ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 120

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1897

REPORTED BY

ROBERT T. GRAY

ANNOTATED BY

WALTER CLARK

(2 ANNO. ED.)

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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

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OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1897

JOHN L. HINTON v. J. L. PRITCHARD ET AL.

Trustee, Discretion and Duties of—Sale Under Deed of Trust.

1. In trust deed for the benefit of creditors, the trustee is agent of both creditor and debtor and must exercise his discretion in a reasonable and intelligent manner, and use his power in such a way as neither to oppress the debtor nor sacrifice the estate.

2. The holder of a note secured by a junior deed of trust bought one of two parcels of land embraced in it, and afterwards purchased the note secured by the senior deed, and then, treating the latter deed as still in force, demanded that the trustee at the sale under it should first sell another parcel embraced in both deeds, while the debtor requested that the lot purchased by the creditor at the first sale should be first offered. *Held*, that the trustee had the right, in his discretion, to disregard the instructions of the creditor and to follow the request of the debtor, there being no allegation of fraud or wrong doing on the part of the trustee.

ACTION for recovery of land, tried before *Timberlake, J.*, at Fall Term, 1896, of PASQUOTANK. Judgment for the plaintiff, and defendants' appealed.

Messrs. Battle & Mordecai for plaintiff. (2)
Mr. E. F. Aydlett for defendant (appellant).

MONTGOMERY, J. The plaintiff purchased the tract of land, which is the subject of this action, at a trustee's sale made under a deed of trust subsequent to and subject to the provisions of a former deed of trust. The debtor was the same in both deeds and both deeds embraced the tract of land described in the complaint, and also another parcel of real estate described as the town lot. The plaintiff purchaser was the *cestui que trust* in the deed under which he bought, and the trustee's deed to him recited that the land sold was subject to the former trust deed. The

former trust deed referred to was executed to U. L. Simpson, trustee, After the purchase of the land by the plaintiff, he bought from the holder the note secured in the first deed of trust. Both parcels of land were then advertised regularly and sold by Simpson under the first deed. At the sale, the plaintiff insisted that Simpson should sell the town lot first, and the debtor insisted that the tract which the plaintiff had purchased under the first sale should be sold first. The trustee, Simpson, sold first the tract which the plaintiff had bought at the first sale, and the defendant J. L. Pritchard, a son of the debtor, became the purchaser at the price of five dollars. There is no allegation of fraud or wrong doing alleged in the complaint, and no allegation as to the value of the tract of land.

The question then presented is, did the trustee Simpson have the discretion and power to sell first in order the tract of land which he did sell first, against the plaintiff's specific direction that he should not sell the town lot first? If the trustee has this power and discretion, it follows that the defendant got a good title to the land, notwithstanding that the purchaser was the son of the debtor and the purchase money was only five dollars (no fraud having been alleged in the transaction), and the
(3) plaintiff cannot recover. The plaintiff having bought the tract of land at the first sale under the junior trust deed got title to the land upon his purchasing the note secured in the first deed of trust. At the sale of the land he acquired, by his deed from the trustee, all the interest of the debtor in the same, subject to the charge upon it of the indebtedness secured in the first deed, and the purchase of that indebtedness was a payment of it if he chose to so regard it. But the plaintiff did not choose to be satisfied with this position. He treated the first deed of trust as still open and in force, and ordered the trustee to proceed under it with a sale of one of the parcels of land conveyed in it. In our opinion he could not treat the trust as open for the sale of one parcel of the land and closed as to the other. In trust deeds for the benefit of creditors, the trustee is the agent of both creditor and debtor, and he is required to discharge his duties with the strictest impartiality as well as with fidelity, and according to his best ability. *Johnston v. Eason,* 38 N. C., 330; Perry on Trusts, sec. 620. The purposes of the creditor and debtor, here, are plainly to be seen in this transaction. The creditor wished to place the burden of his debt upon the town lot, he having bought the other tract at the first sale but still subject to the first trust deed; and the debtor wished to make him proceed against the tract which he had bought at the first sale, and by that course to save his home. Under this condition of things the trustee was forced to exercise his discretion, and the law holds him to the exercise of this discretion in a reasonable and intelligent manner. He was bound in the exercise of his

power to use it neither for the oppression of the debtor nor to sacrifice the estate. We cannot say from the facts in this case that the trustee, Simpson, exercised his power unjustly towards the creditor, the plaintiff, or unnecessarily prejudicial to his interests. We can see from the record in the case how the trustee may have impartially, and with (4) the utmost good faith, acted as he did, thinking that the creditor might be unprejudiced in his rights and that the debtor might be enabled to save his home. There is nothing going to show either bad faith or unfair discretion in the action of the trustee. The result is serious to the plaintiff, but a person *sui juris* is allowed to manage his own affairs in his own way, if not contrary to law.

There was error in the ruling of his Honor, and judgment should have been rendered for the defendants.

Error.

Cited: Monroe v. Fuchtler, 121 N. C., 104; *Woodcock v. Merrimon,* 122 N. C., 738.

WILLIS W. MIDGETT v. JAMES TWIFORD ET ALS.

Special Proceeding for Division of Land—Tenancy in Common—Deed —Description.

In a deed by one of four devisees to a stranger, the specific description of the land by metes and bounds was immediately followed by the words, "or the one-fourth part of all the land that my father M. died seized and possessed of." *Held,* that the addendum to the specific description did not control the latter so as to create a tenancy in common in other land devised by the deceased.

PROCEEDING for the partition of land tried on issues transmitted by the Superior Court Clerk of DARE, before *Timberlake, J.,* at Fall Term, 1896, of DARE. Judgment for the defendant, and the plaintiff appealed.

Mr. J. Heywood Sawyer for plaintiff (appellant).
Mr. W. J. Griffin for defendants.

FURCHES, J. This case was before us at Fall Term, 1895, 117 N. C., 8. It is a proceeding for the partition of land among the (5) plaintiff and the defendants, as tenants in common. And when it was here before, upon the complaint and demurrer of defendants, we held that they were tenants in common under the will of Edward Mann: the parties all being devisees or assignees of devisees of said Mann.

But this case presents quite a different state of facts. The plaintiff is the assignee of W. K. Mann, through T. M. Gard, and occupies a very different relation to the other devisees and assignees to what the grantor, W. K. Mann, did.

The facts stated tend to show that there had been an oral partition of the land devised by Edward Mann to his four sons, and the lines run and marked. And the argument before us was principally upon the effect of this oral partition, and the length of possession thereunder, and as to whether the Court should have submitted the issue to the jury instead of directing a finding against the plaintiff.

But upon examination we are of the opinion that the case does not turn upon that question, but upon the grant contained in the plaintiff's deed.

The deed from W. K. Mann to Thomas Gard, the plaintiff's grantor, contains the following description of the land conveyed: "Beginning at a post joining the lands and line of Thomas R. Mann, thence running a westwardly and southerly course along the line and land of Thomas R. Mann to a marked tree, thence a northwardly course along the swamp to a marked gum, thence an easterly course joining the undivided land between Thomas R. Mann and others, thence along said land to a post, thence a southerly course to the first station—one hundred acres of
(6) land, be the same more or less, or the one-fourth part of all the land that my father Edward Mann died seized and possessed of." Thomas R. Mann, whose land is called in this deed, is one of the devisees of Edward Mann.

It was contended by plaintiff's counsel that the closing part of this description—"or the one-fourth part of all the land that my father Edward Mann died seized and possessed of"—controlled the description and created the tenancy in common. We do not think so. If this had been the only description contained in the deed, the plaintiff's contention would have been correct. But when added to a specific boundary, locating the land conveyed, it can not have that effect. Thus, connected with the specific description, it can only be considered as an identification of the land described in the boundary. This being so, it necessarily follows that the plaintiff had no interest in the other land willed by Edward Mann, and is not a tenant in common with the defendants. He can have no interest, under his deed, in land not conveyed by the deed.

We find no error, and the judgment is

Affirmed.

Cited: Loan Association v. Bethel, post, 345; *Peebles v. Graham,* 128 N. C., 221; *Midgett v. Midgett,* 129 N. C., 24; *Ricks v. Pope, ib.,* 56; *Johnston v. Case,* 131 N. C., 495; *Lumber Co. v. McGowan,* 168 N. C., 87.

P. G. MORRISETT, ADMINISTRATOR OF W. A. FEREBEE, v. BLANCHE FEREBEE.

Sale of Land for Assets—Right of Infants to Homestead—Failure to Claim Homestead—Res Judicata—Estoppel.

Where, in a proceeding for the sale of land for assets, the infant heirs of decedent through their *guardian ad litem* admitted the allegations of the petition, made no claim to a homestead and allowed judgment ordering the sale, which was followed by a sale and payment of the purchase money, they are estopped by the judgment and proceedings thereunder from claiming either a homestead in the land or the payment of $1,000 out of the purchase money in lieu thereof.

PROCEEDING for the sale of land for assets heard before *Tim-* (7) *berlake, J.*, at Fall Term, 1896, of CAMDEN, on appeal from the judgment of the Clerk.

From the judgment of his Honor, who held that the infant defendants were entitled to a homestead in the land sold, notwithstanding their failure to assert their claim to it before the order of sale was made and the purchase money paid, the plaintiff appealed.

Mr. E. F. Aydlett for plaintiff (appellant).
Mr. J. H. Sawyer for defendants.

FURCHES, J. This is a proceeding by the plaintiff, as administrator of W. G. Ferebee, to sell land for assets to pay debts. It is admitted that Ferebee died intestate, leaving a widow and three infant children, his heirs at law; that the plaintiff is the administrator, and that the widow and heirs at law are properly made parties defendant; that the infants were properly represented by one Dozier as their guardian *ad litem,* who filed an answer admitting the allegations of the complaint; that upon this state of the case, it came on for hearing before the Clerk on 6 July, 1896, when an order of sale was made, subject to the widow's dower, which had theretofore been assigned to her; that on 10 August, 1896, the plaintiff sold, subject to the terms of the order, and the widow became the purchaser of the reversionary interest in the dower land, which sale was duly reported; that on 17 August, the infant defendants, by and through their said guardian, filed a verified application, or petition, in the cause, pleading their infancy and asking that an order be made requiring the plaintiff to pay into court one thousand dollars for the benefit of the infant defendants, which should be invested for their benefit until they were 21 years of age. And the case coming on for further hearing, on the motion of plaintiff to confirm and the de-

(8) fendant's application for the order to pay into court one thousand dollars, &c., the Clerk, on 4 September, made both orders; that is, he confirmed the sale and ordered that the plaintiff pay into court one thousand dollars for the benefit of the infant defendants, as prayed for; from that part of the judgment requiring him to pay into court the $1,000, the plaintiff appealed, and at Fall Term of Camden Court, the appeal was heard by *Timberlake, J.,* who reversed the judgment of the Clerk as to the $1,000. But he held that the infant defendants were entitled to have their homestead laid off and assigned to them in land; that this should be located on the widow's dower, if there should be $1,000 worth of that, and if the dower land should turn out to be of less value than $1,000, then upon other unincumbered land of the intestate; and that the plaintiff should pay back to the widow, the purchaser of the reversionary interest in the dower land, what she had paid for the same. And from that part of this judgment that holds that the infant defendants are entitled to a homestead, and that plaintiff pay back to the purchaser the purchase money she had paid him for the reversionary interest in the dower land, the plaintiff appealed to this Court.

There is error in both rulings. The infant defendants were entitled to their homestead, which should have been laid off on the dower land. *Watts v. Leggett,* 66 N. C., 197; *Graves v. Hines,* 108 N. C., 262; *Gregory v. Ellis,* 86 N. C., 579. But when they were made parties and were properly in court, represented by a guardian, as is found to be the case here, admitted the allegations of the complaint and made no claim to the homestead, and allowed judgment to be taken against them and an order of sale, subject to the dower of the widow, a sale of the

(9) property, a confirmation of the sale, and a payment of the purchase money, as must have been the case here, as the order of the Court is, "that the plaintiff pay back the purchase money," it is too late. They are estopped by this judgment. *Dickens v. Long,* 109 N. C., 165.

Third parties have become interested, and this judgment can not be thus collaterally attacked. *Dickens v. Long, supra,* and cases there cited.

It is true that the defendants made their application to have the $1,000 paid into court for their benefit before the sale was confirmed. But they did not object to the confirmation. In fact, the order they asked to have made substantially asks a confirmation of the sale, as there could have been no money in the hands of the plaintiff to pay into court without such confirmation.

Defendants not being entitled to a homestead, there is no ground to support the order for plaintiff to pay back to the widow the money she

paid him for the reversionary interest in the land covered by the dower. She is the owner of this reversion and must pay for it, if she has not done so.

For the errors pointed out the judgment appealed from is reversed, and the judgment will be the ordinary judgment of confirmation.

Error.

Cited: Spence v. Goodwin, 128 N. C., 276.

IN RE SUTTON DAVIS' WILL.

Joint Will of Two Persons—Probate.

1. An instrument of writing, purporting to be the joint will of two persons, cannot be probated as the will of both if one of the parties be living.
2. An instrument of writing, jointly executed by a husband and wife, purporting to be their joint will, devising to a third person lands belonging partly to each, may, upon the death of the husband, and during the life of the wife, be probated as his will, as to his property devised thereby, and upon the death of the wife, unless revoked, may be probated as to her property.

PROCEEDING for the probate of a certain paper writing pur- (10) porting to be the will of Sutton Davis and Henrietta Davis, his wife, heard before the Clerk of the Superior Court of BEAUFORT, who refused to admit the instrument to probate, either as the joint will of the two or as the separate will of Sutton Davis, who has died. On appeal, his Honor, *Timberlake, J.,* at chambers, affirmed the judgment of the Clerk, and Thad. R. Hodges, the person named in the instrument as executor, appealed.

Mr. Chas. F. Warren for Thad. R. Hodges, propounder (appellant). No counsel contra.

FAIRCLOTH, C. J. On 27 July, 1893, Sutton Davis and wife, Henrietta Davis, jointly executed an instrument of writing, regular in all respects, purporting to be their last will and testament, giving several tracts of land to Fanny Robertson and others and their heirs and assigns. On 15 July, 1896, Sutton Davis died, Henrietta is still living.

The executor named in the will offered to prove the paper-writing as the joint will of the signers, also to prove it as the separate will of Sutton Davis, and to qualify as executor. The Clerk refused the motion,

and on appeal, his Honor affirmed the judgment of the Clerk. The executor appealed, assigning as error 1. The refusal of the Court to declare said writing to be the joint will of Davis and wife; 2. The refusal of the Court to declare said writing to be the will of the husband alone and to order the Clerk to qualify him as executor thereof.

(11) This case is somewhat novel, and presents a question which, so far as we have discovered, has not been brought to the attention of this Court except in one case. First. Can the paper-writing be probated as the joint will of the signing parties? Second. If it can not, may it be proved as the separate will of the deceased husband?

The record failed to disclose whether the property belonged to one or partly to each of the devisors, but we are informed by counsel that some parts of the land belonged to each. We shall assume such to be the fact, as that is the strongest view against the executor. The paper professes in plain language a joint purpose to dispose of the property in a single instrument and to have one executor. There is no intimation of survivorship on the death of one, or when the devise shall become operative, whether upon the death of one as to his or her part, or upon the death of both as to the whole property. The question then must be answered upon these plain words, "We give and bequeath to Fanny Roberson, colored, and her daughter, Adelia Roberson, and their heirs and assigns, a certain tract or parcel of land bounded and described as follows," &c.

We omit from our consideration the first error assigned, for in no view can the instrument be proved as the will of both, the wife now living. If established in any way, it must be as the separate will of the deceased husband. The text books to which we were referred on this subject, treat of joint wills, conjoint wills, compacts and mutual wills, &c., all of which would fall under the first error assigned.

There is nothing from which it can be implied even that there was any agreement that if one should devise to these devisees the other would do so, or that if one should afterwards revoke, the other would do so. Either had the right to do so, and without notice to the

(12) other. It is not like the case of a mutual will, in which after the husband's death, by which event the wife's estate was much increased, she makes another will and diverts the husband's property from the course intended and agreed upon by them at the execution of the joint will. In such case the probate court was unable to control and prevent the wrong, but a court of equity takes hold on the ground of preventing a fraud.

So, the rights of parties in a court of *probate* are essentially different from their rights after probate, which are to be administered in another jurisdiction. Then why may not a husband and wife convey

their separate property by will as well as by deed? The irrevocability in the latter case, and the revocability in the former, necessarily so long as the party lives, can make no difference, because the act must be as valid at the time it is done in the one case as the other. Third parties are interested in contracts (as deeds), whereas no one can acquire any interest in a devise until after the devisor's death. We find nothing in the Statute of Wills in conflict with this view. If each had made a separate will at the same time, giving the same property to the same devisees, there could be no doubt of the validity of each, with the power to revoke at any time. Can the fact that they did so by one joint act change the character of the transaction? The intent of both is equally manifest, and the intent is the controlling element, both in the execution and construction of wills.

In *Clayton v. Liverman,* 19 N. C., 558, the majority of the Court held that a will jointly executed by two sisters could not be probated, either as a joint will or as their separate wills. There, both died within a few days of each other, and the will was not offered for probate until after the death of both. The decision was upon the ground that it was a very singular case and that such an instrument, as a will, was unknown to the law of this country, and relied upon *Hobson v. Blackburn,* 2 Eng. Eccl., 115. *Daniel, J.,* in his able dissenting opinion, com- (13) bats the whole argument of the Court and insists that the Court misapprehended the Judge's opinion in *Hobson v. Blackburn, supra.* On a close reading of the case we think the Court did misconceive the question at issue in *Hobson's case,* and we approve the conclusion in the dissenting opinion. As the question was so ably discussed in *Clayton v. Liverman, supra,* we are not disposed to repeat it, but only give the conclusion.

We find in the books and cases cited below that the current of opinion in the States is contrary to that in *Clayton v. Liverman, supra,* and we think the reason and common sense of the question are the same way. 1 Schuyler Wills, sec. 456, n. 4, 457, 459; Law Journal 1858, 62 p. 87, vol. 31; 1 Redfield Wills, 182-3; Theobold Wills, 12; 1 Jarman Wills, 201, n. 31, n. 5; *Beth v. Harper,* 39 Ohio St., 639, 641; in the matter of Diez, 50 N. Y., 94; *Evans v. Smith,* 28 Ga., 98.

Our conclusion is that the instrument offered for probate may be proved now as the separate will of Sutton Davis as to his property described therein and that, unless in some way revoked, it may, upon the death of his wife, be probated as to her property mentioned therein.

Reversed.

Cited: In re Cole, 171 N. C., 75, 76.

(14)

L. G. DANIELS, GUARDIAN OF RUTH H. DANIELS AND HENRIETTA FOWLER, v. J. O. BAXTER ET AL.

Action to Set Aside Deeds as Fraudulent, for Conversion, for Damages, and for Accounting—Joinder of Different Causes of Action—Pleading—Parties—Removing Cloud from Title—Demurrer.

1. Where the causes of action stated in a complaint arise out of one and the same transaction or series of transactions, forming one course of dealing, and all tending to one end, so that one connected story can be told of the whole, the complaint is not multifarious.
2. Under section 267 (1) of the Code, where causes of action all arise out of a transaction connected with the same subject matter, a cause of action in tort can be joined with one to enforce an equitable right, and a complaint to set aside, as fraudulent, various conveyances of real and personal property by means of a series of alleged fraudulent deeds and proceedings, and for damages for the detention and conversion of such property, does not show a misjoinder of causes of action.
3. In an action by heirs at law and distributees to set aside deeds procured from their ancestor by fraud and imposition, it is immaterial and not ground for demurrer that the personal representative is made a party defendant, instead of plaintiff, especially where it is alleged and admitted that there are no creditors.
4. Under chapter 6, Acts of 1893, an action can be maintained to remove a cloud on title, although plaintiff is not in possession.
5. The objection that a complaint is "argumentative, hypothetical and in the alternative," cannot be made by demurrer, but must be taken advantage of by motion, before answering or demurring, for a repleader and to make the complaint more specific.

ACTION heard, on complaint and demurrer, before *Timberlake, J.*, at Fall Term, 1896, of PAMLICO. The action was brought by the heirs at law and distributees of S. H. Fowler, through their guardian, the plaintiff Daniels, against J. O. Baxter, assignee of S. H. Fowler, C. H. Fowler, administrator of S. H. Fowler (in their representative and individual capacities), Hannah J. Kennedy, grantee, as agent of C. H. Fowler, with notice, and without paying a valuable consideration,
(15) and J. F. Cowell, a joint tort feasor, as agent, and with notice, to recover the real and personal estate formerly owned by S. H. Fowler, and damages for its detention and conversion, on the ground that it was fraudulently obtained, through a conspiracy of defendants, by means of a series of deeds, judgments and transactions, and was held by them under color of the following fraudulent claims of title, in none of which frauds the ancestor of plaintiffs participated, towit: (1) A deed of trust for the benefit of creditors, claimed to have been

executed by S. H. Fowler on his death-bed, when he was unconscious, to J. O. Baxter, assignee, preferring C. H. Fowler for $9,000. (2) A deed from Baxter, assignee, to C. H. Fowler, for part of the property mentioned in the deed of trust. (3) A deed from C. H. Fowler, administrator of S. H. Fowler, to Hannah J. Kennedy, for certain lands contemplated in the conspiracy, but left out in the deed of trust by mistake of defendants; and the special proceeding before the Clerk of the Superior Court to obtain leave to sell the land for assets, which the said deed purports to follow. The defendant Baxter was the bookkeeper of defendant Fowler, the defendant Kennedy was the sister and partner of defendant Fowler, and the defendant Cowell was his partner. Defendants demurred to the complaint, and assigned many grounds, which are embodied substantially in the following: (1) That there is a misjoinder of causes of action, and the causes affect the several defendants differently. (2) That the action can not be sustained: Because neither the administrator, administrator *de bonis non,* nor the receiver is a party plaintiff. (3) Because the creditors are not parties plaintiff. (4) Because there is no jurisdiction at term over—first, a cause of action for failure to file annual accounts; second, to set aside orders of sale and confirmation, and a deed executed thereunder, in a special proceeding to (16) sell land for assets. (5) Because there is no allegation that S. H. Fowler made a deed of assignment. (6) That the complaint is argumentative, hypothetical, and in the alternative.

The demurrer was overruled and defendants appealed.

Messrs. Simmons & Ward for plaintiff.
Messrs. Clark & Guion for C. H. Fowler et als., appellants.

