter v. R. R., 97—63; S. v. Sloan, 97—499; Briggs v. Jervis, 98—454; Bryan v. Moring, 99—16; Williamson v. Boykin, 99—238; Walker v. Scott, 106—56; Graves v. Hines, 106—323.

43. Notice of.

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time of such notice.

Sanders v. Thompson, 114—282.

ADDITIONAL ISSUES,

44. If Other Issues Necessary.

(947) If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court, and certified to the Court below for trial, and the case will be retained for that purpose.

MOTIONS.

45. In Writing.

All motions made to the Court shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the sessions of the Court.

McCoy v. Lassiter, 94—131.

ABATEMENT AND REVIVOR.

46. Death of Party.

Whenever, pending an appeal in this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the cases may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other cases, and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that unless such representatives shall (948) become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

47. When Appeal Abates.

When the death of the party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. When Certified Down.

"The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court, which shall have been on file ten days, in cases sent from said Court." Acts 1887, chapter 41.

Cook v. Moore, 100—294; Summerlin v. Cowles, 107—459; S. v. Herndon, 107—934; Scroggs v. Stevenson, 108—260.

(949)

THE JUDGMENT DOCKET.

49. How Kept.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or part, the payment of money—stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been

satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTIONS.

50. Teste of Executions.

When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

Rhyne v. McKee, 75—259.

51. Issuing and Return of.

Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party (950) in whose favor execution is to be issued, it may be made returnable, on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and, when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

PETITION TO REHEAR.

52. When Filed.

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the Court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the justice to whom it is submitted under Rule 53, such justice may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said Court, or until the petition to rehear shall have been determined.

Etheridge v. Vernoy, 71—184; Williams v. Williams, 71—216; Neal v. Cowles, 71—266; Watson v. Dodd, 72—240; Hicks v. Skinner, 72—1; Haywood v. Daves, 81—8; Devereaux v. Devereaux, 81—12; Earp v. Richardson, 81—5; Smith v. Lyon, 82—2; Young v. Greenlee, 85—593; Grant v. Edwards, 90—31; Strickland v. Draughan, 91—103; Barcroft v. Roberts, 92—249; Emry v. R. R., 102—234; Bird v. Gilliam, 123—64; s. c., 125—64.

53. What to Contain. (951)

The petition must assign the alleged error of the law complained of; or the matter overlooked; or the newly discovered evidence; and that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the clerk of this Court, who shall endorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner, who shall be a justice who did not dissent from the opinion; but the petition shall not be docketed unless such justice shall endorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the clerk of this Court, and if docketed, to the opposite party also.

The rehearing may be granted as to the whole case, or restricted to specified points, as may be directed by the justice who grants the application.

Kincaid v. Conly, 62—270; *ibid.*, 64—387; Bledsoe v. Nixon, 69—81; Holmes v. Godwin, 69—467; Etheridge v. Vernoy, 71—184; Neal v. Cowles, 71—266; Williams v. Williams, 71—216; Hicks v. Skinner, 72—1; Shehan v. Malone, 72—59; Watson v. Dodd, 72—240; Blackwell v. Wright, 74—733; Mason v. Pelletier, 80—66; Haywood v. Davis, 81—8; Devereux v. Devereux, 81—12; Earp v. Richardson, 81—5; Lewis v. Rountree, 81—20; Smith v. Lyon, 82—1; Matthews v. Joyce, 85—258; Mauney v. Gidney, 86—717; Grant v. Edwards, 88—246; Wilson v. Lineberger, 90—180; Carson v. Dellinger, 90—226; Lockhart v. Bell, 90—499; Ruffin v. Harrison, 91—76; Strickland v. Draughan, 91—103; Barcroft v. Roberts, 92—250; White v. Jones, 92—388; Simmons v. Mason, 92—12; University v. Harrison, 93—84; Dupree v. Insurance Co., 93—237; S. v. Starnes, 94—973; S. v. Gooch, 94—987; McDonald v. Carson, 95—377; Fisher v. Mining Co., 97—95; Weathersbee v. Farrar, 98—255; Davenport v. McKee, 98—500; S. v. Rowe, 98—629; Bowen v. Fox, 99—127; Harrison v. Grizzard, 99—161; Farrar v. Staton, 101—78; Clark v. Currie, 103—203; Emry v. R. R., 105—45; Gay v. Grant, 105—478; Morrisey v. Swinson, 106—221; Worthy v. Brady, 108—440; Bird v. Gilliam, 123—64.