CLARK, J. If the grounds of the complaint "arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole," it is not multifarious. *Ruffin, C. J.,* in *Bedsole v. Monroe,* 40 N. C., 313, cited and approved in *Young v. Young,* 81 N. C., 91; *King v. Farmer,* 88 N. C., 22, and in *Heggie v. Hill,* 95 N. C., 303. To same purport is *Hamlin v. Tucker,* 72 N. C., 502. That the "main relief may be effectual, the plaintiff may state in his bill any number of conveyances, improperly obtained from him, either at one or more times respecting different kinds of property, and ask to have them all put out of his way, or to have reconveyances; for the several conveyances do not so much constitute distinct subjects of litigation, but are rather so many barricades erected by the defendant to impede the progress of the plaintiff towards his rights." *Bedsole v. Monroe, supra.* "Where a general right is claimed, arising out of a series of transactions tending to one end, the

plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter." *Young v. Young, supra.*

Under the Code, sec. 267 (1), where the causes of action all arise out of transactions connected with the same subject matter, a cause of action in tort can be joined with one to enforce an equitable right
(17) (*Benton v. Collins,* 118 N. C., 196); and proceedings for enforcement of legal and equitable rights can be joined. *Solomon v. Bates,* 118 N. C., 311, 316; *State v. Smith,* 119 N. C., 856. This is an action for the conversion of the entire estate of the ancestor of the infant plaintiff and to set aside sundry transactions, conveyances and judgments, by means of which the wrong has been done, in none of which frauds the ancestor participated. The demurrer for misjoinder was therefore properly overruled. Had it been sustained, the action would not have been dismissed, but divided into several, in the trial of each of which substantially the same evidence would have been admitted and the same proposition of law discussed, with great increase of costs and time and with benefit to no one. *Pretzfelder v. Insurance Co.,* 116 N. C., 491. The principle that an action in tort can not be united with one in contract applies only where they arise out of transactions connected with different subject matters. *State v. Smith, supra.*

"The subject matter of the action" is so well defined by Bliss on Code Pleading, sec. 126, that we cite it: "The cause of action has been described as being a legal wrong threatened or committed against the complaining party; and the object of the action is to prevent or redress the wrong by obtaining some legal relief. The subject of the action is neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the Court, nor is it that which the Court is asked to do for him, but it must be a matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is ordinarily the property, or the contract and its subject matter, or other thing involved in the dispute. Thus, in an action to recover the possession of
(18) land, the 'right' is the right of possession; the 'wrong' is the dispossession; the 'object' is to gain possession; and the 'subject,' or that in regard to which the action is brought, is the land and usually its title."

The personal representative is made a party defendant. It is immaterial and not ground of demurrer that he is not a plaintiff. *Teague v. Downs,* 69 N. C., 28; *McCormac v. Wiggins,* 84 N. C., 279. The creditors are not necessary parties. *Carlton v. Byers,* 93 N. C., 302; *Hancock v. Wooten,* 107 N. C., 9. Besides, it is alleged in the complaint that there are no creditors, and the demurrer admits it.

The fourth ground of demurrer was also invalid. It misconceives matters stated as inducement as the cause of action itself. As to the fifth ground of demurrer, there is an allegation that the defendants claim that S. H. Fowler made a deed of trust, that what purports to be such is on record, and that the defendants are holding under it. This is sufficient under Laws 1893, chap. 6, to proceed to have the cloud removed, though the plaintiffs are not in possession.

The last ground assigned for demurrer, that the complaint is "argumentative, hypothetical, and in alternative," if it were true, is not cause for demurring, but would justify a motion, before answering or demurring, for a repleader and to make the complaint more explicit. The Code, 261, and cases cited in Clark's Code (2 Ed.), p. 207.

No error.

Cited: Pender v. Mallett, 123 N. C., 61; *McLean v. Shaw,* 125 N. C., 492; *Junge v. MacKnight,* 135 N. C., 116; *Reynolds v. R. R.,* 136 N. C., 347; *Fisher v. Trust Co.,* 138 N. C., 242, 246; *Hawk v. Lumber Co.,* 145 N. C., 50; *Campbell v. Cronly,* 150 N. C., 466; *Ricks v. Wilson,* 151 N. C., 48, 49; *Crockett v. Bray, ib.,* 617; *Swindell v. Smaw,* 156 N. C., 2; *Speas v. Woodhouse,* 162 N. C., 69; *Ayers v. Bailey, ib.,* 212; *Christman v. Hilliard,* 167 N. C., 8; *Lee v. Thornton,* 171 N. C., 213, 214.

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(19)

STATE ON RELATION OF J. H. BLOUNT, SOLICITOR, v. W. S. SIMMONS ET ALS., COMMISSIONER OF PAMLICO COUNTY.

Action by State to Vacate Entry of Oyster Beds—Liability of State for Costs of Action—Costs—Fee Bill—Taxing Costs—Appeal.

1. Under section 536 of the Code the State is liable for the costs of an action instituted by the State Solicitor under the provisions of sec. 4, ch. 287, Acts of 1893, requiring him, as Solicitor, to bring an action to vacate an oyster bed entry upon the filing with him of an affidavit of five inhabitants of a county alleging that such entry is a fraud upon the State. In such case, *it seems* that the persons making the affidavit might be held liable as relators if it should appear that the action was for their benefit and at their instance.
2. The fee taxable for "appeal and docketing in Supreme Court" is two dollars only.
3. An action by the State to vacate an oyster bed entry being a civil action, a fee of one dollar for entry of judgment in term time is taxable against the State as the losing party.
4. Where, in an unsuccessful action by the State to vacate an oyster bed entry, a judgment was rendered against the county for costs, but set aside on

appeal, and subsequently the judgment was properly rendered against the State for costs, it was error to charge the State with the fees for the entry of the first judgment, and "appeal and docketing in Supreme Court" on the appeal by the county.

5. Costs are not allowed for docketing, filing and indexing a judgment against the State or county, since no lien can be acquired by such docketing.
6. The fee of twenty-five cents for motion for judgment can only be taxed when the motion is a motion in the cause, in writing, and required to be recorded.
7. An appeal lies to this Court from the erroneous taxation of items in bill of costs in the Superior Court.

PETITION by the State for a rehearing and reversal of the case decided at September Term, 1896, 119 N. C., 50.

Zeb. V. Walser, Attorney-General, and Mr. W. A. Guthrie for the State.

Messrs. Simmons & Ward and Allen & Dortch, contra.

(20) FAIRCLOTH, C. J. This case was decided at last term, when it was held that the State was liable for the costs of the action, upon nonsuit being taken in the Superior Court, and this is a petition to rehear. The decision was based upon the Code, sec. 536. It is now urged that Code, sec. 537, controls the case, and that the State is not liable.

At common law the king neither paid nor received costs, as the former was his prerogative and the latter was beneath his dignity, and the general statutes giving costs did not include the Sovereign. The same principle has been applied in this country and in this State, so that the State is only liable in the event of express statutory provisions, which are now quite general in the different States. In the absence of express statute the relator, in an action in the name of the State when the matter was of a public nature, and he had no more interest in the controversy than other citizens, was not liable for the costs of the defendant when a nonsuit was entered. *Hill v. Bonner,* 44 N. C., 257. There are instances in which the State allows its citizens to use its name to enforce *private* rights, for example, *quo warranto* (Code, chap. 10, sec. 603, *et seq.*), but the relator is required by security to indemnify the State against all costs and expenses. There is no such requirement in the Act of 1893, chap. 287, sec. 4, but it expressly makes the State Solicitor the relator.

In the argument it was properly conceded that the party for whose "benefit" the action was instituted was chargeable with the costs. Laws 1893, chap. 287, sec. 4, made it the imperative duty of the State Solicitor to institute this action, as soon as an affidavit of five inhabitants was filed with him, alleging that certain licenses, including *natural* oyster beds, were frauds upon the public property of the State.

It was suggested by plaintiff's counsel that these five inhabi- (21) tants were really the relators, and liable for the costs, and that the State was not liable according to said sec. 537. We could probably agree to that proposition if we could see that the action was at the instance of these men and for their benefit. It does not appear that they were promoters of the Act of 1893, chap. 287, or that they advised or encouraged the suit, nor how the success of the suit would have enured to their benefit more than to any other citizen of the State, for in that event the recovered natural oyster beds would at once become the State's public property. Sec. 537 of the Code provides for the enforcement of private or corporation rights in the name of the State, at the expense and cost of the relator, and in sec. 536 the Sovereign assumes the costs of such civil actions as it may deem proper to prosecute, and in the Act of 1893 selects its own relator.

We are called upon to determine the legality of the several items of costs charged by the Clerk in this case. We do so, and call the attention of the courts to this matter.

The items of cost taxed by the Clerks of the Superior Court have rarely been before this Court, and hence the fee bill (the Code, sec. 3739, amended by Laws 1885, chap. 199), has been construed by the different Clerks in the State, each according to his own judgment, and doubtless in many instances illegally and to the great wrong of suitors. The items of the present bill present some of these errors for correction. "Appeal and docketing in Supreme Court," taxed at $3 each, should be $2, and the State is only taxable with the last appeal, the first having been decided against the defendants. The entry of "two judgments in term time $2," would be illegal if this were a criminal action, since the $1 is only allowed by statute for "judgment" when the judgment is against the defendant, but the charge is valid in this instance, as this is (22) a civil action, though the State is plaintiff. But on the first appeal the judgment was held to have been erroneously entered against the county of Pamlico, and was set aside, and the State can not be taxed with that $1, nor, as above said, with the "appeal and docketing" in that appeal—only for the last judgment and last appeal. The charge of 45 cents for docketing, filing and indexing judgment is also disallowed. The statute does not contemplate that bills of cost, devolved upon the State or county by a *nol pros* or even a verdict of not guilty, or even in a civil action, shall be docketed, since no lien can be acquired by such docketing. An observance of this will save many thousands of dollars which are improperly taxed against the county in cases where the prosecution fails. The charge, "motion for judgment 25 cents," is often made by Clerks, but is illegal. The "motion" for which "25 cents" is allowable is a motion in the cause made in writing and requiring to be recorded,

and not the mere verbal application for a judgment. Nor is there any "notice" in the papers justifying the charge of 25 cents, and we can not see the necessity of any, unless the Clerk ingeniously thought to charge for "notice of a motion for judgment." Correcting the bill as above, the $13.15 sent up should properly be $6.95. The overcharges and abuses in making out bills of cost have become, and justly, a matter of public complaint. Yet there is this excuse, that bills of cost having rarely been before the Courts, Clerks, no matter how conscientious, have had no authoritative construction to follow. Hence, there has been very little uniformity, each Clerk being, like the Gentiles of old, "a law unto himself."

It has been a mistaken conception that an appeal does not lie to this Court to correct erroneous taxation of items in bills of costs. Parties have a right to have such orders reviewed here on appeal, and in
(23) that manner only can uniformity be maintained. The Court has often held that when the subject matter of an action has been destroyed by accident, compromise, or otherwise, the Court will not try such cases on the merits, merely to determine which side should pay the costs. *S. v. Horne,* 119 N. C., 853. This is what is meant by the ruling that the Court will not hear an appeal involving only a matter of costs. The Court never meant to hold that a litigant could be taxed with items of costs, not allowed by law, and be without the remedy of an appeal to redress his wrongs. But for chap. 199, Laws 1885, which evidently was prepared in the interests of large fee bills and which has nothing of merit to recommend it, this and all other bills of costs might be pruned of many items charged without corresponding service rendered. With this addition the judgment is

Affirmed.

Cited: Guilford v. Commrs., post 28; *Garner v. Worth,* 122 N. C., 256; *Herring v. Pugh,* 125 N. C., 438; *Miller v. State,* 134 N. C., 273; *Luther v. R. R.,* 154 N. C., 104.

GEORGE W. GUILFORD, CLERK OF BEAUFORT SUPERIOR COURT, v. THE BOARD OF COMMISSIONERS OF BEAUFORT COUNTY.

Action for Costs—Costs in Criminal Cause—Liability of County—Fees of Clerk of Superior Court.

1. The State and county are liable for costs only in the cases expressly provided by statute.

2. A county cannot be taxed, under section 739 of the Code, with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill."

3. When a defendant is bound over to the Superior Court by a Justice of the Peace, the Clerk of the Superior Court is not entitled to the fee of 50 cents allowed by chapter 199, Acts of 1885, for "appeal from Justice of the Peace."

4. The fee of 10 cents allowed the Clerk of the Superior Court by chapter 199, Acts of 1885, for "filing papers," is for filing all the papers in an action after final judgment, as prescribed by section 86 of the Code, and not for filing each paper in a case.

5. The Clerk of the Superior Court is not entitled under section 3739 of the Code to a specific fee for recording the proceedings of a cause in the minute docket of the Court, as required by section 83 (6) of the Code.

6. The liability of a county for defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the Court is not liable to defendant's witnesses where he is convicted and unable to pay.

7. An appeal lies from a judgment involving merely the taxation of a bill of costs.

ACTION, commenced before a Justice of the Peace by George (24) W. Guilford, against the Board of Commissioners of Beaufort County, to recover fees as Clerk of the Superior Court, heard on appeal and on complaint and demurrer before *Bryan, J.*, at Spring Term, 1897, of BEAUFORT.

The complaint was as follows:

"The plaintiff, complaining of the defendants, alleges: (1) That plaintiff is the Clerk of the Superior Court of Beaufort County, N. C. (2) That at the Fall Term, 1896, of the Superior Court of Beaufort County, a bill of indictment was sent before the grand jury of said county, charging one George Pilly with larceny, and was returned by the grand jury 'Not a true bill.' That there was no prosecutor in the said case. That the following fees are due plaintiff in said criminal action, towit:

Indictment	$ .60
Docketing	.25
Six subpoenas	.90
Filing papers	.20
Preparing bill of costs	.25
Recording in minutes	.50
Making	$2.70

"That the defendants are indebted to plaintiff for one-half of said bill of costs, under sec. 739 of the Code. That there is due plaintiff
(25) the sum of one dollar and thirty-five cents on said bill of costs by defendants. That defendants have refused to pay the said sum, on the ground that the county is not liable in cases where the grand jury has returned 'Not a true bill.' (3) That at Fall Term, 1896, of the Superior Court of Beaufort County, one Elijah Selby, who had been bound over by a Justice of the Peace to said term, charged with larceny, was indicted and convicted and sentenced to the State Prison for the term of two years. That among other fees due the plaintiff in the said criminal action are the following, towit:

Appeal from Justice of the Peace	$ .50
Docketing same	.25
Filing papers	.20
Recording in minutes	.25
Making	$1.20

"That the defendants are indebted to plaintiff for one-half of the fees above specified. That the defendants have refused to pay the said bill of costs, or the one-half thereof for which the county is liable, on the following grounds, towit: First. That the said Elijah Selby did not appeal from the Justice of the Peace to the Superior Court, but was bound over by the Justice of the Peace to appear at said term, and that the fee of 50 cents for an appeal and 25 cents for docketing the same is not due plaintiff in said criminal action. Second. That the plaintiff is not entitled to charge the fee of 25 cents for filing papers, but defendants insist that a single fee of 10 cents only can be charged for filing papers in each case, and not a fee of 10 cents for filing each paper. Third. That the plaintiff is not entitled to a specific fee of 25 cents or any other specific sum, for recording in the minutes.

Wherefore, plaintiff prays judgment against the defendants
(26) for the sum of one dollar and thirty-five cents, being half fees in State against George Pilly, as set forth in section 2 of this complaint, and for the sum of sixty cents, being half fees in State against Elijah Selby.

The demurrer was sustained and plaintiff appealed.

Mr. Charles F. Warren, for defendants.
No counsel contra.

CLARK, J. At common law, in criminal actions, the sovereign neither paid nor recovered costs. *S. v. Manuel,* 20 N. C., 20. The State and

county are now liable for costs, but only in the cases expressly provided by statute. *S. v. Massey,* 104 N. C., 877. Code, sec. 739, which specifies the instances in which the county shall be liable either for half or for whole fees in criminal actions, is restricted to those in which "there is no prosecutor, and the defendant shall be acquitted or convicted, and unable to pay the costs, or a *nolle prosequi* be entered, or judgment arrested." There is no provision for taxing the county with any part of the fees of officers if the grand jury ignores the bill, or if the bill is quashed, nor if the prosecutor is taxed and proves unable to pay. Possibly, the legislature considered that it would entail great and unjustifiable expense if the county were taxed with the fees of officers in the frivolous and trivial prosecutions in which the grand jury refuse to find a true bill, or in which the judge should quash the indictment because not good in law. The judge properly held that the county was not liable for half fees in the case of State against Pilly, in which the grand jury had returned "Not a true bill."

As to the second cause of action, for the half fees in the case of State against Selby, in which the defendant therein was bound over by a justice of the peace for larceny, was "convicted and unable to pay the costs," and in which there was no prosecutor, the officers were (27) entitled to half fees from the county, as to all legal fees. But the charge, "Appeal from justice of the peace, 50 cents, and docketing same, 25 cents," is illegal. There was no appeal, for the Justice "bound over," having no final jurisdiction. Code, sec. 3739, prescribed: "Appeal from justice of the peace, including docketing, 50 cents." Acts 1885, ch. 199, strikes out the words "including docketing," but no fee is given for docketing an appeal, and none could be taken in any event. Besides, the fee for appeal from a justice is only allowed in civil cases and in those criminal cases in which the defendant or the prosecutor is taxed with the costs. Even though the defendant should be acquitted or *nol pros'd* in the upper court, the county is in no manner liable for fees. Code, sec. 895, expressly provides that in no case of which a justice of the peace has final jurisdiction (and only in such would an appeal lie) shall the county be liable to pay any costs." *Merrimon v. Commissioners,* 106 N. C., 369; *S. v. Shuffler,* 119 N. C., 867.

Code, sec. 86, prescribes that "the clerk shall keep the papers in each action in a separate roll or bundle, and, at its termination, attach them together, properly labeled, and file them in the order of the date of final judgment." This is the "filing papers" for which the clerk is entitled to charge a fee of 10 cents. Acts 1885, ch. 199. If the statute had intended to give a fee of ten cents for filing each paper, it would have said so. Evidently, the fee was allowed for the single act of "filing papers" when the case is closed. There are no words

used to support the contention that a separate fee of ten cents is to be allowed for each summons process, subpœna notice, and affidavit returned; nor is there any authority for the charge, "Recording
(28) in minutes, 25 cents." The clerk is required to keep "a minute docket, in which shall be entered a record of all proceedings had in the court during the term, in the order in which they occur, and such other entries as the judge may direct to be made therein." Code, sec. 83(6). But there is no specific fee given therefor, either against defendant or the county. The language of section 3739 is: "Recording and copying papers, per copy sheet, 10 cents." This refers to recording and copying papers, and not to keeping the minutes or proceedings of the court. When compensation for officers is made by fees, they are not paid for each and every service performed; but for certain designated services prescribed fees are allowed, the aggregate of which the legislature deems would be sufficient for the discharge of all the duties of the office. Indeed, Code, sec. 3739, provides that "the fees of the clerk of the Superior Court shall be as follows, and no other, namely," etc.

The liability of the county for state witnesses though not for half fees of officers, when the prosecutor is unable to pay, is caused by the difference between the wording of section 739 and that of sections 740 and 1204 (and these last are safeguarded against abuse by sections 743, 744, and 746). *Pegram v. Commissioners,* 75 N. C., 120. But the liability of the county for defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. *S. v. Horne,* 119 N. C., 853; *Blount v. Simmons, ante,* 23.

It admits of some question whether this action can be maintained as brought. Certainly it would have been more regular to have had the costs taxed or retaxed in the original cause, and an appeal
(29) from the judgment thereon. *Moore v. Commrs.,* 70 N. C., 340; *Belden v. Snead,* 84 N. C., 243. But the objection is not raised by either party, and we do not pass upon it.

Affirmed.

Cited: Clerk's Office v. Comrs., 121 N. C., 30; *Garner v. Worth,* 122 N. C., 255; *S. v. Hicks,* 124 N. C., 838; *S. v. Wheeler,* 141 N. C., 777; *Luther v. R. R.,* 154 N. C., 104.

ZELL GUANO COMPANY v. P. T. HICKS.

Practice—Appeal—Time for Service of Case on Appeal—Certiorari.

1. The time for service of a case on appeal must be counted from the actual adjournment of the Court.
2. When, by agreement of counsel, the time for service of the case on appeal was extended to thirty days and the Court adjourned on 31 October, the time expired on 30 November, the last day not being Sunday, and a service on 1 December was a nullity.
3. A petition for a writ of *certiorari* to bring up the case on appeal will not be granted when the petitioner has failed to file a transcript of the record proper, except, possibly, in a meritorious case where the only defect is the absence of the record, but certainly not where the appeal was lost by failure to serve the case on appeal.

PETITION by the defendant for *certiorari* to bring up a case on appeal which was not served within the time limited for the service.

Messrs. R. B. Peebles and MacRae & Day, for petitioner.
Mr. R. O. Burton contra.

CLARK, J. The time in which to serve "the case on appeal" must be counted from the actual adjournment of the court. *Rosenthal v. Robertson,* 114 N. C., 594; *Delafield v. Construction Co.,* 115 N. C., 21; *Worthy v. Brady,* 91 N. C., 265; *Turrentine v. R. R.,* 92 N. C., 642; *Chamblee v. Baker,* 95 N. C., 98; *Walker v. Scott,* 104 N. C., 481. The court having adjourned on 31 October, the "30 days" agreed upon, in lieu of the statutory ten days, in which to serve the case on appeal, ex- (30) pired on 30 November (the last day not being Sunday). Code, sec. 596; *Barcroft v. Roberts,* 92 N. C., 249. The attempted service therefore upon 1 December, was too late and was a nullity. *Peebles v. Braswell,* 107 N. C., 68; *Cummings v. Hoffman,* 113 N. C., 267. It may seem a hardship that a party shall lose his appeal by being one day too late, but this is not comparable to the confusion which would be brought about by not adhering to the time fixed by statute, or the time agreed upon by parties in lieu thereof. Every case in which there was a failure to observe the time specified would become the subject of controversy, with affidavits and counter affidavits, and with a wonderful increase in the number of such cases. In the present case, the appellee gave by consent twenty days more time than the statute allowed, and we have no power to add another day against the appellee's will. *Vigilantibus non dormientibus leges subveniunt.*

The petitioner failed to file a transcript of the record proper, and without doing so he is in no condition to ask for a writ of *certiorari* to bring up the "case on appeal."

Brown v. House, 119 N. C., 622; *Shober v. Wheeler,* 119 N. C., 471; *Owens v. Phelps,* 91 N. C., 253; *Pittman v. Kimberly* 92 N. C., 562; *Bailey v. Brown,* 105 N. C., 127; *Stephens v. Koonce,* 106 N. C., 255; *Porter v. R. R.,* 106 N. C., 478; *Pipkin v. Greene,* 112 N. C., 355; *State v. Freeman,* 114 N. C., 885.

Since this motion was argued the petitioner has asked to be allowed to file a transcript of the record proper. In a meritorious case, where the only defect is the absence of such record, the court might allow it,

(31) but here it would be of no avail and would uselessly impose the costs of a transcript upon the petitioner, since it appears as above that the appeal was lost by failure to serve the case in the time limited.

Petition denied.

Cited: Davison v. Land Co., post, 260; *Burrell v. Hughes, post,* 278; *Parker v. R. R.,* 121 N. C., 504; *Lumber Co. v. Rowe,* 151 N. C., 130; *Walsh v. Burleson,* 154 N. C., 175; *Hardee v. Timberlake,* 159 N. C., 552.

STATE ON THE RELATION OF EDWARD T. CLARK, ADMINISTRATOR D. B. N. C. T. A. OF SOLOMON G. BOONE, DECEASED, v. R. W. PEEBLES, ADMINISTRATOR OF JOHN T. PEEBLES ET AL.

Practice—Appeal—Statement of Case on Appeal—Assignment of Error—Sufficiency of Record—Trustee—Executor—Administrator C. T. A.—Invalid Payments by Trustee.

1. When the grounds of error appear sufficiently assigned in the record itself, without a statement of the case on appeal, this Court will consider and pass upon its merits.

2. Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator *cum testamento annexo* appointed in his stead succeeds to the trusteeship, and hence an appointment by the Clerk of the Court of a trustee in place of the executor is void and clothes the appointee with no power.

3. In such case payments of the body of the trust fund made by the administrator *d. b. n. c. t. a.* to the *cestui que trust* (who was to receive the income only) and to the alleged trustee acting under the clerk's appointment were not valid payments, and the administrator *c. t. a.* is not entitled to credit therefor.

CLARK *v.* PEEBLES.

ACTION, heard before *McIver, J.*, at May Term, 1895, of HALIFAX, on exceptions to report of W. E. Daniel, referee. Both plaintiff and defendants appealed from the judgment rendered.

Mr. Thos. N. Hill, for plaintiff.
Mr. R. B. Peebles, for defendant.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. The defendants moved in this court to dismiss the plaintiff's appeal on the ground that there was no statement of the case on appeal in this court. It is a fact that no such statement of the case, made out either by the judge or signed by the (32) counsel of both sides, is here, as the general rule requires. The motion brings up the question whether or not this particular case falls within the exception to the general rule. The action was brought by the plaintiff as administrator *de bonis non* with the will annexed of Solomon Boone, against R. W. Peebles, administrator of John T. Peebles, the said John T. having been before his death a former administrator *de bonis non* with the will annexed of Solomon Boone, and W. W. Peebles, a surety on the administration bond of the said John T. Peebles, for an account and settlement of the matters between the deceased administrator, John T. Peebles, and the estate of Boone.

The whole matter was referred to Walter Daniel to decide the matters of law and fact, including the pleas in bar. An account was to be stated, however the pleas in bar might be decided, the whole to be subject to the review of the judge of the Superior Court.

A half dozen or more different reports were made by the referee under various orders of the court, and to each one exceptions as numerous as leaves in Vallombrosa were made by both plaintiff and defendant. The whole of the evidence was returned as a part of the report, and each and every exception appears on the face of the record itself. There is nothing *dehors* the record which would aid this court in the least in passing upon the question raised by the plaintiff's appeal: and it has been decided by this court in *Brooks v. Austin*, 94 N. C., 222, that when the grounds of error appear sufficiently assigned in the record itself, without a statement of the case on appeal, this court will consider and pass upon its merits. The plaintiff did not print all of the evidence—not as much of it as he should have done—but owing to the importance of the matters involved in the suit, the (33) immense volume of manuscript and printed matter making up the case, the extraordinary amount of work which it seems the counsel on both sides have voluntarily imposed upon themselves (a large proportion of which it was unnecessary to have imposed upon us), we have

concluded to take no exception to this failure to print the evidence by the plaintiff, especially as the defendant did not move to dismiss for failure to print, under rule 30 of this court.

The referee in one of his reports allowed the defendant as a credit the sum of $200, which had been paid to Indiana Bristow and her husband, on 21 December, 1875, with the interest on the same, which amounted to the sum of $184.69. He also allowed the defendant $100, paid to the said Bristow, 7 March, 1876, and $97.07 interest thereon; and he also allowed the further sum of $150, paid to William Grant, 31 May, 1875, and $143.50 interest thereon. His Honor, Judge Graves, sustained the referee, and in passing upon the report allowed the credits. The plaintiff excepted.

There was error in the ruling of his Honor. In his last will and testament the plaintiff's testator, Solomon Boone, bequeathed to his daughter, Indiana, now Mrs. Bristow, an equal share in his property, with limitations as follows: "I desire that an equal share of my estate be allotted to my daughter Indiana Florence, and that it shall remain in the hands of my executors, that I shall herein and after mention, and that she shall be entitled to the incomes of said property yearly, during her life, and at her death if she shall have a lawful heir of her body begotten, I give said property to them and their heirs forever, if not to the rest of my children except my said executor shall think it necessary to spend any portion of said share in educating the said Indiana Florence, which I desire should have a good educa-
(34) tion, and should the income of her share of my estate be insufficient for such purpose I desire done."

John T. Peebles, the intestate of the defendant, R. M. Peebles, upon his qualification as the administrator *de bonis non* with the will annexed of Boone, became the trustee of this fund for the benefit of Indiana and her children. *Jones v. Jones,* 17 N. C., 387; *Creech v. Grainger,* 106 N. C., 213; *Young v. Young,* 97 N. C., 132. He had no right to pay over to Mrs. Bristow any part of the body of this fund, and in doing so he became liable. The clerk of the court appointed William Grant a trustee for Mrs. Bristow to secure this fund, in the place of the executor named in the will, and who had refused to qualify as executor. He mistook his power when he made this appointment, and any payment made to him was not a valid payment. The law, as we have said, constituted the administrator *de bonis non,* with the will annexed, trustee of Mrs. Bristow.

It would be almost an impossible task for the court to specifically discuss each and all of the exceptions filed in this case, but we have spent a great deal of time and labor in the consideration of them, and we find no error, except the ones pointed out, that would cause us to

recommit this case or to alter the judgment, except in the particular hereinafter stated. We will observe, by the way, that the amounts which the plaintiff undertook to collect in this action out of the defendants on account of rents which the administrator, John T. Peebles, received from the lands of the testator, could not be charged against the defendants in this action, and the referee was right in refusing to charge the defendants with them. It appears from the record that they (the rents) are the subject of another suit between the devisees under the will of Boone, the testator, and the defendant administrator.
Of course, no credit allowed in this action to the defendant will (35) be allowed in that suit as a counter claim to the plaintiff's demand.

The judgment of Judge McIver is affirmed in all respects, except that the share of Indiana Bristow, towit, $882.90, must not be deducted from the amount of the plaintiff's recovery, towit, $2,648.70. That deduction was ordered in Judge McIver's judgment, because the judgment of Judge Graves allowed the defendant credit for the amounts paid by John T. Peebles, adm'r., etc., of Boone to Mrs. Bristow, and for the amount paid to William Grant, the alleged trustee, and we have said that that was error.

The judgment of Judge McIver will be reformed as we have herein indicated, and the share of Mrs. Bristow will be declared vested in the plaintiff in this action, to be held by him in trust for her and her children, under the conditions and terms set out in the will of her father, Solomon G. Boone.

Affirmed and modified.

CLARK, J., did not sit.

DEFENDANT'S APPEAL.

MONTGOMERY, J. The exceptions of the defendant were properly overruled by the court below and, for the reasons set out in the opinion in the plaintiff's appeal, there was no error in the rulings of his Honor.

No error.

CLARK, J., did not sit.

Cited: Clark v. Peebles, 122 N. C., 162; *R. R. v. Stewart,* 132 N. C., 249; *Wallace v. Salisbury,* 147 N. C., 60; *Commrs. v. Scales,* 171 N. C., 525.

(36)

D. D. BRYAN AND VIRGINIA P. BRYAN, HIS WIFE, v. NAT. DUNN.

Will, Construction of—Forfeiture of Devised Land—Judgment—Execution.

1. While a judgment is a lien upon the lands of the debtor in the county where docketed, it gives no peculiar lien upon any particular parcel of land, nor does it divest the title and estate out of the debtor, but only enables the creditor, by proper process, to subject the land to the satisfaction of the debt.
2. A devise of land to F. was accompanied by the declaration that if it "should at any time be subjected, by process of law, to the debts of F., then his estate therein shall, *eo instanti*, cease." A judgment was obtained against F., on which an execution was issued, and his homestead exemption of $1,000 laid off in other lands. The execution was then returned with the endorsement, "No property found after said homestead laid off." *Held*, that as there was no attempt or purpose shown to subject the devised land, by process of law, to the satisfaction of the creditor's debt, there was no forfeiture of the estate as provided for by the will.

ACTION for the recovery of land, tried before *Robinson, J.*, at Fall Term, 1896, of HALIFAX.

The facts appear in the opinion of the court. There was judgment against the plaintiffs, who appealed.

Messrs. Thos. N. Hill and McRae & Day, for plaintiffs (appellants).
Messrs. R. O. Burton and David Bell, for defendants.

MONTGOMERY, J. In the last will and testament of Mrs. Nancy Conigland, she devised a certain tract of land in Halifax County to her husband for life, with remainder after his death to her nephew, Newell E. Faucett, if he should be living at that time, or to his living issue should he be then dead. The testatrix further declared her will to be "that in case the real estate hereby devised to the said Newell E. Faucett should at any time be subjected or sought to be subjected
(37) by process of law to the debts of the said Newell, then his estate therein shall *eo instanti* cease and determine, and the said real estate shall vest in his issue then living, and should he have no issue then living, then in my niece Virginia P. Faucett," etc. The husband died before the testatrix, and Newell, who was living at her death, went into possession of the land. A judgment was obtained against Newell in September, 1880; an execution was issued upon the judgment in 1882, and the debtor's homestead exemption of $1,000, in value, laid off in another of his tracts of land. The sheriff made return of the execution as follows: "No property to be found after said homestead laid off." The judgment was paid off in 1886.

On 20 October, 1888, Newell conveyed by deed the tract of land devised to him to the defendant in this action. The plaintiff, Virginia P. Faucett, requested the court to instruct the jury that upon the facts admitted, and the testimony, they should find that the plaintiff was the owner of the tract of land and entitled to the possession thereof, and that the defendants wrongfully withheld possession from her, and that they should answer the first and second issues, "Yes." The first and second issues were as follows: "1. Is the *feme* plaintiff the owner and entitled to the possession of the land described in the complaint? 2. Does the defendant wrongfully withhold possession thereof from plaintiffs?" The court refused the instruction and told the jury that if they believed the evidence they should answer the first and second issues "No," that is, that the plaintiff was not the owner, and that the defendant did not wrongfully withhold possession from the plaintiff.

The counsel for the defendant, on the argument here, insisted that the devise vested in Newell a fee simple estate, with all its incidents, including the one of subjection to demand of creditors; that the words of the will, whether they be regarded as a condition or (38) as a limitation, which attempted the forfeiture of the estate of Newell and the taking of the fee by the plaintiff in case Newell's creditors should subject or undertake to subject, the land to their debts, were void, and the absolute estate passed to Newell.

The plaintiff's counsel contended that the fee passed under the will, but that it was determinable whenever the land should be subjected, or sought to be subjected, to the debts of Newell; and he insisted that, when judgment was obtained and execution issued, Faucett forfeited the estate, and *eo instanti* the plaintiff took under the will. We are not called on, therefore, to decide the quantity of interest as to Newell's estate in the land under the will, for the counsel of both plaintiff and defendant agreed that the fee was devised to him. The defendant insisted that the deed from Newell to him conveyed the interest and estate of the grantor to him in fee, whilst the plaintiff insisted that Newell's deed to the defendant conveyed nothing, for the reason that while Newell was in possession of the property one of his creditors, by procuring the judgment and issuing the execution thereon, sought to subject the property to the judgment debt, whereby his estate was forfeited, and the whole vested in the plaintiff under the will. The only point then for decision in the case is this: Was the land sought to be subjected by process of law when the creditor procured judgment against Newell and issued execution thereon? We think not. It seems that the creditor took no steps under his judgment and execution to proceed against this land. A homestead of the full value of $1,000 was laid off in another tract of the debtor, and the sheriff made a return of the

execution, "Nothing to be found after laying off the homestead." The creditor and the sheriff seemed to know of the provisions of the will and that if they undertook to advertise the property for sale under
(39) the execution, and to give the debtor the notice then required to be given by sheriffs to judgment debtors whose lands were advertised to be sold under execution (Bat. Rev. ch. 44, sec. 14), that it would be a vain thing. It is true that a judgment is a lien upon the lands of the debtor in the county in which the judgment is docketed, but it gives to the creditor no peculiar lien upon any particular parcel or tract of the defendant's land. A judgment does not prevent the debtor from selling his land, and the deed will be good and pass the title if the debt is afterwards paid off before sale under execution. A judgment does not divest the title and estate out of the debtor; it only constitutes the land a security for the debt; and as was said in *Murchison v. Williams,* 71 N. C., 135: "So as to enable the creditor by proper process to subject it to the satisfaction of his debt." Execution is this proper process, and as the execution in this case was issued, and no attempt made to levy upon the land in dispute, it must be concluded that the creditor by his judgment and execution did not attempt or purpose to subject the land by process of law to the satisfaction of his debt. There was no error in the court's instructions to the jury and, therefore, none in the refusal to give those prayed by plaintiff, and the judgment is

Affirmed.

Cited: Brown v. Harding, 170 N. C., 267.

LEWIS FROELICH, TRUSTEE, v. THE FROELICH TRADING COMPANY.

Action on Note—Note of Business Concern Signed by Manager—Parties.

1. The fact that a manager of a business concern has made himself personally liable by signing a note as manager, with the addition of the name of the business concern, does not affect the liability of such concern where it has received the benefit of the proceeds of such note.

2. Where an estate of a deceased person is, under the provisions of the will, doing business under a certain name and under the conduct of the executor as manager, and is sued, judgment may be rendered against the concern in the name by which it is so sued, as well as against the manager, but not against the estate, as such, so as to acquire a lien on the property of the estate.

3. Where a will authorizes the executor to conduct and wind up the business of the testator, and gives the beneficiaries the net proceeds only, they are not entitled to claim exemptions against judgments for liabilities incurred in conducting and winding up the business.

ACTION tried before *Graham, J.*, at March Term, 1896, of (40) HALIFAX, a jury trial being waived. The facts appear in the opinion of the Court. There was judgment for the plaintiff, and defendants appealed.

Messrs. McRae & Day for plaintiff.
Mr. Thos. N. Hill for defendants (appellants).

FURCHES, J. The testatrix was a merchant in the town of Halifax at the time of her death. This business was done under the name and style of "Froelich & Co.," which she directed by her will to go to her children "to be divided into equal shares by my executor to each, to hold to their assigns forever." In the third and next paragraph of her will she provided as follows:

"That my executor is authorized to carry on the business above named, to change the style of the firm name, or incorporate the same, according to the statute in this State, giving it such name as he deems most appropriate, or wind up the business if he deems it for the best interest of the children, and distribute the proceeds to them or invest the proceeds for them in some other manner." "Lastly, I appoint Frederick Froelich, my husband, my executor."

This will was duly admitted to probate, and the husband, executor therein named, qualified and undertook to carry out the trusts contained in the will and to settle the estate. (41)

Under the power contained in the will, he elected to carry on the business of "Froelich & Co.," and to change its business name to "The Froelich Trading Co." Under this new name, "The Froelich Trading Co." on 6 July, 1894, Frederick Froelich, acting as he supposed under the powers contained in the will of his wife and for what we must suppose he thought to be for the best interests of the children named in the will, bought out the interest of Charles Froelich & Co. in the "Froelich Trading Co." for which he agreed to pay $496.68. And for the payment of this sum he executed a note, under seal, payable six months after date, and signed the same "F. Froelich (Seal), Manager of the Froelich Trading Co."

There is no fraud alleged in this transaction, and it is admitted that the goods were bought for the "Froelich Trading Co."; that they were in the store building of the "Froelich Trading Co." at the time of the purchase and the date of the note, and a part of them are there now.

The allegations of the complaint and the admissions in the answer resolve the whole case substantially into one question, and that is, whether this is a debt of the "Froelich Trading Co." or not.

Of course, it is contended by the plaintiff that it is, while the defendant contends that it is not, and is the individual debt of Froelich. The defendant contends that where an agent or executor gives his note, signing his name with a seal, and adds the word "executor," or words showing his agency, that these words are surplusage and the agent alone is bound. And while it is admitted that this proposition is generally true, it is not always true.

Frederick Froelich is more than an agent. Under the will of his wife, Cornelia, he is a trustee of this fund, with direction to
(42) continue the business, and to change the name of the concern if he thinks best—both of which he did, continued the business and changed its name. He could not continue the business without buying more goods. It was not *his* business. He was not to receive the profits. It was to be carried on for the benefit of the children of the testatrix, and he was "to distribute the *proceeds* to them."

This fund, though created by the will of the testatrix, and in a sense constituting a part of her estate, was not the subject of distribution among the children, after the executor, Frederick, elected to continue the business, but only the *proceeds* that should arise from or remain upon the same being wound up. This being so, it seems to us that the business concern, "The Froelich Trading Co." is liable for this debt. *Edwards v. Love,* 94 N. C., 365. It is contended by defendant's counsel that the defendant, Frederick, has made himself personally liable by the execution of the note sued on. And in our opinion this is true. But where it appears that the purchase of these goods was for the benefit of the "Froelich Trading Co.," and that this concern got the benefit of them, the defendant Frederick making himself personally liable by the manner in which he executed the note does not prevent the business concern, "The Froelich Trading Co." from also being liable. *Edwards v. Love, supra.* Suppose the note had been made and signed in the name of the Froelich Trading Co.; it seems to us that it could hardly be contended that it would not be liable. Or, suppose the goods had been bought just as they were by defendant Frederick, but no note given for them, could it be contended that the business concern, the Froelich Trading Co., would not have been liable?

And if it would be liable with a note given in the name of the
(43) concern, or without any note at all, upon what principle of equity is it not liable in this case?

It is contended that, if otherwise entitled to recover, he cannot do so in this action, for the reason that the executor is not a party. And

it is conceded that in personal actions against a decedent's estate the personal representative must be made a party. In this case the executor is a party defendant, though he is not named or sued as such; nor was it necessary that he should be so named and sued. The cause of action is fully set out in the complaint, and is to collect a debt contracted after the death of the testatrix. The judgment should not be against her estate, but against the defendant Frederick personally, and the Froelich Trading Co., represented by the defendant Frederick, for a debt made by him in the due course of executing the trust. So the proper parties were the Froelich Trading Co. and Frederick Froelich, and both of these are defendants.

It is also contended by defendant that the Froelich Trading Co. is a partnership concern, composed of the four children of the testatrix, and that each of them is entitled to a personal exemption. But from what we have said, it is seen that this is not so. This is a trust fund, created and placed in the hands of the defendant Frederick to carry on the business for the benefit of the children, and they are only to *have the proceeds distributed among them* at the closing out and winding up of the concern. This is the only interest they have in the concern—that is, in what is left after paying the debts and liabilities of the concern. It is clear, then, that they are not entitled to the personal property exemptions claimed.

We see no ground for a specific lien. The plaintiff sets up a mortgage in his complaint, but we see no further mention of it in the case and, of course, no lien can be declared on this.

The judgment of the court below should have been a personal judgment against Frederick Froelich, and also judgment against (44) the Froelich Trading Co. With this modification the judgment is

Affirmed.

Cited: Alexander v. Alexander, post, 474; *Roberts v. Connor,* 125 N. C., 47; *Fountain v. Lumber Co.,* 161 N. C., 38.

FRANCES O. RIGGAN ET AL. v. NANNIE LAMKIN ET ALS.

Will, Construction of—Devise—Estate, Vesting of.

Where a testator provided in his will that his estate should be managed by his daughter L. alone during her life, and at her death by his daughter P., if she should survive L., until the death of his last single daughter, who had never married, and further provided for its division at the death or

marriage of his last single daughter among such of his children as should never marry after the making of the will, and L. survived the other unmarried daughters. *Held*, that no estate vested in the unmarried daughters before their death.

SPECIAL PROCEEDING for the division of land commenced before the Superior Court Clerk of HALIFAX, and heard, on the issues raised, before *Boykin, J.*, at September Term, 1895, of HALIFAX, on an agreed statement of facts.

Mr. Joseph B. Batchelor, for plaintiff.

(48) *Messrs. T. W. Hawkins and Cook & Green for defendants (appellants).*

FURCHES, J. This appeal involves the construction of a most remarkable will. The will was made in 1865, and the testator, William Lamkin, died in 1866, and soon thereafter it was duly admitted to probate. The testator had ten children, all surviving him at the time of his

(49) death—four of whom were then married, the other six, all of whom were daughters, being unmarried.

After providing for the payment of his debts in the first clause of his will, he provides in the second clause that all the residue of his estate shall be kept together, and under the management of his daughter, Letha A. Lamkin, and if she shall die before Parmelia Lamkin, then the estate to be under her management for the use and benefit of his six single daughters.

The third clause of his will is as follows: "At the death or marriage of my last single daughter, who has never married, I give to such of my children—Frances O. Riggan, Lucy H. Riggan, Harriet M. Lamkin, Parmelia E. Lamkin, Letha A. Lamkin, Mary W. Lamkin, Rebecca E. Lamkin, Sarah M. Lamkin, and George W. Lamkin—as shall never marry, after this time, each an equal portion of said balance of my estate; but the shares of my said daughters, Frances O. Riggan, and Lucy H. Riggan, are only given to them during their lives, and after their death said shares are hereby given to their children, then surviving, by their present husbands."

Clause 4. "After the death or marriage of my last single daughter, who has never married, her share of my estate is to be divided equally between my above-named children who shall have never married after this time—the children of any deceased child among them to stand in the place of the deceased parent."

This will was made 23 September, 1865, and on the 30th of the same month the testator made the following codicil: "I do hereby declare that

my daughter, Mahala Paschall, and her two children, William Henry Paschall and Elizabeth H. Bottoms, are not to take any part of my estate under the foregoing will."

The question as to whether the inhibition to marry, placed on (50) the single daughters, was not against the policy of the law and therefore void, leaving the estate to vest in fee, was ably argued by counsel. But the view we take of the case and the construction of the will, does not make it necessary that we should consider this question.

We are clearly of the opinion that no estate vested under the will until the death of Letha A. Lamkin, at which time the testator says, "I *give* to such of my children * * * each an equal portion of said *balance of my estate.*" This being so, that is, no estate being in the unmarried daughters before their death, the removal of the unlawful restrictions was of no avail, as they had no estate to be freed. And as they had no estate, none could descend to their brothers and sisters upon their death.

It only remains to see who were the devisees capable of taking under the will, at the death of Letha A. Lamkin.

And it seems to us to be plainly declared that Frances O. Riggan and her children, Lucy H. Riggan and her children, and George W. Lamkin, who were married at the date of the will, and were never married again after that time, are the only beneficiaries under the will.

Mahala Paschall and her son, W. H. Paschall, and her daughter, Elizabeth H. Bottoms, are expressly excluded from any benefits under the will by the codicil.

And the defendant, Nannie E. Lamkin, is excluded for the reason that her mother, Sarah M. Lamkin, died in 1893, before Letha A. Lamkin, and therefore had no estate in the property willed by William Lamkin, to descend to the defendant, Nannie Lamkin. And she cannot inherit, through her mother, from her aunts, if they had any estate to inherit, being an illegitimate child.

This makes it unnecessary for us to determine whether Letha A. Lamkin, the surviving single daughter, took any estate or not (as the learned Judge below seemed to think she did), as the results are the same, whether she did or did not. The judgment below is affirmed. (51)

MONTGOMERY, J., did not sit in the case.

K. H. CUTCHIN ET AL. v. W. H. JOHNSTON.

Life Insurance Policies—Beneficiaries—Husband and Wife—Transfer by Wife of Interest in Proceeds of Life Insurance Policy Without Consent of Husband—Power of Election by Wife—Mortgage—Subrogation.