54. Notice of.

Before applying for an order to restrain the issuing of an exe- (952) cution, or the collection and payment of the same, written notice must be given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The Court may, however, grant a temporary restraining order without notice.

Ruffin v. Harrison, 91—76.

CLERKS AND COMMISSIONERS.

55. Report in Hand of.

The clerk and every commissioner of this Court who, by virtue or color of any order, judgment or decree of the Supreme Court in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act was made; the amount and character of the investment,
(953) and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. Report Recorded.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and, their or his approval endorsed, shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled *Record of Funds*, and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. Books Taken Out.

No book belonging to the Supreme Court Library shall be taken therefrom except into the Supreme Court chamber, unless by the justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the Chairmen of the several committees of the General Assembly; and in such case the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.

58. Minute Book.

The clerk shall keep a *Permanent Minute Book*, containing a
(954) brief summary of the proceedings of this Court in each appeal disposed of.

59. Clerk to Have Opinions Typewritten and Sent to Judges.

After the Court has decided a cause, the judge assigned to write it, shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent to each member of the Court, to the end that the same may be more carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

LIBRARIAN.

60. Reports by Him.

The librarian shall keep a correct *Catalog* of all books, periodicals and pamphlets in the library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year, what books have been added during the year next preceding his report to the library, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. Sittings of the Court.

The Court will sit daily, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.
The Court will sit, however, on the first Monday of each term for (955) the examination of applicants for license to practice law.

62. Citation of Reports.

Inasmuch as many of the volumes of Reports prior to the 63d have been reprinted by the State with the number of the report instead of the name of the reporter, and all the other volumes will be reprinted and numbered in like manner, counsel will cite the volumes prior to the 63d as follows:

1 and 2 Martin, Taylor, and Conf.	as 1 N. C.	4 Devereux Law	as 15 N. C.
1 Haywood	" 2 "	1 Devereux Equity	" 16 "
2 Haywood	" 3 "	2 Devereux Equity	" 17 "
1 and 2 Car. Law Repository and N. C. Term	" 4 "	1 Dev. and Bat. Law	" 18 "
1 Murphey	" 5 "	2 Dev. and Bat. Law	" 19 "
2 Murphey	" 6 "	3 and 4 Dev. and Bat. Law	" 20 "
3 Murphey	" 7 "	1 Dev. and Bat. Eq.	" 21 "
1 Hawks	" 8 "	2 Dev. and Bat. Eq.	" 22 "
2 Hawks	" 9 "	1 Iredell Law	" 23 "
3 Hawks	" 10 "	2 Iredell Law	" 24 "
4 Hawks	" 11 "	3 Iredell Law	" 25 "
1 Devereux Law	" 12 "	4 Iredell Law	" 26 "
2 Devereux Law	" 13 "	5 Iredell Law	" 27 "
3 Devereux Law	" 14 "	6 Iredell Law	" 28 "
		7 Iredell Law	" 29 "
		8 Iredell Law	" 30 "

9 Iredell Law	as 31 N. C.	2 Jones Law	as 47 N. C.
10 Iredell Law	" 32 "	3 Jones Law	" 48 "
11 Iredell Law	" 33 "	4 Jones Law	" 49 "
12 Iredell Law	" 34 "	5 Jones Law	" 50 "
13 Iredell Law	" 35 "	6 Jones Law	" 51 "
1 Iredell Equity . . .	" 36 "	7 Jones Law	" 52 "
2 Iredell Equity . . .	" 37 "	8 Jones Law	" 53 "
3 Iredell Equity . . .	" 38 "	1 Jones Equity . . .	" 54 "
4 Iredell Equity . . .	" 39 "	2 Jones Equity . . .	" 55 "
5 Iredell Equity . . .	" 40 "	3 Jones Equity . . .	" 56 "
6 Iredell Equity . . .	" 41 "	4 Jones Equity . . .	" 57 "
7 Iredell Equity . . .	" 42 "	5 Jones Equity . . .	" 58 "
8 Iredell Equity . . .	" 43 "	6 Jones Equity . . .	" 59 "
Busbee Law	" 44 "	1 and 2 Winston . . .	" 60 "
Busbee Equity	" 45 "	Phillips Law	" 61 "
1 Jones Law	" 46 "	Phillips Equity . . .	" 62 "

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout without marginal paging.