1. The proceeds of a policy of insurance on the life of a husband payable to his wife and children belong to them and not to the estate of the decedent.
2. A married woman who is beneficiary in a life insurance policy cannot transfer her interest therein or in the proceeds thereof without the consent of her husband.
3. Where a married woman who was the beneficiary in a life insurance policy issued on the life of her father, elected without the consent of her husband to allow the proceeds to be applied to the reduction of a mortgage on her father's land and then to take as an heir, as directed in her father's will, and upon discovering that the estate was insolvent, she and her husband joined in an action to be subrogated to the rights of the mortgage. *Held*, That by such action the husband ratified the election which his wife had made.
4. Where the beneficiaries of a life insurance policy elect to allow the proceeds of the policy to be applied to the reduction of a mortgage on the decedent's land and then take as devisees under the latter's will, and the estate is found to be insolvent, they are entitled to be subrogated to the rights of the mortgagee as against other devisees and creditors, but only upon paying the mortgage debt in full.

CLARK, J., dissenting, as to par. 2, of headnote.

ACTION, to be subrogated to the rights of the defendant, W. H. Johnston, as holder of a mortgage which plaintiffs, as devisees of their father, partially discharged with the proceeds of a life insurance policy
(52) belonging to them, tried before *Robinson, J.*, at Fall Term, 1896, of EDGECOMBE, upon a case agreed. His Honor gave judgment for the defendants, and the plaintiffs appealed. The facts are stated in the opinion of the court.

Messrs. G. M. T. Fountain and J. L. Bridgers, for plaintiffs (appellants).

Messrs. H. G. Connor and Staton & Johnston, for defendant.

FURCHES, J. Norfleet Cutchin, at the time of his death, held an insurance policy on his life, of $3,000, for the benefit of his wife, Margaret A. Cutchin, and his four children. The money arising from this policy was no part of his estate, but belonged to the widow and children named therein. *Burwell v. Snow,* 107 N. C., 82. But said Norfleet was in-

debted at the time of his death, and had executed a mortgage to the defendant Johnston upon a tract of land known as the "Pipkin tract," to secure a debt of $3,000, this debt being for money he had borrowed to purchase this tract of land. The said Norfleet Cutchin, at the time of his death, left a last will and testament, in which the defendant Johnston was named as executor, and this will was duly admitted to probate, and Johnston qualified as executor thereof. By the will the testator devised his lands, consisting of the Pipkin tract and other lands, to his said widow (who was to have a life estate in the home tract), to his daughter, Mattie Lee Bobbitt, and to the children of his son, R. N. Cutchin, and the children of his son K. H. Cutchin—the wives of the said R. N. Cutchin and K. H. Cutchin—to have a life estate in a part of the land devised to their children respectively. After making this disposition of his property, the testator, by the tenth paragraph of his will, made the following provision: "I direct and provide that the proceeds of the policies of the Equitable Insurance Company, which were (53) issued for benefit of my wife and children, except my son B. E. Cutchin, shall be applied to the satisfaction of the debts I contracted to enable me to purchase the tract of land known as the Nathan Pippen tract, which was conveyed to me by William M. Pippen, as above stated. If my children, collectively or individually, elect to take such proceeds for their own use, and thus prevent the application of the same to said debts, I do, in that event, direct that their, his, or her share be sold and applied to the payment of the note held by W. H. Johnston, for the purchase of the 'Pippen place.' In order to better identify said debt, I hereby state that the price thereof was originally $3,250, but has been reduced to $3,000 and that the bonds therefor were given by me to W. H. Johnston for money loaned me by him to enable me to pay for said lands, and were dated 1 January, 1883."

After the death of the testator the defendant, Johnston, as the agent of the widow and children of the said Norfleet Cutchin, collected this insurance money. And under authority, as he supposed, of the following order, towit: "We, the undersigned, to whom the proceeds of the policy on the life of Norfleet Cutchin, deceased, issued by the Life Assurance Society of the United States, have decided to apply our shares of the same to the payment of the debts specified in the will of the said Norfleet Cutchin, as in the hands of W. H. Johnston, and direct said Johnston to apply the same to the payment of said debts." (Signed by R. N. Cutchin, K. H. Cutchin, Mattie Lee Bobbitt, and Margaret A. Cutchin, on 6 July, 1889, and witnessed by Noah Lewis). He applied that part of this insurance money due to R. N. Cutchin, K. H. Cutchin, Mattie Lee Bobbitt, and Margaret A. Cutchin (less the costs and charges of collecting the same), to the payment of the said debts (54)

secured by the mortgage on the Pippin tract—but leaving a balance still due thereon, including principal and interest, of more than one thousand dollars. By the depreciation in value of the real estate of the testator, his estate has become insolvent to such an extent that it is thought it will take the greater part of the real estate to pay the testator's debt, still remaining due, after the application of the insurance money, as above stated. The Pippin tract, so mortgaged to secure the debt upon which the insurance money was paid, will probably not sell for much more than will pay the balance of the mortgage debt.

Under this state of facts, which are agreed to by plaintiffs and defendant, the plaintiffs have brought this action, in which they allege that as their money has been used, at the testator's request, and as they thought for the purpose of preserving and saving the real estate devised to them or their children, they are entitled to be subrogated to the rights of the mortgagee (or trustee Johnston), the purchase money only being due to him in a fiduciary capacity, and that they shall be paid back their money out of the proceeds of the sale of the Pippin tract and out of the money arising from the sale of any other land belonging to the testator at the time of his death.

The plaintiff, Mattie Lee Bobbitt, alleges, and this is admitted, that she was at the time of the death of the testator, and still is, a married woman, and that by reason of this fact she was legally incapacitated to make an election, or to sign away and transfer her estate in the insurance money without the consent of her husband. And this he has never given.

We are of the opinion that the plaintiff, Mrs. Bobbitt, is not bound by reason of having made an election to take under the will of her father; nor by reason of her assignment to the defendant Johnston, herein
(55) set forth, if the case had only presented that state of facts. But Mrs. Bobbitt and her husband, A. E. Bobbitt, join in this action against the defendant, Johnston, and in the fifth paragraph of their complaint they allege "that they are advised and so believe, that they are entitled to be subrogated to the rights of the mortgagee, whose debt they have paid, and to have their said insurance money returned to them, with interest from the date of the said application of the same on the mortgage debt aforesaid, out of the assets of said estate, and out of the proceeds of the sale of said land." And their prayer for relief is almost in the very words of the fifth article of the complaint, above quoted.

If Mrs. Bobbitt and her husband had not joined in bringing this action, but had brought a personal action against the defendant, repudiating or denying the legal validity of her order to apply the money, and demanding payment of the same to them, it is probable they would have recovered judgment against him for the money wrongfully appropriated. But they do not choose to take this course, and join in with other heirs

and devisees in bringing this action against the defendant Johnston, as the executor of Norfleet Cutchin; and ask that they "be subrogated to the rights of the mortgagee, whose debt they have paid," and that they have their money returned to them, with interest thereon, "out of the assets of said estate and out of the proceeds of the sale of said land."

We are not at liberty to disregard the allegations of the plaintiffs in their complaint, and must take these allegations and the prayer of plaintiffs for relief as a ratification of the order to the defendant, Johnston, to apply the insurance money to the payment of this mortgage debt. This being so, it puts Mrs. Bobbitt on the same footing with the plaintiff, K. H. Cutchin and R. N. Cutchin. The other plaintiffs, being grandchildren, and having no interest in the insurance money, (56) have no right to complain of any application that may have been made of the same. They have no standing in court from any point of view.

This examination of the case reduces it to the consideration of one question—that of subrogation.

The plaintiffs having [been] requested by the testator in his will to apply this insurance money to the payment of this mortgage debt, and in exoneration of the land which was willed to them or their children, are entitled to be subrogated as against the other devisees and legatees of the testator, Norfleet Cutchin, who have paid nothing. *Burwell v. Snow,* 107 N. C., 82; *Liles v. Rogers,* 113 N. C., 197. But subrogation is purely an equitable doctrine, and is never enforced against a legal title or a superior equity. *Vaughan v. Jeffreys,* 119 N. C., 135; 3 Pomeroy Eq. Jur., section 1419, note 1. And as the defendant Johnston has both the legal estate and a superior equity, as to the Pippin tract of land, the plaintiffs can have no subrogation as to the proceeds of this tract, until the balance of the mortgage debt is first paid.

The judgment of the court, reformed in accordance with this opinion, is

Affirmed.

CLARK, J., dissents, as to headnote 2.

Cited: Johnson v. Cutchin, 133 N. C., 122.

STATE ON THE RELATION OF W. WARREN v. NATHAN BOYD, CONSTABLE ET ALS.

Action for False Imprisonment—Action on Constable's Bond—Arrest Without Warrant—Demurrer—Pleading.

1. An irregularity, such as want of registration, will not invalidate a constable's bond, and, if such irregularity existed, it cannot be objected to by a demurrer to a complaint in an action on the bond, but must be set up in the answer.
2. Under section 1883 of the Code the official bond of a constable is liable for the false imprisonment of a person by a constable, as such, without process or color thereof.
3. An allegation in a complaint in an action on a constable's official bond that he, "acting as constable and under color of his office," illegally arrested and imprisoned the plaintiff, is sufficient to place the bond within the liability of section 1883 of the Code, notwithstanding it does not allege that the bond contained any condition other than for the faithful discharge of all the duties devolving upon the constable as such.

(57) ACTION by the State on the relation of William Warren against Nathan Boyd, constable, and the sureties on his official bond, for false imprisonment, tried before *Robinson, J.*, at Fall Term, 1896, of EDGECOMBE, on complaint and demurrer.

The complaint was as follows:

The plaintiff alleges:

1. That the general election held in and for the county of Edgecombe, State of North Carolina, on the first Tuesday in November, 1892, the defendant, Nathan Boyd, was duly elected constable in and for the county aforesaid, Township No. 1, for and during the period of two years next ensuing after the first Monday in December of said year.

2. That thereafter, towit, on the first Monday of December, 1892, the said Nathan Boyd executed his official bond as constable in the penal sum of one thousand dollars, with the above named John C. Dancy and Orren James as sureties thereto, payable to the State of North Carolina and conditioned for the "faithful discharge of all duties devolving upon him as such constable and according to law," which said bond was thereafter duly accepted and approved by the proper authorities.

3. That the said Nathan Boyd thereupon took and subscribed the proper oath of office and entered upon the duties of the said office, and thereafter, towit, the 17th day of December, 1893, acting as con-
(58) stable in and for the said township and county, and under color of his said office, arrested the relator herein and imprisoned him in the jail or "lock-up" used for such purposes by the municipal authorities of the Town of Princeville, and there confined him forcibly and

against his will, from 10 o'clock a. m., till 5 o'clock p. m., restraining him of his liberty and subjecting him to hardships, privations, humiliation and disgrace.

4. That the arrest and imprisonment of the relator as aforesaid was without legal process or color thereof and not in due course of law.

5. That the course and conduct of the defendant Boyd, as aforesaid, was in wanton and reckless disregard of the rights of the relator and wholly without excuse or justification in law.

6. That by reason of the said false arrest and imprisonment, the said relator was detained from his business and restrained of his liberty, to his great loss and damage, and in mind, body and reputation has sustained injuries, in all amounting to the sum of one thousand dollars.

Therefore, the plaintiff relator demands judgment for the full penalty of said bond, towit, one thousand dollars, and the costs of this action.

The demurrer was as follows:

The defendants demur to the complaint, that as it appears from the face thereof the complaint does not state facts sufficient to constitute a cause of action. For that

1. It does not appear that the bond alleged to have been executed was duly proved and registered, and after such registration filed in the office of the register of deeds, and that the defendant Boyd took before the Board of County Commissioners the oaths prescribed for public officers, and also an oath of office in accordance with the provisions (59) of the statute, so as to make it effectual as an official bond.

2. That it does not appear that the alleged arrest and imprisonment of the relator occurred while the alleged official bond was in force, or that the action was brought upon the bond for the year during which the alleged arrest and imprisonment occurred.

3. That it does not appear that the alleged bond contained any clause to cover the case of any abuse or usurpation of power, or that the defendant Boyd would commit no wrong by color of his office or do anything not authorized by law.

4. That it does not appear that the alleged bond contained any other condition than for the "faithful discharge of all duties devolving upon him as such constable, according to law," and the arrest and imprisonment of relator, as alleged in the complaint, is admitted in paragraph 4 thereof, to have been done by the defendant Boyd "without legal process or color thereof and not in due course of law."

The demurrer was sustained and plaintiff appealed.

Messrs. Douglass & Holding and Gilliam & Gilliam, for plaintiff (appellant).

Messrs. Fred. Phillips and Shepherd & Busbee, for defendants.

CLARK, J. The demurrer admits the allegations of the complaint, from which it sufficiently appears that the defendant Boyd was duly elected, qualified, and inducted into office and executed his bond, which was accepted and approved by the proper authorities, and that the alleged arrest was within the period for which he was elected. The Code, 2670. An irregularity would not invalidate the bond (The Code, 1891), and, indeed, none could be alleged by the demurrer. Details, such as
(60) registration of the bond and similar matters, are presumed to be regular, and any defect, if material, must be set up in the answer.

The complaint further alleges that Boyd, "acting as constable and for said township and county, and under color of his office, arrested the relator and imprisoned him," etc., and that such arrest and imprisonment of the relator was "without legal process or color thereof," *i. e.,* was illegal and without authority of law, and "was in wanton and reckless disregard of the rights of the relator," all of which is admitted by the demurrer. Whatever may have been the liability of official bonds for such conduct formerly, the following lines, added to section 1883 of The Code, by the Code Commissioners, are broad enough to cover this case, towit, "every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue and under color of his office." *Kivett v. Young,* 106 N. C., 567; *Joyner v. Roberts,* 112 N. C., 111; *Daniel v. Grizzard,* 117 N. C., 105.

The allegation that Boyd, "acting as constable and under color of his office," illegally arrested and imprisoned the relator, places the bond within the liability imposed by this addition to the statute. In sustaining the demurrer there was

Error.

Cited: Com'rs. v. Sutton, post 301; *Brewer v. Wynne,* 154 N. C., 472.

J. W. SHERROD ET AL. V. J. S. DIXON ET AL.

Husband and Wife—Mortgage of Wife's Land as Security for Husband's Debt—Principal and Surety—Indemnifying Surety—Trust and Trustee.

1. The liability of a married woman, who signs a note with her husband and mortgages her land to secure it, is not personal, but is limited to the value of the land so mortgaged.

2. A Court of Equity will not declare one holding the legal title to land to be a trustee for another where there is no allegation of actual or con-

structive fraud, or of the violation of some confidential or fiduciary relation existing between the parties.

3. Where a husband bought land with the proceeds of a note secured by mortgage on his wife's land, and caused a legal title to be conveyed to his wife to secure and indemnify her against loss by reason of the mortgage upon her land, a trust in such land so conveyed to the wife will not, in the absence of allegations of fraud, be declared in favor of the creditor (mortgagee) for a deficiency remaining after the foreclosure of the mortgage, except upon a reimbursement to the wife of the price of her land sold under the mortgage.

ACTION, heard before *Robinson, J.*, at Fall Term, 1896, of (61) EDGECOMBE. The facts appear in the opinion of the Court. There was judgment for the plaintiffs, and defendants appealed.

Mr. G. M. T. Fountain, for plaintiffs.

Messrs. Gilliam & Gilliam and Shepherd & Busbee, for defendants (appellants).

FURCHES, J. On 4 February, 1888, J. S. Dixon borrowed $2,000 of the plaintiffs, for which he gave them his note due twelve months after date, which note was signed by the defendant, P. L. Dixon, as well as by her husband, the said J. S. Dixon.

At the same time the defendants, J. S. Dixon and wife, made a mortgage to the plaintiffs upon a tract of land belonging to the *feme* defendant, as further *security* for the $2,000 so borrowed of the plaintiffs by her said husband. With this money the defendant, J. S. Dixon, bought of Mayo, Braswell & Lyon, three undivided interests in a tract of land, being three-fourths thereof, and caused the deed therefor to be made to P. L. Dixon, his wife, with a declaration of trust to secure and save her harmless against any loss she might sustain on account of the suretyship, towit, the mortgage she had made to plaintiff as a surety for the money he had so borrowed.

Plaintiffs have foreclosed this mortgage by a sale of the *feme* defendant's land, which they bought at the price of $1,000, and (62) this sum, less expense of sale, has been applied to plaintiff's debt. To this the defendants make no complaint or objection. But plaintiffs say that, after making this application of the money arising from the mortgage sale of the *feme* defendant's land, there is still due them from J. S. Dixon, the husband, $1,779.53, and that the land purchased from Mayo, Braswell & Lyon, was conveyed to the *feme* defendant in trust to indemnify and save her harmless on account of her suretyship and mortgage, and that, this being so, the law implies a trust to plaintiffs or for their benefit, and that the remainder of their debt must be first paid

before the *feme* defendant can have any benefit from the land. This contention of plaintiffs is denied by defendants. And this brings us to a discussion of the law involved in the case.

The legal title to this land was never in J. S. Dixon, the husband. It was bought by the husband and paid for with his money. But by his direction the deed was made to his wife, P. L. Dixon. So we see that neither 13 nor 27 Elizabeth applies, because they make the conveyance void, and this would put the title back in the grantors, Mayo, Braswell & Lyon. *Gowing v. Rich,* 23 N. C., 553; *Guthrie v. Bacon,* 107 N. C., 337, and many other cases cited in Womack's Digest. Neither was the equitable tile in him, as against his wife. But if it was made to the wife without consideration, or for the purpose of defrauding the creditors of the husband, then a court of equity will take hold of it, and appropriate the same to the payment of the husband's debts.

It is not claimed by plaintiffs that they are entitled to have this land subjected to the payment of the balance of their debt, upon the ground of fraud, or for the want of consideration, by reason of which the
(63) title in the *feme* defendant is void. But they allege in their complaint that these lands have been conveyed to her by the said Mayo and others, without any suggestion of fraud, or want of consideration on her part. And the judge below finds as a fact, upon which he bases his judgment in favor of plaintiffs, that these lands were conveyed to the *feme* defendant *"in trust* to indemnify her against loss as surety of J. S. Dixon." And in his judgment, ordering the land to be sold for the payment of the balance of plaintiff's debt, the court speaks of it as the land being conveyed to the defendant, P. L. Dixon, *in trust* as aforesaid. The plaintiffs would not be at liberty to treat it as a conveyance, creating a trust estate in the *feme* defendant, and at the same time treat it as a void conveyance on account of fraud, or for want of valuable consideration. And we will do the plaintiffs the justice to say that they have not attempted to do so, but that they have all the time treated the deed as a valid conveyance and *in trust* to the *feme* defendant; and that this trust enured to the benefit of the plaintiffs, and the residue of their debt must be paid before the *feme* defendant can be benefited.

This has relieved us from the discussion of some very interesting questions, that, at first, seemed to be presented, such as the parol declaration of the trust which we thought might be sustained under *Shelton v. Shelton,* 58 N. C., 292, and that line of cases. Also, from considering the question of consideration, which it seemed to us might have been sustained under *Potts v. Blackwell,* 56 N. C., 449, and *Sutherland v. Fremont,* 107 N. C., 565.

It must be admitted that the general rule is that where one is *surety* for the principal debtor, and the surety takes *a security* for the prin-

cipal debtor, such as a mortgage for the purpose of indemnifying and saving harmless the *surety,* that this *security* does enure to the benefit of the creditor, whose debt must be paid before the *surety* (64) can have any benefit therefrom. And if this case falls under this general rule, it must be governed by it.

It is said in *Wiswall v. Potts,* 58 N. C., 184, that the reason of this rule is, that the debt due the creditor affords the consideration that supports the mortgage. And another reason that suggests itself to us is, that the surety is bound for the whole debt for which he takes indemnity. And the payment of the debt discharges the surety from his liability, and he is not discharged until the debt is paid in full. In this way he gets the benefit of the *security:* the surety's liability being coextensive with that of his principal for the whole debt; that when the mortgage is made, it is a dedication of that property to the payment of the debt for which the surety is liable. This being so, the creditor becomes at once the *cestui que trust,* to the extent of the surety's liability—the entire debt. This being so, the insolvency of the surety does not affect his obligation to pay, nor does it discharge the debt. So it is with the statute of limitations, as to the surety. Because this does not pay the debt, nor does it discharge the surety from his obligation to pay the debt. The law, after the statutory lapse of time, refuses to give the creditor a legal remedy to collect his debt. So, it seems to us that neither of these reasons sustain the plaintiffs' contention that they are the beneficiaries of this trust, held by the *feme* defendant.

Suppose the surety, who is bound for the whole debt, pays off and satisfies the same in full, does all that he contracted to do. Can it be contended that he would not then be entitled to the benefit of the indemnity? Certainly not. He is one of the objects of the trust. It is made for his benefit as well as for that of the original creditor. But as he was only surety, and his principal would be liable to him if he paid the debt, the law makes the fund which the principal debtor (65) has furnished liable in the first place. If the *securities* had been given to the creditor, and the surety had paid off the debt, he would have become entitled to the securities given to the creditor, to the extent of indemnifying him.

It is admitted that the *feme* defendant is under no obligation to the plaintiffs for the payment of this debt, on account of her signing the $2,000 note. Her only liability to plaintiffs is created by the mortgage, which is *security,* and not a suretyship. And she is not liable to plaintiff for anything on account of this mortgage. She has by her deed dedicated that much of her land to the benefit of plaintiffs as a *security* for her husband's debt. That much they have. But they have no obligation on her that she will pay one cent of plaintiff's debt.

Therefore, to free this matter from circumstances that are calculated to confuse the mind, and that have no legal bearing upon the question under consideration, we will take Mrs. Dixon out of this consideration for the present. Then, instead of its being Mrs. Dixon who mortgaged $1,000 worth of her land as a *security* for J. S. Dixon's debt to the plaintiffs, suppose that John Jenkins, a neighbor of J. S. Dixon, had said, "I will not sign your note as surety to the plaintiffs, but I will mortgage a certain tract of land, worth $1,000, to them as a *security,*" and he does so. After this, J. S. Dixon buys a tract of land, and causes the title to be so conveyed to said Jenkins in trust to indemnify him against loss. The plaintiffs' debt is not paid, and Jenkins' land is sold. Can it be that plaintiffs could have this land sold and applied to their debt, and Jenkins get nothing? Where is the connection between Jenkins and the plaintiffs? He owes them nothing. He has not agreed to become their trustee, nor has he agreed to take this and hold it in trust for them.

There must be some continuity, something to connect the trustee (66) and the *cestui que trust,* before there can be a trust.

It being admitted that Mrs. Dixon is the legal owner of this land, and, as we think, the equitable owner to the extent of the price of her land, equity will not declare her a trustee for the plaintiffs who do not claim to have the legal title, and, according to the view we have taken of this case, have no equitable title. Nor have they any specific or equitable lien on this land, as it was not bought with their money, nor was it bought for them. Before a court of equity will declare a party holding the legal title to land a trustee, there must be allegations of fraud, actual or constructive, or some confidential or fiduciary relations existing between the parties, which have been violated.

There is no allegation of fraud in this conveyance, and no proof of any confidential relations between the plaintiffs and the *feme* defendant, and there can be no trust. The plaintiffs seek to declare Mrs. Dixon their trustee. It cannot be done.

In thus holding, we do not say that plaintiffs are without any remedy. As the land was bought with J. S. Dixon's money, and the deed from said Mayo and others was made to the *feme* defendant to indemnify her, and as it appears that she has been damaged to the amount (we will say of one thousand dollars), the residue, if any, resulted to J. S. Dixon. This estate would only be equitable, as we have seen from what has already been said. But by a proper reformation of the pleadings in this action (by permission of the court), or by a nonsuit in this, as to the lands now sought to be subjected to plaintiff's debt, and a new action, it may be that these lands, so conveyed to Mrs. Dixon, might be sold under an order of the court, and Mrs. Dixon, being first reimbursed, the residue applied to the plaintiffs' debt.

Error.

CLARK, J., dissenting: "Where a wife joins her husband in a (67) conveyance of her separate property to secure a debt of her husband, the relation she sustains to the transaction is that of surety." *Reade, J.*, in *Purvis v. Carstaphan*, 73 N. C., 575; 24 Am. & Eng. Enc., 720, and numerous cases cited.

"In all cases where the wife executes a mortgage on her property for her husband's debts, or for money loaned to him, it is well settled that she occupies the position of and is entitled to all the rights and privileges of surety for her husband." Kelly Contracts of Married Women, 105; *Hinton v. Greenleaf*, 113 N. C., 6; *Smith v. B. & L. Asso.*, 119 N. C., 257; *Montgomery J.*, in *Hedrick v. Byerly*, 119 N. C., 420; Brandt Suretyship, sections 34, 35, and cases there cited. The only distinction between such suretyship and any other is that the liability of the wife as surety is restricted to the value of the property mortgaged by her. *Hubbard v. Ogden*, 22 Kan., 363. There is no decision in our courts that a married woman cannot be surety for her husband. *Pippen v. Wesson*, 74 N. C., 437, merely holds that the bond of a woman, whether as principal debtor or surety, is not binding unless she charges her separate estate with its payment. Any indemnity furnished by the principal to his surety enures to the benefit of the creditor and is a security for his debt (*Morrill v. Morrill*, 53 Vt., 74), which he may enforce whether the surety is or is not indemnified. *Smith, C. J.*, in *Matthews v. Joyce*, 85 N. C., 258, on p. 264, citing Story Equity Jur., sec. 499; *Wiswall v. Potts*, 58 N. C., 184; *Bank v. Jenkins*, 64 N. C., 719; *Harrison v. Styres*, 74 N. C., 290. In *Ijames v. Gaither*, 93 N. C., 358, *Ashe, J.*, says: "The principle is so well settled as not at this day to admit of controversy, that where a mortgage is given by a principal debtor to his surety, to indemnify him as such surety, the creditor has an equitable claim to the securities, and upon the insolvency of both principal (68) and surety, may have the security subjected to the satisfaction of his debt"—citing Jones on Mortgages, sec. 385 and 387. To same effect, Brandt on Suretyship, sec. 324, 325 and many cases there cited.

The answer of defendants admits that the money borrowed by the husband was invested in the land in controversy, and that the deed therefor first made to him was changed to avoid the expense of another conveyance, and was made to the wife in trust to indemnify her for any contingent loss by reason of her suretyship to her husband, and his Honor finds such to be the fact. The husband was therefore the equitable owner of the land, and it could have been subjected by the plaintiff to the payment of his debt. *Thurber v. LaRoque*, 105 N. C., 301. If the plaintiff had proceeded first against such equitable estate of her husband, upon its proving insufficient, he would not have been estopped to proceed against the land mortgaged by the wife as surety. That the plaintiff pro-

ceeded first against the land mortgaged by the wife and then against the equitable estate of the husband, in the land paid for by his money, does not increase or affect the rights of the surety in any way. If, upon application to the husband's debt of the property mortgaged by the wife as security, the wife can instantly subtract from liability to the creditor an equal amount of the husband's property which has been conveyed to her in trust to indemnify her, then such suretyship is a mere delusion. Instead of having the additional resource of the property of the wife mortgaged as security for his debt, the creditor has in fact no security but the extent of the husband's property, if an equal amount of the husband's property can thus be relieved of liability to the creditor and turned over to the wife to reimburse her. Such security for debt
(69) adds no more to the amount of property which would have been liable to the claim of the creditor than if no security had been given. Such proceedings resemble nothing so much as Sancho Panza's feast in the island of Barataria, when the fine dishes set before him were whisked away before he could touch them.

There is no distinction between the suretyship of the wife and that of any other person, except that the liability of the wife is restricted to the value of the property mortgaged by her, but there is nothing in that restriction which can alter the long recognized principle that property conveyed by a principal debtor, to indemnify a surety against loss, enures to the benefit of the creditor. The wife might have charged her entire separate estate with the payment of her husband's debt (*Flaum v. Wallace,* 103 N. C., 296), or, as in this case, the specific property embraced in the mortgage. To the extent of the charge she is surety for her husband, and with the same duties and rights as any other surety.

Cited: Bank v. Fries, 121 N. C., 243; *McLeod v. Williams,* 122 N. C., 453; *Meares v. Butler,* 123 N. C., 208; *Jenkins v. Daniels,* 125 N. C., 168; *Blanton v. Bostic,* 126 N. C., 421.

JOHN V. GOSSLER v. M. L. WOOD.

Action for Money Received as Agent—Trial—Evidence—Error Cured—Appeal — Practice — Pleadings as Evidence — Breach of Trust — Arrest.

1. Error in disallowing a proposed question is cured where the witness subsequently answers it.
2. Where an exception to an instruction fails to point out the error complained of and nothing prejudicial appears in the instruction, the exception will be overruled.

3. Pleadings *as evidence* are not before the jury and cannot be referred to or commented on, as such, unless they have been introduced like other written evidence.

4. Where a complaint contained several distinct and properly numbered allegations, and the first paragraph of the answer recited "that sections 1, 2, 3, 4 and 5 are admitted," such paragraph was admissible as evidence, when offered by the plaintiff, without the remaining parts of the answer which constituted distinct issues for the jury.

5. The intent with which a breach of trust is committed is immaterial.

6. A defendant in an action for money received or property fraudulently misapplied by him, as agent, may be arrested under the provisions of section 291 (2) of the Code.

ACTION to recover money alleged to have been received for the (70) plaintiff by the defendant and fraudulently misapplied by the defendant, heard before *Graham, J.*, and a jury, at Spring Term, 1896, of BERTIE. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

Mr. F. D. Winston, for plaintiff.
Messrs. R. B. Peebles and Spier Whitaker for defendant (appellant).

FAIRCLOTH, C. J. The pleadings in this case are complaint, answer, and counterclaim, amended answer and amended complaint. The issues are these: 1. Was the plaintiff the owner of the timber described in the complaint? Answered by the jury, "Yes." 2. Did the defendant contract with the plaintiff to cut, remove, and sell the timber, as alleged in the complaint? "Yes." 3. Did the defendant cut or remove and sell 101,291 feet of said timber at the price of $5.50 per thousand feet? "Yes." 4. Did the defendant fail to account for and pay over to plaintiff the proceeds of said sale of timber, after deducting the sum of $2.50 per 1,000 feet, as alleged in the complaint? "Yes." 5. Did the defendant wrongfully take, detain, and convert said timber, or the proceeds of the same? "Yes." 6. Did the plaintiff contract with the defendant that the defendant should cut and deliver 500,000 feet of cypress timber for the plaintiff? "Yes." 7. Did the plaintiff wrong- (71) fully prevent the defendant from cutting and delivering said 500,000 feet of cypress timber? "No." 8. If so, what damages, if any, has the defendant sustained?

This action is brought to recover $329.66, the net balance due plaintiff on a contract to cut cypress timber trees and sell the same, which contract required the defendant to make return of account of sale and remit balance of proceeds to the plaintiff. The plaintiff alleges that the defendant refused to pay said account, and this is admitted. Plaintiff also

alleges that defendant's refusal is a breach of the fiduciary relation and confidence between them by reason of his agency. This is denied. Defendant in his answer avers that at the same time he had a parol agreement with the plaintiff to cut 500,000 feet of cypress timber on agreed terms, and that he was stopped from so doing by plaintiff, after some expenditures, and was damaged $1,000, and alleges this as a counterclaim, and offers this as his excuse for refusing to pay the net balance aforesaid. In his amended answer he denies several of the allegations admitted in his original answer to be true. The case was tried upon the admissions in the pleadings and the evidence of the parties, and the jury found all the issues in favor of the plaintiff.

Pending the action, the plaintiff obtained an order of arrest against defendant, as he was authorized to do under Code, 291 (2), and so held in *Boykin v. Maddrey,* 114 N. C., 89. There being no exceptions by either party to the evidence touching the counterclaim, the finding of the jury on the 7th issue cut the counterclaim up by the roots, and that is out of the case. His Honor rendered judgment for plaintiff and against the counterclaim, and adjudged that plaintiff is entitled to an execution against the person of the defendant. All the exceptions (72) were abandoned in this court except the 3d, 4th, 7th, and 9th.

The 4th exception must be overruled, for the reason that the question was subsequently answered by the defendant, when he said, "I deposited the money with Harrell by advice of counsel, to hold until litigation ended."

The 7th exception was to the charge that if the jury believed the evidence they should answer the second, third, and fourth issues "Yes." The original answer admits those facts to be true, but they are denied in the amended answer, and we find nothing in the evidence of the defendant or other witness denying the facts found by the jury on those issues. Exception overruled.

The ninth exception was to this part of the charge: "A conversion consists either in the appropriation of a thing to a party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own. If a person entrusted with another's goods places them in the hands of a third person, contrary to orders, it is conversion." The exception fails to point the error, and we see nothing in the charge prejudicial to the defendant. The exception must be overruled.

The third exception is overruled, but it requires more attention. The direct point presented, so far as we can find, has not been before decided or discussed by this court. The plaintiff's complaint contains ten distinct and numbered allegations. The first section of the answer to the

complaint says: "That sections 1, 2, 3, 4, and 5 are admitted." During the trial the plaintiff offered in evidence paragraph 1 of the original answer of the defendant, which appears from the answer in the record. The defendant objected to the introduction of the said paragraph unless the whole answer was put in. Objection overruled. Form- (73) erly, in courts of law and equity, the several parts of the allegations and answers were usually interlinked and explanatory of each other, so that the just rule was to introduce the whole allegation or answer. 1 Taylor on Evidence, sec. 660 and 663. An admission in a former trial of the same matter may be read in evidence in a later trial. *Grant v. Gooch,* 105 N. C., 278. Since the adoption of the present system of practice and procedure, the complaint must contain a plain and concise statement of the facts, and each material allegation shall be distinctly numbered (Code, sec. 233; 2), and denials in the answer must be equally certain (Code, sec. 245), and the jury must separately determine the merits of each issue. In good pleading, facts should be stated and not the evidence nor the law. Pleadings *as evidence* are not before the jury and cannot be referred to or commented on, as such, in the argument, unless they have been introduced like other written evidence. *Smith v. Nimocks,* 94 N. C., 243.

In *Adams v. Utley,* 87 N. C., 356, two answers had been filed and the plaintiff offered the first to the jury as an admission, without offering the second answer. This court held that the plaintiff had the right to read the first answer without the second. This was approved in *Guy v. Manuel,* 89 N. C., 83, and several later cases. But these do not quite fit the present question.

In *McDonald v. McDonald,* 16 Vt., 634, *Redfield, J.,* speaking for the court, said: "In general, the orator may read any portion of the defendant's answer as evidence, without making any other portion of the same evidence in favor of the defendant. It is said in some of the cases that the orator has no right to select parts of sentences, but must take the entire sentence. This may be true, if, by taking parts of a sentence the sense is perverted or rendered uncertain; but beyond that I do not think the rule can be made of such significance." (74)

In *Bompart v. Lucas,* 32 Mo., 123, it was held that where the plaintiff reads in evidence a portion of an answer of defendant he must read the whole of the sentence, and not admit that part which qualifies the statement read, and said that a contrary rule would be "only equalled by the case of the infidel, who undertook to prove from the Scriptures the want of a Deity by reading the words 'there is no God,' and omitting the preceding words, 'The fool hath said in his heart.'"

We are of opinion that the plaintiff, upon the facts, had a right to introduce the admissions in the first five allegations of the answer, without

the others. The allegations 1, 2, 3, 4, and 5, admitted, and the remaining ones do not blend, or explain the other, but constitute distinct issues for the jury.

The defendant deposited the money with Harrell, to whom he was indebted over $300, and refused to account, and set up a counterclaim. He insists that he did so in good faith and ought not to be held to have committed any breach of trust. Unfortunately, he had no cause for a counterclaim, and the intent with which a breach of trust is committed is immaterial, as explained in *Boykin v. Maddrey,* 114 N. C., 89. Judgment Affirmed.

DOUGLAS, J., dissenting.

Cited: Trust Co. v. Benbow, 131 N. C., 418; *Grocery Co. v. Davis,* 132 N. C., 98; *Lewis v. R. R., ib.,* 385; *Mfg. Co. v. Steinmetz,* 133 N. C., 193; *Norcum v. Savage,* 140 N. C., 473; *Organ Co. v. Snyder,* 147 N. C., 272; *Daniel v. Dixon,* 161 N. C., 379; *Berbarry v. Tombacher,* 162 N. C., 499.

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(75)

J. B. NICHOLS & BRO. v. ANDREW SPELLER.

Agricultural Lien—Chattel Mortgage—Agricultural Supplies.

1. One who advances money or supplies, on an agricultural lien, for making a crop, is not bound to see that they are used on the farm, his duty being discharged by furnishing them.
2. An instrument which gives a lien on a crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with the ordinary powers of sale, is valid both as a chattel mortgage and an agricultural lien and, as between the parties, in the absence of fraud and compulsion, the lien attaches for dry goods, shoes, tobacco, powders, snuff and candy, without a showing that such articles were actually used in making the crop.

CLAIM and delivery, tried before *Robinson, J.,* at Fall Term, 1896, of BERTIE. A jury trial was waived, and the court found the facts. The plaintiffs introduced a lien bond from Andrew Speller to plaintiffs, as follows: "Whereas, J. B. Nichols & Bro. have this day agreed to make advances of supplies and money to Andrew Speller during the year 1893, not to exceed $750, for the cultivation of crop upon the following described land [describing the land]: Now, therefore, in consideration of the premises, I promise to pay the amount advanced me on or before the first of November, 1893, and do hereby give to Nichols & Bro. a lien

upon all the crop which may be made by me on said land during the year, to the extent of the advances made, in accordance with the statute in such case made and allowed, and if I fail to pay by the time specified, Nichols & Bro. shall have the power to take possession of the crop, sell the same, and apply the proceeds to the payment of the advances, and the surplus, if any, to be paid to Andrew Speller. And, for the further securing of the advances, I do hereby give and convey to them these articles of personal property: One black horse mule [and other mules described, cart and wagon], and all other personal property, (76) of every kind I now possess, but on this special trust: that if I fail to pay in pursuance of said agreement they may sell the property, or so much thereof as may be necessary, for cash, at public auction, first giving twenty days' notice at three public places in Bertie County, of the time and place of sale, and apply the proceeds, etc. It is further agreed that if Andrew Speller shall, from any cause, fail to cultivate the crop or do any act the effect of which would defeat the objects of this conveyance, then Nichols & Bro. shall not be obliged to make any further advances, and the indebtedness already incurred shall become due and collectable at once, in the manner herein provided." Dated 24 March, 1893, and signed and sealed by Andrew Speller. The plaintiff also put in evidence an itemized account, amounting to $782.68, and credited with $623.78, leaving a balance due to Nichols & Bro. from Andrew Speller of $158.90. J. B. Nichols testified that he was a member of the firm of J. B. Nichols & Bro., and that the articles charged in the account were furnished Andrew Speller under the contract (set out above). "I made the bargain with him, and the goods were sold under the contract. He admitted to me that he owed me a balance of $158 when I exhibited the account to him. The whole amount was advanced. He admitted the account, and asked for more time on it. Outside of our agreement (as set out above), nothing was said at the time of getting the various articles charged in the itemized bill. He called for the articles, and got them at prices charged, which were the usual prices. He was not my tenant or the firm's tenant; farmed on his own land." M. L. Spruill testified, after objection on the part of defendant, which was overruled, and an exception noted: "The articles read over to me [counsel having read over the underscored articles, which defendant claims were not advancements] are necessary supplies for agricultural purposes. (77) [The articles underscored are as follows: Flannel goods, calicoes, homespun, buttons, spool cotton, sugar, dipper, merchandise, shoes, coffee, powder, salt, snuff, flour, cakes, candy, hose, lye, soap, hat, cap, velvet, homespun, and articles of a similar character.] I am a farmer of several years' experience, and I live near defendant." The items of the account underscored, amounting to the sum of $89.20, were objected

to by defendant on the ground that they were not agricultural supplies and advances. It was admitted that all of the items were sold and furnished after the execution of the lien bond, except the sum of $56.14, which was anterior to the execution of said bond. In apt time defendant asked in writing the following instructions: "That in order for plaintiff to recover for any goods, shoes, tobacco, etc., they must show affirmatively that such articles were used for the purpose of making a crop." "That plaintiffs have not shown affirmatively that such articles were thus used, and that they cannot be allowed the plaintiffs in this action." "That in order for plaintiffs to recover for the sugar, coffee, etc., they must show affirmatively that such articles were reasonable and necessary for use of defendant to enable him to make the crop." "That plaintiff has not shown this, and is not entitled to recover for such items in this action."

All of these instructions were refused, and defendants excepted. There was judgment for the plaintiffs and defendants appealed.

Mr. Francis D. Winston for plaintiffs.
Messrs. Martin & Peebles for defendant (appellant).

DOUGLAS, J. There are three exceptions relied upon by the defendant appellant, all to the refusal of the court below to give special instructions prayed by the defendant. These instructions practically
(78) depended upon the single question whether certain articles, such as dry goods, shoes, tobacco, powder, snuff, and candy, were or could be covered by an agricultural lien, under section 1799 of The Code.

The lien in question not only gave "a lien upon all the crops," to be made by the defendant upon the land in question, with full power to take and sell upon default; but also in apt and effective terms conveyed to the plaintiff, as further security for such advances, four mules and other personal property, with the ordinary powers of sale. This paper was therefore a valid chattel mortgage as to the personal property, and equivalent to a mortgage as to the crops. *Rawlings v. Hunt,* 90 N. C., 270. There is no allegation of fraud, compulsion or other undue influence in the execution of the lien, or the purchase or selection of the goods. They appear to have been bought at the usual prices by the defendant, and the debt therefrom resulting admitted by him. The appellant is the original lienor, and the original parties to the lien are the only parties before this court. Under these circumstances, we see no reason why the defendant could not purchase such goods as he saw fit, and charge his own property with the payment of the debt. Section 1799 of The Code was not intended simply to permit a person to give a lien upon his crop for advances; but also to give such a lien a *"preference to all other liens*

existing or otherwise to the extent of such advance." Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the mortgagor must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the plaintiff was not bound to see that the property was used on the farm—his (79) duty being discharged by furnishing it. *Womble v. Leach,* 83 N. C., 84. In the leading case of *Clark v. Farrar,* 74 N. C., 686, this court, holding that an agricultural lien, valid upon its face, was void because it did not speak the truth, says that the deed may be good between the parties to it, though not good against a purchaser for value. We are not aware of any case wherein this court has held the contrary, between the original parties. As between them, even registration is not essential. *Gay v. Nash,* 78 N. C., 100, cited and approved in *Reese v. Cole,* 93 N. C., 87. The restrictive provisions in section 1799 of The Code are manifestly for the security of creditors and others dealing with the debtor. *Reese v. Cole, supra.*

If there were any elements of fraud or compulsion in this case, our judgment might be different, but as it is presented to us we can see no error. Whatever may be our sympathies, we cannot undertake to set up over parties, *sui juris* a *quasi* guardianship repugnant to our institutions and dangerously infringing upon the *jus disponendi* inseparable from ownership.

Affirmed.

(80)

LILLY E. ROBBINS v. A. S. RASCOE ET AL.

Deed—Delivery—Cancellation of Deed.

1. When the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in some way reserving the right to repossess it, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery; hence,

2. Where a donor signed and sealed a deed of gift and delivered it to a deputy of the Superior Court Clerk with instructions to have it proved by the subscribing witness before the Clerk, who was then absent, and to have it registered, and shortly after, and before probate, the maker took the deed from the deputy, saying he had changed his mind about the delivery owing to some displeasing conduct of the grantee. *Held,* That the delivery was complete on delivery to the deputy, notwithstanding the fact that the grantee knew nothing of the deed until after its recall.

ROBBINS *v.* RASCOE.

ACTION tried before *Robinson, J.,* and a jury at Fall Term, 1896, of BERTIE. The action was instituted by the plaintiff, as the alleged grantee of Thomas Gilliam, to have the defendants declared trustees of and to convey certain lands to the plaintiff for life, with remainder in fee to her children, according to the limitations in a deed alleged to have been made and delivered by said Gilliam, and subsequently destroyed. The facts appear in the opinion of the Court. From a judgment for the plaintiff the defendants appealed.

Messrs. Martin & Peebles for plaintiff.
Mr. Francis D. Winston for defendants (appellants).

FAIRCLOTH, C. J. The natural father of the plaintiff executed a deed *signed and sealed* conveying property to the plaintiff, and "delivered said deed to the deputy clerk of the Superior Court of Bertie County, with instructions to have the same proved by the subscribing witness before the clerk of said court, who at the time was absent from his office, and to have the same duly registered," and some time thereafter, before any probate was had, without plaintiff's knowledge or consent, the grantor took the deed from the deputy clerk and carried it away from the office, stating that he had changed his mind about the delivery of the same, and after his death his executor destroyed the deed. Plaintiff knew nothing
(81) of the deed or of its recall. The court held that the delivery was complete, and the title passed. Exception and appeal. This is the only question in the case, the defendant denying that there had been a delivery.

Upon principle and the authorities, we must affirm the judgment. The principle is that when the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in some way reserving the right to repossess it, the delivery is complete, and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery.

In *Threadgill v. Jennings,* 14 N. C., 384, it is stated that, "A deed is good if delivered to a stranger to the use of the obligee" and "at the time it was thus delivered."

In *Tate v. Tate,* 21 N. C., 26, David Tate executed a deed of bargain and sale conveying land to his infant children, and delivered the deed to their uncle, Hugh Tate, in whose possession it remained until his death, when the bargainor went to the widow of Hugh Tate and obtained the deed before it was registered, and canceled it by tearing off his signature, and that of the witness, and he, David Tate, conveyed the same property

to another. The delivery of the deed was upheld, the Court saying, "Where the maker of a deed parts from the possession of it to anybody, there is a presumption that it was delivered as a deed for the benefit of the grantee, and it is for the maker to show that it was on condition, as *an escrow.* Such a delivery to a third person is good, and the deed presently operates, and infants may assent to such a deed to themselves, and their assent is presumed until the contrary appears"—citing several English cases.