RULES OF PRACTICE

IN THE

Superior Courts of North Carolina

REVISED AND ADOPTED BY THE

Justices of the Supreme Court, at February Term, 1897, by Virtue of The Code, Sec. 961.

Barnes v. Easton, 98—116.

RULES.

1. Entries on Records.

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

Walton v. McKesson, 101—428.

2. Surety on Prosecution Bond and Bail.

No person who is in bail in any action or proceeding, either civil or criminal, or who is security for the prosecution of any suit, or upon appeal from a justice of the peace, or is security in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty (958) of the clerks of the several Superior Courts, to state in the docket for the Court, the names of the bail, if any, and security for the prosecution in each case, or upon appeal from a justice of the peace.

3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

Brooks v. Brooks, 90—142; Cheek v. Watson, 90—302.

4. Examination of Witnesses.

When several counsel are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the Court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel

so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further unless by special leave of the Court.

Olive v. Olive, 95—485; Dupree v. Insurance Co., 93—237.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit,
(959) the nature of such testimony and what he expects to prove by it, and the opposite party may file his counter-affidavit, whereupon the motion shall be decided without debate, unless permitted by the Court.

(The above rules substantially prescribed by the Supreme Court at January Term, 1815, the last being amended by Acts 1885, Chapter 394.)

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, the Court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

Brooks v. Brooks, 90—142; Cheek v. Watson, 90—302; Austin v. Secrest, 91—214; S. v. Keene, 100—509; S. v. Anderson, 101—758; Shober v. Wheeler, 113—870; S. v. Robinson, 124—802.

7. Issues.

Issues shall be made up as provided and directed in The Code, sections 395 and 396.

Wright v. Cain, 93—206; McDonald v. Carson, 94—187; Carpenter v. Tucker, 98—396; Mining Co. v. Smelting Co., 99—445; Davidson v. Gifford, 100—18; Humphreys v. Trustees, 109—132; Carey v. Carey, 108—267; Perry v. Jackson, 88—103; Silver Valley Co. v. Baltimore S. Co., 99—445; McAdoo v. R. R., 105—140; Denmark v. R. R., 107—187; Leach v. Linde, 108—547.

8. Judgments.

Judgments shall be docketed as provided and directed in The Code, section 433.

9. Transcript of Judgment.

Clerks of the Superior Courts shall not make out transcripts of
(960) the original judgment docket, to be docketed in another county,

until after the expiration of the term of the Court at which such judgments were rendered.

Norwood v. Thorp, 64—682; Farley v. Lea, 20—169.

10. Docketing Magistrate's Judgments.

Judgments rendered by a justice of the peace upon a summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

Johnson v. Sedberry, 65—1.

11. Transcript on Appeal to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substance for an appeal, it shall be the duty of the Clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same.

On some paper attached to the transcript of the record, there (961) shall be an index to the record in the following, or some equivalent form:

Summons—date ..... page 1
Complaint—First cause of action..... page 2
Complaint—Second cause of action..... page 3
Affidavit for attachment ..... page 4

and so on to the end.

12. Transcript on Appeal—When Sent Up.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of Clerk of the Superior Court.

Code, sec. 551; Walker v. Scott, 104—481; Bailey v. Brown, 105—127; S. v. Nash, 109—822; Griffin v. Nelson, 106—235; Roberts v. Lewald, 108—405; Avery v. Pritchard, 93—266; S. v. Deyton, 119—880.

13. Reports of Clerks and Commissioners.

Every Clerk of Superior Court, and every commissioner appointed by such court, who, by virtue or color of any order, judgment or decree of the Court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the Court at which the order, or orders, under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every
(962) payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the Judge of the Superior Court holding the first term of the Court in each and every year, who shall examine, or cause the same to be examined, and, if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by The Code, sec. 545. In such case, the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the Court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The Court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the Court may deem pertinent, and dismiss the same, or order the
(963) case to be placed on the trial docket according to law.

In proper cases the Court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, it shall manifestly appear that the record is imperfect, the Court may grant the writ upon motion in the cause.

See cases cited in Clark's Code (2d Ed.), pp. 554 and 555; Boing v. R. R., 88—62; Davenport v. Grissom, 113—38.