In *Kirk v. Turner,* 16 N. C., 14, *Henderson, J.,* says: "A delivery of a deed is in fact its tradition from the maker to the per- (82) son to whom it is made, or to some person for his use; * * * for his acceptance is presumed until the contrary is shown. It being for his interest, the presumption is, not that he *will accept,* but that he *does.*"

In *Morrow v. Alexander,* 24 N. C., 388, a father residing in South Carolina signed and sealed a deed to his daughter residing in North Carolina, and delivered it in South Carolina to his son to be given to his daughter; held by this Court that the delivery to his son was complete and the title passed. *Gaskill v. King,* 34 N. C., 211, sustains and cites *Tate v. Tate, supra.*

In *McLean v. Nelson,* 46 N. C., 396, the Court says: "When one delivers a deed to a third person in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed, and the legal effect is to pass the property. This presumption may, of course, be rebutted by proving that the party refused to accept it; but until he refuses, his assent is presumed for the purpose of giving effect to the instrument as a deed. *Ut res magis valeat quam pereat.*"

In *Phillips v. Houston,* 50 N. C., 302, the donor *signed and sealed* the deed and delivered it to Holland, the witness, "and requested him to take it to the courthouse and have it recorded," which was not done until after the donor's death; it was held that the delivery to the first person (Holland), was perfect, and it made no difference whether it was registered before or after the donor's death, the Court saying: "In the case of *Hall v. Harris,* 40 N. C., 303, it was said by the Court that the delivery of a deed depends upon the fact that a paper *signed and sealed* is put out of the possession of the maker. That, we think, is the true test and, if it appear that the grantor or donor has parted with the possession of the instrument to the grantee or donee, or to any other person (83) for him, the delivery is complete, and the title of the property granted or given thereby passes. But it will be otherwise if the grantor or donor retains any control over the deed: as if he, when he hands it to a third person, requests him to keep it and deliver it to the person for whom it is intended, *unless* he shall call for it again. These principles

will be found to govern all the cases, beginning with *Tate v. Tate,* 21 N. C., 22—and then a large number of North Carolina cases are cited."

This principle has governed this court to the present time. *Helms v. Austin,* 116 N. C., 751; *Frank v. Heiner,* 111 N. C., 74.

The case of *Adams v. Adams,* 21 Wall., 185, is well argued by the Court, and the same conclusion arrived at. It is there stated upon the ancient authorities that if A execute a deed to B and deliver it to C, though he does not say to the use of B, yet it is a good delivery to B if he accepts of it, and it shall be intended that C took the deed for him as his servant—that it is conclusive unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed. There are some decisions in the States holding otherwise, but they are not in harmony with the higher and better authorities. *Parmalee v. Simpson,* 5 Wallace, 81, was a controversy between a grantee and mortgagee, and was decided in conformity to the laws of Nebraska. *Hawkes v. Pike,* 105 Mass., 560, is a decision to the contrary, but the annotator of 4 Kent's Com., calls attention to this case as out of line with the better decisions.

In *Hedge v. Drew,* 12 Pick., 141 (Mass.), the grantor left the deed with the register to be recorded, his daughter being the grantee. The deed was dated 2 October, 1823, and was recorded 3 October,
(84) 1823. An attachment was levied on the same property on 4 October, 1823. The Court held unanimously that the delivery was equivalent to an actual delivery to the grantee personally.

In the case before us, that the grantor intended a delivery and that the title should pass at the time he put the deed in the hands of the deputy clerk, with instructions to have it probated and registered, is manifest from his statement, when he took the deed from the deputy clerk, saying, "that he had changed his mind about the delivery of the same, owing to some conduct of the plaintiff that displeased him."

Affirmed.

CLARK, J., dissenting. It is elementary law that a deed is a "written instrument, signed, sealed and delivered," and that the delivery is as essential as the signing and sealing. There are cases which hold that registration raises a presumption of acceptance by the grantee; 1 Devlin on Deeds, sec. 392, and cases cited, all of which hold that such presumption can be rebutted by evidence. There are cases where a deed is delivered to a party for the benefit of infant children, in which case, as they cannot accept, the law presumes acceptance, *Ellington v. Currie,* 40 N. C., 21; *Gregory v. Walker,* 38 Ala., 26, and also cases where a deed has been delivered to a third person to be registered at the grantor's death, in which event its recall by the grantor being impossible, a deliv-

ery is presumed. But the doctrine of constructive delivery has been extended no further, and there is no case applying it to the facts of the present action, and many to the contrary. Here, the deed, which was a deed of gift, was not delivered to the grantee, nor to her agent, nor even to any one to deliver it to her; it was not accepted by her, nor was its existence then known to her, nor till after its revocation by the grantor. It was not even registered, and hence there is not the (85) presumption of acceptance or delivery. The grantor gave it to a messenger, the deputy clerk, who was to have the clerk probate it, and was then to hand it to the register, who was to record it, but before it got into the hands of the register, indeed before it was probated, the grantor changed his mind and took back the deed. Here, certainly, there was no delivery, and no presumption of delivery. In *Parmalee v. Simpson,* 5 Wallace, 81, the United States Supreme Court held that though the deed is delivered to the register and recorded, this is not a delivery if the grantee is ignorant of the existence of the deed, as this rebuts the presumption of acceptance raised by the registration, an acceptance being necessary to constitute delivery. In *Banks v. Webster,* 44 N. H., 264, 268, it is said "that the mere sending of a deed to the registry for record is not a delivery, is well settled," citing *Barnes v. Hatch,* 3 N. H., 304; *Maynard v. Maynard,* 10 Mass., 456; *Samson v. Thornton,* 3 Metc., 281 (S. c., 37 Am. Dec., 135); *Oxmard v. Blake,* 45 Me., 602; 4 Kent Com., 455, 456: "Even though the deed was executed and sent to the register in consequence of a previous agreement that this should be done, if the grantee did not know of its being sent," *Jackson v. Phipps,* 12 Johns., 418; "The acceptance is essential to a delivery," *Jackson v. Dunlap,* 1 Johns., 114; *Jackson v. Richards,* 6 Conn., 816. It is true that the registration raises a presumption of acceptance, and that the subsequent acceptance of a deed registered without the knowledge of the grantee is sufficient, *Thayer v. Stark,* 6 Cush., 11, unless in the meantime the rights of third persons have accrued, as by an attachment against the grantor or registration of a deed to another, *Harrison v. Phillips Academy,* 12 Mass., 461; *Jackson v. Rowland,* 6 Wend., 666, but the assent must be made before the grantor revokes his intention to convey, (86) *Canning v. Pinkham,* 1 N. H., 357.

In *Hawkes v. Pike,* 105 Mass., 561, the grantor gave the deed to the register to be recorded, without the grantee's knowledge; the next day the grantor called, the deed being then partially recorded, and asked to recall it; the register refused till he had completed the recording, and then handed the deed back: It was held that no title passed. To same purport, that even a registration of a deed, if without the grantee's assent, is not a delivery, see 1 Devlin on Deeds, sec. 290, and numerous cases there cited.

It must be recalled that, here, there was no registration, hence no subsequent assent which could turn it into a delivery, and no presumption of delivery. If there had been such presumption, it would have been rebutted by the admission that the grantee had no knowledge of the deed till after its recall. Indeed, the deed was not only not delivered and not registered, but it did not even get into the hands of the register and was never in a condition to be registered, since it was recalled by the grantor before it was probated. It was given to a subordinate to hand to the clerk to probate, and then to be carried to the register, but recalled before there was any probate by the clerk, or any delivery to the grantee, or any acceptance or even knowledge on her part, or any registration which could have raised even a presumption of delivery. There is no precedent which will make it a valid deed in this absence, alike of probate, of delivery, of acceptance, and of registration.

This case differs from *Phillips v. Houston,* 50 N. C., 302, and other cases cited in the opinion of the court, in that, here, the deed was not delivered to any one to hold for the grantee. It was delivered to the deputy clerk who was the agent of the grantor, not of the grantee,
(87) since his duty was to have it probated for the grantor, and was then to convey it to the register. At no time was it in the hands of any one for the use of the grantee, or who was directed by the grantor or authorized to deliver it to the grantee.

While the execution was still incomplete for lack of delivery to the grantee, or to any one for her, the grantor revoked what he had done and refused to perfect the execution and recalled the inchoate instrument.

Cited: Perkins v. Thompson, 123 N. C., 179; *Bond v. Wilson,* 129 N. C., 330; *Tarlton v. Griggs,* 131 N. C., 221; *Craddock v. Barnes,* 142 N. C., 96; *Fortune v. Hunt,* 149 N. C., 360; *Weaver v. Weaver,* 159 N. C., 21; *Buchanan v. Clark,* 164 N. C., 63; *Huddleston v. Hardy, ib.,* 215; *Lynch v. Johnson,* 171 N. C., 614.

JOHN C. BRITTON v. MARY E. RUFFIN, ADMINISTRATRIX OF JOSEPH B. RUFFIN.

Action for Breach of Warranty—Covenants—Warranty of Title—Breach—Damages.

1. A covenantee must be actually damaged by reason of the breach of the covenant before he can have substantial relief for the breach.

BRITTON *v.* RUFFIN.

2. In an action for breach of a warranty of title in a deed for standing timber only nominal damages can be recovered by the grantee if he has cut all the timber which was on the land when the deed was made.

ACTION, for damages arising from an alleged breach of warranty of title, tried before *Robinson, J.,* and a jury, at September Term, 1896, of BERTIE. The facts sufficiently appear in the opinion of the Court. There was judgment for the plaintiff and defendant appealed, assigning as error the refusal to give the instruction referred to in the opinion.

Messrs. Pruden & Vann and Battle & Mordecai for plaintiff.
Mr. F. D. Winston for defendant (appellant).

FAIRCLOTH, C. J. The defendant's intestate in consideration (88) of $450, by deed, sold to plaintiffs "all of the cypress timber on Ahoskie and Loosing Swamps, * * * except enough for his farming and building purposes," and warranted the title. The plaintiffs cut trees for two or three years, and voluntarily quit. The deed under which defendant Ruffin claimed title was held to be void for uncertainty in description. *Mizell v. Ruffin,* 113 N. C., 21. Plaintiffs entered in 1874 and cut trees two or three years, and after 1890 attempted to resume cutting, when subsequent purchasers from defendant's grantor forbade defendant to cut any more, and he desisted and brought this action on the warranty for damages, and had judgment, and defendants appealed.

It is conceded that there was a breach of warranty, and that plaintiffs were entitled to nominal damages. The defendant, in substance, requested his Honor to instruct the jury that if plaintiffs cut all the timber off the land standing on it at the time the deed was made, except that excepted, they were not entitled to recover any more than nominal damage. This was refused and defendant excepted. This refusal was error.

The evidence of several witnesses tended to prove that all the trees on the land at the time of the sale, except those reserved, were cut away by plaintiffs during their actual occupancy. This was material and an issue ought to have been submitted to the jury to ascertain the fact.

The plaintiff's contention is that, as defendant's title was bad, and in fact was no title, and a breach of warranty is admitted, he is entitled to recover the purchase price paid as damages. We can not assent to that proposition as stated. In deeds of conveyance we frequently find several covenants, such as seizin, right to convey, no incumbrance, quiet enjoyment, warranty of title, and further assurance, etc., and whilst there is sometimes difficulty in determining what consti- (89) tutes a breach and what is the correct rule of damages in cases arising under these several covenants, the rule is general that the coven-

antee can not have anything more than nominal damages until he has been injured in consequence of a breach of the covenant. It is not sufficient that he is menaced by an outstanding title or incumbrance. He must be actually damnified by reason of the breach, before he can have substantial relief for the breach. Suppose an eviction from a particular estate, as *per auter vie,* after the expiration of a part, the party evicted would be entitled to damages for the lost time only. Suppose the title to a part of the acres in a tract should be invalid, and eviction for so many acres takes place, compensation could be allowed only for the lost acres, not in proportion to the number of acres lost, but in proportion to their value compared with the value of the whole tract. This would represent the actual loss.

Suppose the title to only half of the trees in the present case had failed, why would not the same reason apply? Suppose, soon after paying the purchase price, the plaintiff had been evicted by the true owner, would he not have been entitled to recover the whole value of the trees? But whether the price expressed in the deed would have been conclusive we need not now say.

We have considered this question because it is presented and may be of use to the parties at the conclusion of the next trial. If the jury should find that plaintiffs have received all they have purchased, this opinion will dispose of the case. If they should find otherwise, then other important questions will be presented.

New trial.

Cited: S. c., 123 N. C., 70; *Griffin v. Thomas,* 128 N. C., 313.

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(90)

E. WILSON ET ALS. v. JOHN W. LEARY ET ALS.

Action to Recover Land—Corporation, Dissolution of—Land Belonging to Extinct Corporation.

Upon the dissolution or extinction of a corporation for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. (*Fox v. Horah,* 36 N. C., 358 overruled.)

ACTION, for the recovery of land, tried before *Robinson, J.,* at Fall Term, 1896, of BERTIE, upon an agreed statement of facts, a jury trial being waived. The land in controversy was conveyed on 5 July, 1849,

by Henderson Wilson, the ancestor of plaintiffs, to trustees for Oriental Lodge, No. 24, Independent Order of Odd Fellows, which was incorporated under an Act of the General Assembly of North Carolina, at its session of 1850. The conveyance was in fee. The trustees and the Lodge went into possession and held it until 1872, when the Lodge ceased to exist, and was never revived. Under the direction of the Grand Lodge of Odd Fellows the land was sold in 1873, to the defendants. Previous to the incorporation of Oriental Lodge by the General Assembly, it had been chartered by the Grand Lodge upon regular petition, and was one of the regularly constituted and duly organized subordinate lodges or branches of the Order. It was also agreed that the plaintiffs had never listed its property for taxation. The action was brought 5 March, 1892, but the plaintiffs, as heirs at law of Henderson Wilson, the original grantor, claiming that the land reverted to them upon the extinction of the corporation, his Honor gave judgment for the plaintiffs and defendants appealed.

Messrs. Battle & Mordecai for plaintiffs. (91)

Messrs. Francis D. Winston and Shepherd & Busbee for defendants (appellants).

CLARK, J. The plaintiffs must recover upon the strength of their own title, and not upon defects, if any, in the title of the defendants. The conveyance by their ancestor, Henderson Wilson, was in fee simple to trustees "to convey to Oriental Lodge, No. 24, I. O. O. F., when the same shall have been incorporated by the Legislature of North Carolina." It was subsequently incorporated. Though no conveyance by such trustees to the Lodge is shown, the learned counsel for the plaintiffs admitted that the Statute of Uses, 27 Henry VIII, in force in this State by virtue of our statute, executed the use without the execution of a deed. The grant to the trustees being in fee simple, the *cestui que trust* took in fee. *Holmes v. Holmes,* 86 N. C., 205. When the lodge ceased to exist for want of members, whether its property passed to the Grand Lodge of I. O. O. F. in this State, of which Oriental Lodge, No. 24, was a member, or escheated to the State for the University (Code, sec. 2627), does not concern the plaintiffs, and is not before us. The title in fee simple had passed out of the grantor, and having vested in the Oriental Lodge, upon the extinction of the latter as a corporate entity, its property, by no just construction, could return to those whose ancestors had conveyed it in fee upon receipt of the purchase money, which he and they have kept and enjoyed.

The plaintiff's counsel insist, however, that at the time of the conveyance, the Revised Statutes (chap. 26, sec. 17) provided that a cor-

poration, unless otherwise specially stated in its charter, had existence for only thirty years, and as there was no special provision in this charter, the grantor only parted with the property for thirty years and held a resulting trust. But the conveyance was in fee, and a corpora-
(92) tion limited in duration can take a fee simple conveyance just as a natural being, whose existence is also limited. Either may convey away the property, and upon the death of either, without having disposed of it, the property will go to pay creditors, to heirs, to stockholders, or as an escheat, according to the circumstances, but in neither case is there any reverter to the grantors. On the death of a corporation the property is usually administered by a receiver, and on the death of a natural person, by the personal representative, or passes to the heirs.

By the Constitution of North Carolina (Art. VIII, sec. 1) all corporations (if chartered since 1868) are subject to extinction at any time, or their duration can be abridged or extended, at the will of the Legislature. It would now be a startling doctrine that upon the repeal of a charter, all real estate, though conveyed to the corporation absolutely in fee simple, reverts as at common law to the original grantors, to the total exclusion and loss of creditors and stockholders. On the contrary, such property, when not held on a base or qualified fee, as was the case in *S. v. Rives,* 27 N. C., 297 (though it has been since held that there are no qualified fees in this State—*School Com. v. Kesler,* 67 N. C., 443), would be administered to pay creditors, the surplus being divided among the stockholders. If there were no stockholders, then the question might arise whether the property had escheated to the State, but certainly the grantors, upon such corporation becoming extinct, would have no greater right to a reversion than would the grantors to any other corporation. There was no attempt to make avail of the three years and a receiver allowed by the Code, secs. 667, 668, to wind up a corporation and sell its property, and hence no question is raised whether they apply to a corporation which was chartered before they were enacted.

It is true, it was held in an opinion by *Gaston, J., Fox v.*
(93) *Horah,* 36 N. C., 358, that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the State, and its choses in action became extinct, and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtor being absolved by the dissolution. *Judge Thompson* (5 Thomp. Corp., sec. 6720) refers to this decision "in accordance with the barbarous rule of the common law" as "probably the last case of its kind," and notes that it has since been in effect overruled in *VonGlahn v. DeRossett,* 81 N. C., 467, and it is now expressly overruled by us.

Chancellor Kent (2 Com. 307, note) says "this rule of the common law has, in fact, become obsolete and odious," and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations (5 Thompson, *supra,* sec. 6730). The subject is thoroughly discussed by Gray on Perpetuities, secs. 44-51, and he demonstrates that my Lord Coke's doctrine rested on the dictum of a 15th century Judge (Mr. Justice Choke, in the Prior of Spalding's Case, 7 Edward IV, 1467), and is contrary to the only case deciding the point, *Johnson v. Norway,* Winch. 37 (1622), though Coke's statement has often been referred to as law. But whatever the extent of this rule at the common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that "upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not revert to the original grantors or their heirs, and the personal property does not escheat to the State." 5 Thompson, *supra,* sec. 6746; (94) *Owen v. Smith,* 31 Barber, 641; *Towar v. Hale,* 46 Barb., 361.
The crude conceptions of corporations naturally entertained, in a feudal and semi-barbarous age, when they were few in number and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him (Coke Lit., 136) for the reverter of their real estate, towit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or a recent decision. Upon the facts agreed judgment should be entered below against the plaintiffs, dismissing their action.

Reversed.

Cited: Broadfoot v. Fayetteville, 124 N. C., 485; *Torrence v. Charlotte,* 163 N. C., 566; *R. R. v. Oates,* 164 N. C., 172.

JOHN WILSON ET AL. v. BRANNING MANUFACTURING COMPANY.

Practice—Trial—Objections to Evidence—Withdrawing Evidence from Consideration of Jury.

Where a motion by one party to have certain evidence introduced on his behalf stricken out was refused on the objection of the adverse party, the latter cannot assign as error the admission of such evidence.

ACTION, tried before *Robinson, J.*, at Fall Term, 1896, of BERTIE.

The action was for timber cut by defendant from land theretofore cultivated and not included in a contract between the parties.

(95) There was evidence on the part of plaintiff tending to show that its trees were cut from lands that had been cultivated, known as the "Barnes Old Field" and "Beaver Dam Old Field."

The evidence of defendant tended to show that the trees had been cut from land that had never been cultivated.

The plaintiff introduced as a witness one Britton Outlaw, whose testimony was objected to in apt time. The Court permitted him to testify: "I know the 'Barnes Old Field' spoken of; my father, who did not own the land, in passing the 'Barnes Old Field' with me, pointed it out, and said that he had worked it in crops, and that his father helped to clear it up."

At the close of the evidence the plaintiff moved to strike out the conversation testified to by Britton Outlaw between witness and his father as to the clearing up and working in the "Barnes Old Field." Defendant objected, and the Court refused to strike out the evidence. There was verdict for plaintiff, and judgment for $375 and costs, and defendant appealed.

Mr. Francis D. Winston for plaintiff.
Messrs. Martin & Peebles for defendant (appellant).

CLARK, J. It is settled by the uniform decisions of this Court that the trial judge "may correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such instructions as will prevent it from misleading the jury." *Ruffin, J.*, in *McAllister v. McAllister*, 34 N. C., 184, cited and approved by *Ashe, J.*, in *State v. Collins*, 93 N. C., 564, and *Smith, C. J.*, in *State v. McNair*, 93 N. C., 628. To the same purport—*State v. May*, 15 N. C., 328; *State v. Davis*, 15 N. C., 612; *Bridgers v. Dill*, 97 N. C., 222; *State v. Eller*, 104 N. C., 853, and *State v. Crane*, 110 N. C., 530, where the subject is fully discussed. The purpose of a trial is the ascertainment of the

(96) truth of the matter in controversy. It is not a game of skill in

which the object is to catch the judge "out on first base" by an inadvertence or error, which he can and does correct himself without subjecting the parties to the expense of an appeal and a new trial. If the jury are to be deemed intelligent enough to obey his instructions in the charge, they must also be able to comprehend his instruction, that certain evidence had been improperly admitted and is not to be considered by them. If, therefore, the Court had granted the plaintiff's motion to strike out the evidence, the defendant would have had, even in that case, no ground of exception, but the condition of the defendant is worse, for it objected to the withdrawal of the evidence. It was at the defendant's instance that the evidence was submitted to the jury, and he certainly cannot complain.

No error.

Cited: Crenshaw v. Johnson, post, 277; *Waters v. Waters,* 125 N. C., 591; *S. v. Ellsworth,* 130 N. C., 691; *Gattis v. Kilgo,* 131 N. C., 208; *Moore v. Palmer,* 132 N. C., 976; *S. v. Holder,* 133 N. C., 712; *Parrott v. R. R.,* 140 N. C., 548; *Medlin v. Simpson,* 144 N. C., 399; *Bedsole v. R. R.,* 151 N. C., 153; *Houston v. Traction Co.,* 155 N. C., 9; *Cooper v. R. R.,* 163 N. C., 151; *Tilghman v. R. R.,* 171 N. C., 662.

JUDITH HARRISON ET ALS. v. MARY L. HARGROVE ET AL.

Action to Recover Land—Judicial Sale—Defective Service—Recitals in Decree—Verity of Record—Innocent Purchaser.

Where a court of competent jurisdiction of the subject matter recites in its judgment or decree that service of process by summons or in the nature of summons has been made upon the defendants who are subject to the jurisdiction of the court, and the judgment is regular on its face, an innocent purchaser under such a judgment or decree will be protected even though the judgment or decree be afterwards set aside on the ground that, in point of fact, there had been no service of process, and, so far as he is concerned, the judgment is conclusive against all persons.

ACTION, to recover land, tried before *Coble, J.,* and a jury, at (97) May Term, 1895, of VANCE. There was judgment for the defendants and plaintiffs appealed. A full statement of the facts is contained in the opinion of the Court.

Mr. J. B. Batchelor for plaintiffs (appellants).

Messrs. M. V. Lanier, T. T. Hicks, and R. O. Burton for defendants.

MONTGOMERY, J. Lunsford A. Paschal, administrator *de bonis non* with the will annexed of Robert Harrison, filed a petition against the widow of the testator and his children, heirs at law, among whom were the plaintiffs in this action, for the purpose of obtaining a decree of sale of the tract of land which is the subject of this action, to make assets for the payment of the debts of the decedent. The decree of sale was made on 3 December, 1870, by the clerk of the court, and in the decree there was a recital, in substance, that personal service of the summons had been made upon defendants in the following words: "That the non-resident defendant, George Harrison, has been duly notified by publication to appear and answer, etc., and that the resident defendants have been duly served with process summoning them to appear and answer." The pleadings show that George Harrison, one of the children and heirs at law of the testator and one of the defendants in the above-mentioned proceedings, was a non-resident of the State of North Carolina at the time of filing the petition, and that the other defendants in that proceeding, including the plaintiffs in this action, were residents of the State. The defendant's testator and devisor was the purchaser of the land at the sale by Pascal, the administrator of Robert Harrison. A report of the sale was made and in due time confirmed. The proceedings, from the decree of sale to the final decree confirming the
(98) sale and ordering the title to be made to the purchaser inclusive, were regular in all respects.

The plaintiffs, in 1887, after the death of their mother, instituted this action to recover possession of the tract of land, claiming the same as devisees under the will of their father, Robert Harrison.

At the time of the commencement of this action the defendant, testator and devisor, T. L. Hargrove, was living, and in his answer to the complaint of the plaintiffs, set up as a defense the deed of the administrator, Pascal, to him, and the decree of the Court ordering the sale, and which recited that personal service of the summons had been made on the defendants in the special proceedings, among whom the plaintiffs in this action were included, and also the decree confirming the sale. The plaintiffs, finding these decrees in the special proceeding in their way and apprehending that they could not proceed with the action as long as those decrees should remain in existence, made a motion in the special proceeding, under which the land was sold, to set aside and vacate the order of sale on the ground that no service of summons had ever been made upon them in that proceeding, and that they had made no appearance in said proceeding, or had any notice thereof. The Clerk heard this motion and from his ruling there was an appeal, which was heard by Judge Graves, who, after finding the facts, rendered judgment in the following words:

"It is considered by the Court as a matter of legal inference, that the purchasers at the administrator's sale had notice of the order of the sale and of the want of proper advertising of sale. Therefore, it is considered and adjudged by the Court that the said order of sale, made on 3 December, 1870, was irregular and not according to the course of the Court as to the persons named as defendants, towit, Rebecca Harrison, Judith W. Harrison, Nancy Dement, formerly (99) Nancy Harrison, and Mary Harrison, and is void as to them; and that the same be cancelled and vacated as to them by this order, and that all the orders heretofore made in this action shall be allowed to remain upon the records for the purpose of protecting purchasers and others so far as in law they afford protection. It is further considered that the movers recover their costs." From this judgment the defendants appealed to the Supreme Court.

The appeal was heard at the February Term, 1890, and is reported in 106 N. C., 282. In that appeal it does not appear that the question whether or not the decree of sale made in the special proceeding protected the defendant in his purchase, notwithstanding it was shown before Judge Graves, when he vacated the judgment, that in point of fact there had been no personal service of summons on the defendants and that they had not appeared therein, was discussed. Whether Judge Graves' judgment, based upon the fact found by him that there had been no personal service of the summons in the special proceeding upon the defendants, and that they had made no appearance therein, could have had the effect of divesting the defendant of his rights acquired at his purchase at the administrator's sale, was not passed upon. Indeed, it seems upon reading the opinion that the point was not noticed. In the summary of facts made by the Court it is not stated that the decree ordering the sale of the land recited service of the summons upon the defendants.. The judgment of Judge Graves, however, was affirmed by this Court. After the judgment of Judge Graves had been passed upon, this action was brought to trial and judgment was had for the plaintiffs. Upon appeal to this Court by the defendants, reported in 109 N. C., 346, the matter was disposed of on the sole ground of laches in the plaintiffs in bringing their action—seventeen years having (100) elapsed between the order of sale in the special proceeding and the commencement of this action, and a new trial was granted.

The action then came on for trial before Judge Coble, from whose ruling and judgment the present appeal comes. His Honor charged the jury, in substance, that the purchaser at the administrator's sale (the defendant's testator and devisor) was protected by the decree under which the land was sold—the decree having recited that personal service of the summons had been made upon the defendants in the special pro-

ceeding for the sale of the land, and that the administrator, in his deed, conveyed to the purchaser a good title to the land, and that there was no evidence before the Court that the purchaser had notice at the time of the purchase and confirmation of the sale that the defendants had not been served with summons. The language of his Honor is as follows: "But the Court instructs the jury that the decree under which the deed to T. L. Hargrove was made can not be treated as having been set aside so as to affect the right of the defendants who claim under T. L. Hargrove, deceased, who purchased at the sale, unless at the time he purchased and took his deed he had notice in point of fact that the plaintiffs in this action, who were defendants in the proceeding in which the order of sale was made, had not been served with process; and there is no evidence that said Hargrove had such notice. Wherefore the Court instructs the jury that the deed from Pascal, administrator of Harrison, passed to T. L. Hargrove whatever title said Harrison had in the land in controversy, and if the jury believe the evidence, the plaintiffs are not entitled to recover, and the jury are instructed that if they believe the evidence they will answer the first, second, and third issues 'No.'"

That instruction and the exception to it by the defendants present the only point necessary to be discussed and decided in this case. On
(101) the latter section of this instruction it can be said, once for all, that there was no error in his Honor's instruction. In Judge Graves' findings of fact, when he vacated the decree of sale in the special proceeding, he did not *find* that the *purchaser, Hargrove, had notice* that the summons had not been *served upon the defendants.* He found, as a fact, that the summons had not been served upon the defendants, but he did not find that the purchaser had notice of this failure of service of the summons; and there is not a word of testimony appearing anywhere that the purchaser had any such notice. It is contended for the plaintiffs that the judgment of Judge Graves vacating the decree for the sale of the land made in the special proceeding is absolute in its meaning, and that the apparently restrictive words at the end of the judgment, towit, "and that all the orders heretofore made in this action shall be allowed to remain upon the record for the purpose of protecting purchasers and others so far as in law they afford protection," refer only to the purchaser's right of George Harrison's interest (he being a non-resident defendant and served with summons by publication in the special proceeding), and not to the interest of the defendant Hargrove, in his purchase of the interest of the other defendants; and, that as a legal consequence, the deed of the Administrator Pascal to Hargrove, the purchaser, passed no title. If it be conceded that the judgment of Judge Graves does not have the effect to vacate and reverse, unqualifiedly, the decree of sale, then, we are face to face with the question: Is the defendant, whose testa-

tor and devisor was the purchaser under the decree of sale, protected under the decree which recited that personal service of the summons had been made upon the defendants in the rights acquired by the purchaser under that decree, and under the deed made to him by virtue of that decree, notwithstanding it has been since made to appear that (102) personal service of summons of the defendant was in point of fact not made? The judgment of Judge Graves was based, as we have said, on the ground that the defendants in the special proceeding for the sale of the land (the plaintiffs here) had not been served with summons, nor had they made any appearance therein. This matter we will now discuss.

The court (Probate Court) at the time the petition for the sale of the land was filed by the administrator, Pascal, and when the decrees were made (1870) had jurisdiction of the subject-matter and of the persons interested in the land. The decree of sale, upon its face, was perfectly regular in all respects, and recited the fact that the summons had been served on the defendants. It can not be insisted that this decree was a void or irregular judgment. It was perfectly regular on its face. In *Doyle v. Brown,* 72 N. C., 393, the Court declared that "where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceeding to vacate it. And the reason is that the want of service of process and the want of appearance is shown by the record itself whenever it is offered. It would be otherwise if the record showed service of process or appearance, when *in fact* there had been none. In such case the judgment would be apparently regular and would be conclusive, until by a direct proceeding for the purpose it would be vacated." In *Sumner v. Sessoms,* 94 N. C., 371, the same point is decided in the same way, and the ruling in *Doyle v. Brown,* is cited and approved. In *Brickhouse v. Sutton,* 99 N. C., 103, the appeal coming up upon the very point raised in this case, where the Superior Court in a decree of dower recited the fact that the defendant had been served with (103) process and copies of the petition, this Court held that "the ascertainment and recital of facts in the record by the Court imports verity and binding effect, and must be so treated for all proper purposes of the action until in some proper way the action of the Court shall be successfully impeached. Thus, in this case it must be taken that the Court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them, that is, served regularly, effectually."

The counsel of the plaintiffs, no doubt being aware of these decisions, acted under them, and, as we have said, moved in the original special proceeding to vacate and set aside the decree of sale of the land. In the argument before this Court, however, they insisted on both views—that the judgment was void, as well as voidable. We have seen that the decree of sale was valid and conclusive until the impeaching order of Judge Graves was made. Now, if we treat the Graves judgment as unqualifiedly adjudging the decree of sale void and set aside, what effect will this Court give to that judgment in so far as the rights of the purchaser, at the sale of the land under the decree in the special proceeding, are concerned? We think that the decisions of our Court settle the question, and that they are in favor of the defendant.

In *Chambers v. Brigman,* 75 N. C., 487, the purchaser of real estate, at a commissioner's sale appointed by the Court, bought with a knowledge of the fact that the defendant was not served with summons or had notice of the action. This Court held that the defendant was not bound by the decree of sale. The Court in that case said that "no one can contend that a plaintiff can take any benefit by a purchase which is made under a decree in an action to which *he knows* that the person, (104) against whom it was made, and who was in possession of the land claiming it as his own, was not truly a party. Had any other than the plaintiff been the purchaser, the case might have presented more difficulty." The case before us presents whatever of difficulty there might be in the suggestion of the Court in that case. The purchaser here was no party to the special proceeding; he was an outsider and bought under a decree which recited that the summons had been served upon the defendants.

In *Sutton v. Schonwald,* 86 N. C., 198, this Court held in a case where title had been acquired at a judicial sale of land made by decree of a Court of competent jurisdiction and where the party who was the owner of the land was not in point of fact a party to the action, but who of record appeared to be a party, that the purchaser was protected and that the deed from the commissioner passed the title to the property. The Court said: "In such cases the law proceeds upon the ground as well of public policy as upon principles of equity. Purchasers should be able to rely upon the judgments and decrees of the courts of the country, and though they may know of their liability to be reversed, yet they have a right so long as they stand to presume that they have been rightly and regularly rendered, and they are not expected to take notice of the errors of the Court or the laches of parties. A contrary doctrine would be fatal to judicial sales, and values of title derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might at some distant day be declared void, because

of some irregularity in the proceeding, altogether unsuspected by him and of which he had no opportunity to inform himself. Under the operation of this rule, occasional instances of hardship (as this one of the present plaintiffs seems to be) may occur, but a different (105) one would much more certainly result in mischievous consequences, and the general sacrifice of property sold by order of the Court. Hence it is that a purchaser who is no party to the proceeding is not bound to look beyond the decree, if the facts necessary to give the Court jurisdiction, appear on the face of the proceeding. If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense, who had a right to rely upon the order of the Court as an authority emanating from a competent source—so much being due to the sanctity of judicial proceedings.

In *Morris v. Gentry,* 89 N. C., 248, this Court said that "it is likewise well settled that courts will protect third persons who honestly do acts and acquire rights under their judgments, although such judgments may afterwards be reversed. All that such persons need be careful to see is, that the Court had jurisdiction of the parties and the subject-matter, and that the order or judgment, upon the faith of which such acts were done or rights acquired, authorized the same to be done or acquired."

In *England v. Garner,* 90 N. C., 197, the Court said: "It is well settled upon principle and authority, that where *it appears by the record* that the Court had jurisdiction of the parties and the subject-matter of an action the judgment therein is valid, however irregular it may be, until it shall be reversed by competent authority; and although it be reversed, the purchaser of real estate or other property at a sale made under and in pursuance of such judgment, while it was in force and while it authorized the sale, will be protected." Of course we are not inadvertent to the provision of our State Constitution which declares "that no man shall be disseized of his freehold or deprived of his life, liberty or property except by the law of the land," and to that provision of the Constitution of the United States which provides in like terms, "nor shall any State deprive any person of life, liberty or prop- (106) erty without due process of law." This opinion is not at variance, we trust, with the great principle declared in those instruments. We are simply announcing law that is of ancient authority, as well as of recent affirmance, that where a Court of competent jurisdiction of the subject-matter recites in its judgment a decree that service of process by summons, or in the nature of summons, has been made upon the defendants who are subject to the jurisdiction of the Court, and the judgment is regular on its face, a purchaser of property under such a judgment or decree must be protected in his purchase, even though the judgment or

decree be afterwards set aside on the ground that in point of fact service of summons had not been made; that such a decree of such a Court is the best and highest declaration that the constitutional provisions which require that a person should be heard before he is condemned, and that judgment has been rendered only after the trial, have been complied with; and that so far as a purchaser under such a decree is concerned, the judgment is conclusive against all persons.

This conclusion renders it unnecessary to pass upon the other exceptions in the case. There was no error in the ruling and judgment of the Court below, and the same is

Affirmed.

Cited: *Morrison v. Craven, post* 330; *McCauley v. McCauley,* 122 N. C., 292; *Murray v. Southerland,* 125 N. C., 177; *Hinton v. Insurance Co.,* 126 N. C., 22; *Strickland v. Strickland,* 129 N. C., 89; *Swift v. Dixon,* 131 N. C., 46; *Debnam v. Chitty, ib.,* 688; *Ricaud v. Alderman,* 132 N. C., 65; *Card v. Finch,* 142 N. C., 150; *Hatcher v. Faison, ib.,* 367; *Rackley v. Roberts,* 147 N. C., 208; *Yarborough v. Moore,* 151 N. C., 122; *Lawrence v. Hardy, ib.,* 129; *Hobbs v. Cashwell,* 152 N. C., 187; *Bailey v. Hopkins, ib.,* 752; *McDonald v. Hoffman,* 153 N. C., 256; *Currie v. Mining Co.,* 157 N. C., 220; *Cooke v. Cooke,* 164 N. C., 287; *Hopkins v. Crisp,* 166 N. C., 99; *Pennell v. Burroughs,* 168 N. C., 320; *Stelges v. Simmons,* 170 N. C., 44; *Johnson v. Whilden,* 171 N. C., 155, 156.

(107)

STERN & CO. ET ALS. v. LOUIS AUSTERN.

Injunction and Receiver—Fraudulent Confession of Judgment—Execution Sale After Issuance, But Before Service, of Restraining Order.

1. A receiver may be appointed under section 379 of The Code, in a suit against a debtor and others to restrain an execution sale, where the debtor has confessed judgment apparently with fraudulent intent, and executions have been levied on the only property of the debtor within the State in favor of non-resident creditors who seek to take the property out of the State.

2. Where, in an action to enjoin an execution sale on the ground of fraud in the confession of the judgment, the judgment debtor and creditor and the sheriff are parties, and the sheriff sells the property to the judgment creditor after a restraining order is issued, but before it is served, the purchaser acquires no title and may be ordered to deliver the goods to a receiver pending the action.

STERN *v.* AUSTERN.

ACTION, pending in VANCE for an injunction to restrain a sale under execution and for a receiver, heard before *Timberlake, J.*, at chambers, in Louisburg, 16 January, 1896. The defendant appealed from the order appointing a receiver and continuing the restraining order.

Messrs. McRae & Day for defendant (appellant).

Messrs. T. M. Pittman, J. W. Hinsdale, and J. D. Ingle, Jr., for plaintiffs.

MONTGOMERY, J. The plaintiffs allege that the defendant Austern, by various false and fraudulent contrivances and representations, induced the plaintiffs, who relied solely upon these fraudulent representations, to sell him large bills of merchandise; that after the goods were delivered the defendant Austern fraudulently secreted and disposed of the same, with the intent to defraud, hinder and delay the plaintiffs in the collection of their debts; and that the other defendants, Price & Friedman, conspired and combined with Austern to aid him in carrying (108) out his fraudulent and corrupt purpose to cheat and defraud his creditors. The complaint further alleges that, in order to consummate their plan to cheat and defraud the plaintiffs, the defendant Austern pretended to confess judgment for large amounts in the Superior Courts of Wake and Vance in favor of the other two defendants, with the purpose and intent of giving to Price & Friedman an unlawful and fraudulent preference over his true creditors, and to have all his property, except his personal property exemption, and such other of his property as he was unable to dispose of secretly, by means of said judgments and executions fraudulently appropriated to their joint use. That immediately after these pretended judgments were confessed, executions upon them were issued, and the property of Austern seized by the sheriffs of Wake and Vance counties.

Upon complaint and answer and affidavits, on a motion for injunction to restrain the defendants, Price & Friedman, from selling under execution the goods of the other defendant, Austern, and for the appointment of a receiver, Judge Timberlake found the facts, granted the injunction until the hearing of the case and appointed a receiver.

The following are the facts found by the Judge:

"The finding of fact dated 16 January, 1896, hereto attached, was signed on this day. The Court, after having signed the same, and sent it to the Clerk of Court of Vance County, on 17 January, as it was written, wrote to the said Clerk for the return of the said finding, for the purpose of correcting the same, being of the opinion, upon reflection, that said finding did injustice to the defendants, and after notice to both parties, makes the following findings as a substitute for the findings of 16 January:

1. That the defendant Austern is indebted to the plaintiffs.

2. That there is such evidence of fraud and the want of the
(109) verification of the statement authorizing the entry of judgment as presents a proper case for holding his property in the custody of the Court until the final hearing.

3. That the defendant Austern has no property in this State subject to execution, except that described in the pleadings as in the hands of W. H. Smith, Sheriff of Vance County, under levy of execution in favor of M. Price and B. Friedman against L. Austern.

4. That on 17 December, 1895, the defendant Austern attempted to confess judgment in the Superior Court of Vance County in favor of M. Price and B. Friedman for amounts aggregating about $4,000, as per copies attached to the complaint, with the intent and purpose to give a preference over their other creditors.

5. That defendants Price & Friedman are non-residents of North Carolina, and are attempting to enforce the collection of said confessed judgments, undertaking to have the property of Austern sold, and to take the proceeds outside of the State.

6. That after issuing the restraining order herein, and before the service, the sheriff of Wake County, under execution upon the confessed judgments, levied on the property of Austern in Wake County and sold the same to Price & Friedman, who still have the property or proceeds."

The exceptions to the findings of fact are made on the ground that they "are not sustained by the affidavits filed." Upon examination of the complaint, treated by the Judge as an affidavit, and the other affidavits filed in the cause, it appears that there was evidence before his Honor going to show the facts which he found. The complaint, the affidavit of T. M. Pittman, the answer of Austern, and the affidavit of Jordan Thompson, Pegram and Williams, contain evidence of
(110) the matter embraced in his Honor's second finding of facts. The complaint, the affidavit of Pittman and the answers of each of the defendants furnish evidence of the matter embraced in the fourth finding of the facts. The complaint and answers of the defendants furnish evidence upon which his Honor properly found his fifth finding of facts. The affidavit of Pittman and the amended answer of Austern contain evidence upon which his Honor properly made his sixth finding of facts. The affidavit of Pittman especially authorized this finding. That affidavit contains the statement that at the execution sale of Austern's property by the sheriff of Wake County, the defendants Price & Friedman became the purchasers, that the sheriff delivered to them the property, and they received it as so much cash on their judgments and executions, and that the goods or the proceeds were in their hands at the hearing of the injunction.

There was no attempt at denial of these statements made concerning the matters embraced in the sixth finding of facts in the answers or in the affidavits of the defendants. A general exception was made to the order made by his Honor in the cause. There can be no reasonable doubt but that upon the facts found in this case a receiver should have been appointed under subdivision 1 of sec. 379 of The Code. The defendants Price & Friedman were ordered to turn over to the receiver the goods and the proceeds of any portion of the property that the defendants had disposed of. This was clearly proper. If the judgments and executions are fraudulent and feigned (and there was proof of it before his Honor), then the sale under the executions was void as to the defendants, who were purchasers and parties to the proceeding in which the judgments were confessed, and the property is still the property of the defendant Austern, and ought to be delivered to the receiver.

No error.

(111)

M. P. PERSON, ADMINISTRATOR, v. W. P. MONTGOMERY ET AL.

Proceeding to Sell Land for Assets—Administrators—Judgment—Res Judicata—Statute of Limitations—Claims Against Estate of Decedent—Duty of Administrator.

1. Where, in a proceeding for partition of land by two heirs against the third, the plaintiff set up a debt of defendant due to the estate in order that he might be charged with it as an advancement, and the award of arbitrators to whom the matters were submitted and who found that such a debt existed, was subsequently set aside on the ground that the administrator of the estate was a necessary party: *Held*, that the judgment in that action partitioning the land was not a bar to an action on the debt by the administrator.
2. Where, in a proceeding by an administrator to sell land for assets to pay debts, the heirs, who are necessary parties, allege a sufficiency of assets to pay the debts, or deny the existence or validity of the alleged debts, the Court will not order a sale until these questions are determined.
3. In a proceeding to sell lands for assets, the heirs may plead the statute of limitations to any of the debts set up, and may also plead fraud and collusion between the administrator and creditor where the claims have been reduced to judgment.
4. Where an heir and alleged debtor of a decedent was found by arbitrators, to whom the matter had been submitted in an action for the partition of land, to be indebted to the estate and he procured such award to be set aside on the ground that the administrator of decedent was not a party. *Held*, that he will not be allowed to set up the judgment in such partition proceedings as an estoppel against his debt when its validity is attacked in a proceeding to sell land for assets.

5. While it is now left, by the statute, to the discretion of an administrator whether or not he will plead the statute of limitations against a debt preferred against the estate, it is nevertheless his duty to act in good faith in that respect, and, if he fail to do so, he may be held responsible for his failure.

6. Section 164 of The Code is an enabling and not a restrictive statute; it does not cut down the time given by the general statute for bringing actions, but extends the time in the cases therein provided for.

(112) PETITION for sale of land for assets to pay debts, commenced in the Superior Court of FRANKLIN, transferred to term on issues raised before the Clerk, referred to W. B. Shaw, Esq., and heard on exceptions to the Referee's report, before *McIver, J.*, at Fall Term, 1895, of said court. From a judgment directing a sale of the land by the administrator the defendant, Speed, appealed. The facts appear in the opinion of the Court.

Mr. W. M. Person for plaintiff, administrator.

Messrs. Shepherd & Barber for defendant Speed (appellant), and Messrs. F. S. Spruill and J. B. Batchelor for defendant Montgomery.

FURCHES, J. This is a proceeding to sell and to pay debts and costs of administration. The defendants, Eva Speed and Maggie Speed, and their husbands, deny plaintiff's allegations that it is necessary to sell the lands of their intestate mother for the payment of debts and costs of administration. And they allege that the personal estate is sufficient for this purpose if properly and faithfully administered; and that their co-defendant Montgomery is indebted to the estate in a much larger amount than is sufficient to pay the debts and costs of administration.

The defendant Montgomery answers, admitting the allegations of the complaint—denies that he is indebted to said estate; alleges that the estate is indebted to him, and pleads the statute of limitations as to any debt that he may be owing to the estate. He also alleges that the land of the intestate had been divided between him and his co-defendants, under a proceeding for that purpose, and an order of Court; and alleges that, if he was so indebted, it should have been, and in fact was, adjusted and settled in that proceeding. And he pleads the record in that proceeding as an estoppel and bar against his co-defendants against the plaintiff.

Upon this state of the case it was referred to W. B. Shaw, who (113) took an account in the matter, and the case now stands upon pleadings, report of the Referee, exceptions and judgment of the Court thereon.

An administrator has a right to have land sold to pay debts and costs of administration where the personal assets are not sufficient (Code, sec.