15. Judgment—When to Require Bonds to be Filed.

In no case shall the Court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person, until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed.

In all cases where it is proposed that infants shall sue by their next friend, the Court shall appoint such next friend, upon the written application of a reputable disinterested person closely connected with such infant; but, if such person will not apply, then upon the like application of some reputable citizen, and the Court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

McCormack v. High, 75—263; George v. High, 85—113; Young v. Young, 91—359; Tate v. Mott, 96—19; Smith v. Smith, 108—365; Hollomon v. Hollomon, 125—32; Abbott v. Hancock, 123—102.

17. Guardian Ad Litem—How Appointed.

All motions for a guardian *ad litem* shall be made in writing, (964) and the Court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

Moore v. Gidney, 75—34; Young v. Young, 91—359.

18. Cases Put at Foot of Docket.

All civil actions that have been at issue for two years, and that may be continued, by consent, at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When the continuance shall be ordered, and when a civil action shall be continued, on motion of one of the parties, the Court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion is Certified.

When the opinion of the Supreme Court in any cause which has been appealed to that Court has been certified to the Superior Court, such

cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed.

Act 1887, ch. 192, sec. 3.

Calvert v. Peebles, 82—334; Murrill v. Murrill, 90—120; Spence v. Tapscott, 93—250; Williams v. Whiting, 94—481; White v. Butcher, 97—7; Stephens v. Koonce, 106—222; Cook v. Moore, 100—294.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the Court, or by a committee of attorneys under the order of the Court, or by consent of the Court, unless cause be shown to the
(965) contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not be called for trial before a day certain unless by order of the Court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the Court will not be kept open for the trial of such action except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the Court.

22. Calendar Under Control of Court.

The Court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Nonjury Cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals From Justices of the Peace.

(966) Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

S. v. Edwards, 110—511.

25. On Consent Continuance—Judgment for Costs.

When civil actions shall be continued by consent of parties, the Court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the Court.

Mitchell v. Hoggard, 105—173; Seay v. Yarborough, 94—291; Delafield v. Cons. Co., 115—21.

27. Counsel Not Sent for.

Except for some unusual reason, connected with the business of the Court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets.

Clerks of the Courts will be required, upon the criminal dockets prepared for the Court and solicitor, to state and number the criminal business of the Court in the following order:

First—All criminal causes at issue. Second—All warrants (967) upon which parties have been held to answer at the term. Third—All presentments made at preceding term undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. Books.

The Clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of Reports, and shall report at each term to the presiding judge, whether any, and what volumes have been lost or damaged since the last preceding term.

INDEX

COLOR OF TITLE.

An unregistered deed accompanied by continuous possession by the grantor since its execution, is color of title, notwithstanding "Connor's Act" (ch. 147, Laws 1885), and was properly admitted in evidence in a proceeding to recover damages from a railroad for appropriating a part of the land before the registration of the deed. *Utley v. R. R.*, 720.

COLLECTION BY BANK.

1. Whenever it appears on the face of a paper that it is in the hands of a bank for collection, the proceeds of the collection are the property of the owner, and the actual collecting bank is liable to the owner in case of the insolvency of an intermediary bank from which the paper has been received for collection, and to whose credit the proceeds have been placed, notwithstanding the fact that the state of accounts between such intermediary bank and the collecting bank shows a balance (after crediting the collection) in favor of the latter. *Bank v. Bank*, 307.

2. A restrictive endorsement, such as "For collection for account of, etc.," prevents the transfer of title to a bank to which it is sent for collection; and where, in an action to recover the proceeds of the collection of such paper from one who received it for collection from an intermediary, the complaint alleged that the plaintiff had been in possession and was the owner of the paper, and such allegations and the presumption arising therefrom not having been denied or rebutted, it was not error in the court below to adjudge that the plaintiff was the owner. *Ibid.*

COMMISSIONS.

1. A broker is not entitled to commissions on a sale unless he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and vendor. *Mallonee v. Young*, 549.

2. Defendant authorized plaintiff, a broker, to sell his property at a certain price, for certain commissions, reserving the right to withdraw the property from sale at any time, which he did. J learning the property was for sale, wrote to defendant inquiring the lowest price. Defendant enclosed the letter to plaintiff, saying, "I want $5,500 net,"