1436). The heirs must be made parties to a proceeding to sell land for assets, and where they deny that it is necessary to sell, or allege that there are sufficient personal assets if properly administered, or that the debts upon which it is asked that the land be sold are not due by the estate, the Court will not order a sale until these questions are determined. And the usual course is to refer the matter, as was done in this case. This reference is not for the purpose of settling the estate, but for the purpose of informing the Court whether it is necessary to sell the land for assets, and the *probable* amount that it will be necessary to raise out of the land.

In this proceeding, it being against the heirs and for the purpose of taking and converting their land to the payment of debts due by their ancestors, they are at liberty to show any personal estate that should be first made liable, and a solvent debt due the estate, that might be collected, is a part of the personal assets. They are also at liberty to dispute and contest the liability of their ancestor's estate to the debts for which their lands are sought to be sold; and even to plead the statute of limitations against debts claimed to be due, unless they have been reduced to judgment. And if fraud and collusion can be shown between the administrator and the creditor, it may be pleaded where there has been judgment.

These defenses have been allowed the heirs as a defense against the right to convert their land. But our attention has not been called to any case in a proceeding to sell land for assets where the heir has pleaded the statute of limitations against his own debt due the (114) estate. And still, as the defendant Montgomery is a party, and his co-defendants had alleged, specially, his indebtedness to the estate, as a reason why it is not necessary to sell the land, we do not say but what it was proper for him to plead the statute of limitations at that time if he intended to avail himself of that plea, if sued, so that the Referee might pass upon it to see whether this indebtedness was available assets or not.

This is a very peculiar case. The allegations are, and the evidence tends to show, that defendant Montgomery was the agent of his intestate mother for many years in managing, renting and receiving the rent of her land; that in the proceeding to divide the land among the defendants in this proceeding, his sisters, who were the plaintiffs in that proceeding (and co-defendants in this) undertook to set up this indebtedness of defendant Montgomery, as to what they called an advancement, so as to thereby give them more land in the partition than Montgomery. That during the pendency of that proceeding (for partition) it was agreed by the parties to arbitrate the matter and their award to be a rule of court. The arbitrators so appointed took the matter into considera-

tion and found the defendant Montgomery indebted to the intestate's estate $1,552.42, which they took into consideration in dividing the real estate between the two sisters and the brother, the defendant Montgomery. But when this award was returned to court it was set aside, upon the motion of defendant Montgomery, upon the ground that the arbitrators had exceeded their power in finding an indebtedness against him, when there had been no administration upon his mother's estate, and the arbitrators could find no indebtedness against him without an administrator was a party.

This award was set aside—whether rightfully or not, is not a (115) matter for our consideration, and has but little to do with the case before us, and is mentioned to show that there was at least ground for the allegation that Montgomery was indebted to the estate, and for the further purpose of showing the nature of the proceeding, the record of which the defendant Montgomery pleads as an estoppel of record—*res judicata.*

We fail to see any estoppel, and as the defendant Montgomery procured it to be set aside, because there was no administration and no administrator a party to the action, and the partition was made without considering this alleged indebtedness, it seems to us that he is estopped to set it up now. But be this as it may, we can not allow it to work an estoppel as to the defendant Montgomery's debt, if he owed one.

The intestate had been dead three years, one month and nine days when the plaintiff administered. And it is claimed by defendant Montgomery that his agency terminated at the death of his mother. And whatever amount he may have been owing her on account of said agency became due at her death—the termination of the agency. And as more than three years have elapsed since her death and before suit brought—and in fact no suit has yet been brought by the administrator to enforce this debt—the same is barred by the lapse of time and the Statute of Limitations (Code, sec. 164).

There seems to be a want of uniformity upon the construction of this section of The Code, which we will not undertake to reconcile. But we adopt the construction placed upon it in *Benson v. Bennett,* 112 N. C., 505. It is plain to us that it is an enabling and not a disabling statute, as is held in that case. That it was not intended by this section to cut down the time given by the general statute for bringing actions, (116) but to extend this time in the cases therein provided for. And if any of the decisions of this court are susceptible of the construction that it limits the time to one year from the death of the creditor, notwithstanding the general statute—as it is contended they do—such cases to this extent are overruled.

But as the agency terminated at the death of Mrs. Harris, the defendant's indebtedness on account of such agency became due at that time (if he was indebted to her as alleged). This was on 10 August, 1888, and no action has been brought to enforce this indebtedness, and the same is barred by the statute, if pleaded. And we are informed by his pleading it in this case that he would avail himself of that defense if the administrator had brought or should bring suit to enforce the same. And it not being alleged or shown that there are any other debts due the estate, except the $46 worth of personal property sold by the administrator and purchased by the defendant Montgomery, and for which the administrator is liable, it seems the plaintiff will be entitled to an order of sale, if the amounts found to be due by the estate are not paid without sale.

But the Speed defendants object to charging the estate with the Ballard account of $96, the Dr. Moss debt of $35, the Barrow debt of $58.50, the taxes for 1888, $38.40, and the funeral expenses of $85 paid by defendant Montgomery. They say that they appear to have been paid in 1888, soon after the death of Mrs. Harris. And although after the legal termination of his agency, they were paid while he had the crops grown upon her land or the proceeds of the same in his hands, arising out of his agency, for which he has never settled, and which he now says is out of date and cannot be collected. These facts appearing, the presumption is that he paid them out of money in his hands belonging to his mother. *Threadgill v. Commissioners,* 116 N. C., 616. If he did not pay them out of money belonging to Mrs. Harris, but out (117) of his own money, they were voluntarily and officiously made, and he cannot collect these debts out of the estate on that account, except the $85 paid for funeral expenses.

At the time this action was commenced the Statute required administrators to plead the Statute of Limitations against claims barred by the Statute. This act has been repealed, and properly so, as we think, and the law in this respect is left as it was before the passage of this act; that is, to the honest judgment and good faith of the administrator. And if out of bad faith towards his estate he fails to plead the Statute when he should do so, he may make himself personally liable. It may hereafter become a question as to whether the administrator is acting in good faith to his estate, where a party, apparently indebted to the estate, pleads the Statute of Limitations in bar of a recovery. And the administrator allows the same party to recover debts against the estate that are barred by the Statute, without pleading the Statute or interposing any kind of objection.

For the reasons herein assigned, the report of the commissioner and the judgment of the court ordering a sale are set aside. And no further

order of sale will be made to pay any of the claims set up by defendant Montgomery until he has established the claims, alleged to be due him, by a judgment of court. And in these actions by the defendant Montgomery to establish these claims the administrator will take a note of what we have said as to its being presumed that they were paid by the money of Mrs. Harris, but which Montgomery may rebut by competent evidence. Also, as to what we have said as to there being officious payments (except as to the debt for funeral expenses), and that he will not be able to recover on that account, unless he can show by com-
(118) petent testimony that they were not so paid. And the administrator will observe what we have said as to his duty as to the pleas of the Statute of Limitations. The report and judgment are set aside.

Error.

MONTGOMERY, J., being related to one of the parties, took no part in the decision of this case.

Cited: Winslow v. Benton, 130 N. C., 60; *Lowder v. Hathcock,* 150 N. C., 440.

FLORENCE TUCKER, EXECUTRIX OF R. S. TUCKER, v. J. H. SATTERTHWAITE ET AL.

Practice—Trial—Issues—New Trial.

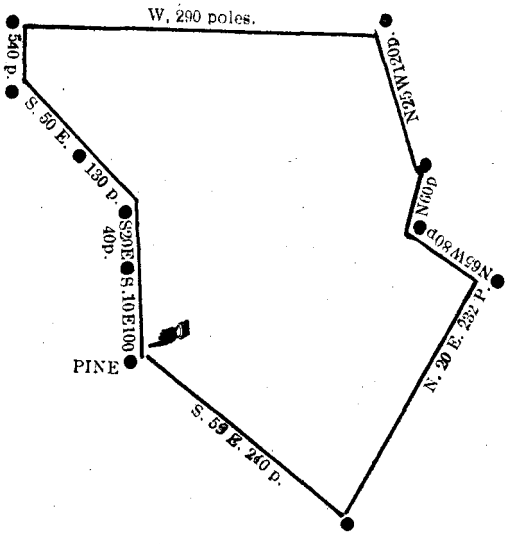
Section 395 of The Code is mandatory, and binding equally upon the Court and counsel, and it is the duty of the trial judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. In the absence of such issues, or equivalent admissions of record sufficient to reasonably justify a judgment rendered thereon, this Court will order a new trial.

ACTION OF TRESPASS *quare clausum fregit,* tried before *Boykin, J.,* and a jury, at March Term, 1896, of PITT, involving the title to land described in the complaint as follows:

"Lying on the Pea Branch Pocosin, beginning at a pine, standing in the branch below the Bee Gum Island, and running with the middle of said branch, the courses thereof, to the line of the Thomas Jordan land (now owned by the plaintiff), and then with said line to a corner of the lands of the heirs of Thomas Little, and with their line out to the Pea Branch Pocosin, to Stephen Little line (now the Whitehead line), and

then with Stephen Little (now Whitehead line) to a marked pine, (119) a corner tree; and thence with a line of marked trees along the Horse Pen Branch to the beginning, containing one hundred and fifty (150) acres of land, more or less."

The following is a copy of the plat introduced in evidence:



By consent, the issues referred to in the opinion were submitted by his Honor and were found in favor of the plaintiff, and from the judgment thereon the defendants appealed.

Messrs. W. B. Rodman, James E. Moore, and Jones & Boykin for plaintiff.

Messrs. Jarvis & Blow, Blount & Fleming, and A. C. Avery for defendants (appellants).

DOUGLAS, J. This is an action of trespass involving the title to the land in controversy, which depends upon the location of two grants. The real point in dispute seems to be whether the line constituting the northern boundary of the Smith grant and the southern (120) boundary of the Brinkley grant, runs from "F," an admitted corner, to "G" or to "H," as stated in the case on appeal. The merits of this case were ably and elaborately argued before this Court, and we regret our inability to determine the matter, but we cannot undertake to

review a judgment based upon issues which utterly fail to present the contentions of the parties. The following are the only issues: Where is Beegum Island, at "H" or "I"? Have the defendants and those under whom they claim been in adverse possession of the land in dispute for a period of twenty years at any time prior to the beginning of this action? What damage, if any, is the plaintiff entitled to recover?

The first issue is the only one looking to the location of the land, and it fails to establish a single matter of issue raised by the pleadings. Beegum Island itself, which is said to contain two or three acres, is not called for by either grant. The Brinkley grant begins at "a pine standing in the branch *below* Beegum Island," running thence north, and when it comes around to the land now in dispute, calls for Smith's line. Smith's grant does not mention Beegum Island in any way whatever. The perplexity of the situation is by no means lessened by the older grant calling for the line and corners of the junior grant.

It is true, the issues were submitted by counsel, but if there was any agreement between the parties that the location of Beegum Island should determine any point in controversy it does not appear in the record.

The submission of issues by consent does not amount to a consent judgment, especially where the judgment which is excepted to is entirely unsupported by the issues. 1 Freeman Judgments, sec. 2; 1 Black Judgments, sec. 106.

The location of the line between Brinkley and Smith is still unsettled, at least as far as appears to us. That should have been the issue.

(121) "Issues arise upon the pleadings when a material fact or conclusion of law is maintained by the one party and controverted by the other." Code, sec. 391; *Heilig v. Stokes,* 63 N. C., 612; *Klutts v. McKenzie,* 65 N. C., 102; *Armfield v. Brown,* 70 N. C., 27; *Wright v. Cain,* 93 N. C., 296; *Patton v. R. R.,* 96 N. C., 455; *Fortesque v. Crawford,* 105 N. C., 29. "The issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action and reduced to writing, *or by the judge presiding,* before or during the trial." Code, sec. 395.

In *Bowen v. Whitaker,* 92 N. C., 367, this Court held that the above section is *mandatory,* and that where no issues are tendered by either party it is the duty of the Judge either to compel counsel to prepare the proper issues or to prepare them himself and submit them to the jury. Such an adherence to the statute is absolutely essential, not only to a fair trial of the case below, but to an intelligent appreciation of its merits upon an appeal to this Court.

In *Arnold v. Estis,* 92 N. C., 162, *Smith, C. J.,* delivering the opinion of the Court, says: "This is another instance in which the matters in controversy, as they appear in the pleadings, are tried without the prepa-

ration and submission of issues eliminated therefrom to the jury as is required by The Code, sec. 395, and which constitutes a distinguishing element in our present mode of practice; and we repeat what has been said in a previous case determined at this term, that this statute *must be observed in the future.*" *Rogers v. Clements,* 92 N. C., 81; *Rudasill v. Falls,* 92 N. C., 222; *McDonald v. Carson,* 94 N. C., 497. The case at bar is very similar in its results to *Turrentine v. R. R.,* 92 N. C., 642, in which this Court says: "The judgment, while the only one that could be rendered on the findings, rests, nevertheless, upon a confused and unsatisfactory verdict, and ought not to stand, as injustice may (122) be done."

In *Fisher v. Mining Co.,* 94 N. C., 397, this Court says: "Thus a distinct issue is raised, which the record does not show was put in form, while the jury were empanelled without such issue and proceeded to try the controversy as it appeared in the pleadings in disregard of the statutory mandate and the reiterated ruling of the Court that it must be observed." Citing *Rudasill v. Falls, supra,* and *Bowen v. Whitaker, supra.* The same rule is laid in *Allen v. Sallinger,* 105 N. C., 333; *Bottoms v. R. R.,* 109 N. C., 72; *Allen v. Allen,* 114 N. C., 121; *Fleming v. R. R.,* 115 N. C., 676.

In *Vaughan v. Parker,* 112 N. C., 96, this Court says that the issues "shall be such as arise out of the pleadings, such that upon the verdict the Court may proceed to judgment," etc., citing *McAdoo v. R. R.,* 105 N. C., 140; *Denmark v. R. R.,* 107 N. C., 185; *Boyer v. Teague,* 106 N. C., 576; *Bonds v. Smith,* 106 N. C., 553.

Many decisions might be cited as to the form of the issues, but that point is not now directly before us. We are not inadvertent to the long line of decisions laying down the rule that the refusal of the Court to submit an issue tendered by either party can not be reviewed by this Court unless exception is taken in apt time; nor do we wish to be understood as reversing or modifying it. That rule, when reasonably construed, does not conflict with the one herein laid down. What we now say is, that sec. 395 of The Code is mandatory, binding equally upon the Court and upon counsel; that it is the duty of the Judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by (123) clear implication, the judgment rendered therein, this Court will remand the case for a new trial. Under this rule there was error in the rendition of the judgment and a new trial is therefore ordered.

New trial.

Cited: Cecil v. Henderson, 121 N. C., 246; *Mitchell v. R. R.,* 124 N. C., 245; *Strauss v. Wilmington,* 129 N. C., 100; *Ray v. Long,* 132 N. C., 893; *Pearce v. Fisher,* 133 N. C., 335; *Kelly v. Traction Co., ib.,* 421; *Griffin v. R. R.,* 134 N. C., 102; *Hunter v. Tel. Co.,* 135 N. C., 462; *Lumber Co. v. Lumber Co., ib.,* 745; *Falkner v. Pilcher,* 137 N. C., 450; *Williamson v. Bryan,* 142 N. C., 82; *Holler v. Tel. Co.,* 149 N. C., 338; *Lloyd v. Venable,* 168 N. C., 536.

FANNIE G. HIGHSMITH ET ALS. V. W. D. WHITEHURST AND JOHN COBURN.

Action to Set Aside Sale of Lands by Administrator—Administrator—Purchase by Administrator of Decedent's Land—Setting Aside Sale.

1. The purchase of land of an intestate by his administrator at a sale legally conducted, confirmed and price paid, passes the legal title and can only be set aside at the suit of some one having an equitable interest therein and upon a repayment of the purchase money.
2. Where land was sold by an administrator to pay debts of his intestate and was bought for his benefit, at its full value, and the sale was confirmed, the price paid, and the creditors ratified it by receiving the proceeds, which together with the other assets were not sufficient to pay the debts of the estate in full, the widow and heirs of the decedent have neither any legal right to the land nor any equitable ground upon which to have the sale set aside or to have the purchaser declared a trustee for them.

ACTION, tried before *Boykin, J.,* and a jury, at January Term, 1896, of PITT. The nature of the action, and facts upon which it was based, are stated in the opinion of the Court. There was a verdict for the plaintiffs and from the judgment thereon the defendants appealed.

Messrs. Blount & Fleming for plaintiffs.
Mr. J. L. Bridgers for defendants (appellants).

(124) FURCHES, J. In January, 1883, B. C. Highsmith died intestate, and soon thereafter (9 April, 1883), the defendant M. D. Whitehurst was appointed and qualified as his administrator. There being an insufficiency of personal assets to pay the indebtedness of his intestate, the defendant administrator applied for and obtained an order to sell the real estate. The proceedings to obtain this order for the sale of land was put in evidence and is made a part of the case on appeal. And while it is not as formal as it might have been, it appears to have been substantially correct and authorized the defendant administrator to

sell the land. This he proceeded to do on 3 December, 1883, when the defendant Barnhill bid it off for the defendant administrator at the price of $1,211.

This sale was reported by the administrator and confirmed by the Court, and the defendant administrator has since the sale made a deed to Barnhill and Barnhill has made a deed to W. D. Whitehurst, a son of the administrator, by and under his directions.

That since this, William Whitehead and other creditors of the intestate brought a creditor's bill against the administrator Whitehurst, which was also put in evidence and made a part of the case on appeal, in which an account of defendant's administration was taken. And in this account the defendant administrator was charged with this $1,211 and interest thereon, which he has since paid to the creditors of his intestate under the order and decree of the Court.

In this creditor's bill it was found by the Referee that the whole amount of intestate's estate, including the $1,211 for which the land sold, was only sufficient to pay a *pro rata* on said indebtedness of less than fifty cents on the dollar.

This report of the Referee was in all things confirmed by *Whitaker, J.*, at Fall Term, 1890, and under this decree the de- (125) fendant administrator has paid the creditors of his intestate every dollar for which he was found to be liable, including the $1,211 and interest thereon.

Under this state of facts, the plaintiffs, the widow and children and heirs at law, bring this action, which as originally constituted was an action of ejectment dependent upon plaintiff's legal title. But by several amendments to the complaint it was turned into an equitable action in which it is asked that the proceeding, order of sale, sale and order of confirmation, be set aside; and, if this can not be done, that defendants be declared trustees for plaintiffs, and required to convey to them. And upon the case coming on for trial the defendants proposed to convey to plaintiffs the lands bought by Barnhill, if the plaintiffs would pay them the $1,211, the amount for which it sold. This proposition was declined by plaintiffs.

The plaintiffs have shown no sufficient reason to set aside and vacate the order of sale, as it is not contended but what it was necessary to sell the land to pay the debts of intestate. And this is shown to be so by the undisputed evidence.

This being so, the administrator had the authority to sell, and the purchase by Barnhill, the acceptance of his bid, the report and confirmation of the sale, and the deed to Barnhill passed the legal title out of plaintiffs. It is true, equity will vacate and declare such sales void; but this is the work of equity and equity will not do an inequitable and unjust thing.

The plaintiffs had neither the legal nor the equitable title to this land when they commenced this action. The legal estate that descended to them upon the death of their ancestor had been taken out of them
(126) by the proceedings to sell for assets, the order of sale, the sale, report and confirmation and deed to Barnhill.

They had no equitable interest because there was not one dollar of the proceeds of the sale going to them. And the *cestuis que* use the creditors of their ancestor, to whom the money was going, had ratified and approved said sale by receiving and accepting the money—the proceeds of said sale. And there is no intimation that there was any collusion between the creditors and the administrator to defraud the plaintiffs. Indeed, it is shown that the plaintiffs could not have been injured by the purchase of Barnhill, though made for the administrator, as the land sold for $1,211, when the jury on the trial of this case found that at the date of the sale it was only worth $1,200.

In no view of the case presented by the record could the plaintiffs have the defendants declared trustees for their benefit, and certainly not without putting them in *statu quo* by paying the money the administrator had paid for the estate. And this much may be said to his credit (and we are not willing to say that he has acted nicely in all this administration), that he offered to convey to plaintiffs the land sold and reconveyed to him upon the payment to him of $1,211, the amount of Barnhill's bid; although he was charged with and paid the creditors for this land the sum of $1,659.07, this being principal and interest, while he had only been in possession of the land a part of the time. This proposition to convey upon the payment of $1,211 while not necessary, as we have seen, to his defense in this action, relieves it from the appearance of oppression.

We do not undertake to pass upon any rights the parties may have as to dower and homestead.

It is a well settled principle that courts of equity, or courts exercising equitable jurisdiction, will set aside sales where the administrator becomes the purchaser, either directly or indirectly. And to do
(127) this it is not necessary to allege or show fraud; but it will not do so after there has been a ratification and the purchase money paid. And certainly not after the purchase money has been paid and accepted by those entitled to receive it, without requiring the purchase money to be repaid.

Error.

Cited: Gorrell v. Alspaugh, post 374; *Shute v. Austin, post* 442; *McNeill v. Fuller,* 121 N. C., 213; *Russell v. Roberts, ib., 325*; *Gorrell v. Alspaugh,* 122 N. C., 561; *Card v. Finch,* 142 N. C., 148.

J. E. BARRETT AND WIFE v. BARRETT & DAVIS.

Action to Cancel Deed—Defective Probate—Curative Acts—Retrospective Laws.

1. While the probate of a deed where the acknowledgment and privy examination of the wife is taken before the proof of the execution by the husband, is insufficient, and registration thereunder is invalid, and no curative statute can divest or impair the rights of third persons acquired before the enactment of such statutes; yet, as between the parties and before the rights of others intervene, the power of the Legislature to remedy such defects is well recognized.

2. Chapter 293, Acts of 1893, validating probates of deeds by husband and wife, where the wife's privy examination was taken prior to the husband's "acknowledgment," embraces cases where the execution of the deed by the husband was proved by a subscribing witness, and not by the technical "acknowledgment" of the husband.

3. Retrospective legislation is invalid only when its effect would be to divest or interfere with vested rights, and it being competent for the Legislature to provide what mode of probate shall be valid and when it does so it can affect past as well as future probates, provided no vested rights of third parties are affected thereby.

ACTION, for the cancellation of a deed, tried before *Graham, J.*, at Fall Term, 1896, of PITT, on a case agreed as follows:

"1. That prior to 16 July, 1891, the *feme* plaintiff was seized of an undivided one-half interest in a certain tract of land in the (128) county of Pitt, fully described and set out in her complaint, and that on the said day she and her husband signed a deed purporting to convey, and sufficient in form to pass, a fee simple title in her said interest in the land to one R. B. Bynum, executing his note for the purchase money thereof in the sum of nine hundred dollars, the whole of which note still remains unpaid. That the said R. B. Bynum is insolvent.

"2. That on the said 16 July, 1891, the acknowledgment and privy examination of the *feme* plaintiff was taken before a justice of the peace, and later in the day proof as to the execution by the husband was made before the clerk of the court, the examination and acknowledgment of the wife before the justice preceding the proof as to the husband before the clerk in point of time a few hours.

"3. That subsequently the said R. B. Bynum conveyed the said land to the defendant R. L. Davis, in fee, who conveyed same to defendant E. B. Barrett. That the defendants were purchasers for value and without any notice of any defect in the probate and registration of said deed

from plaintiffs to said R. B. Bynum (if there be any defect), except such as the law may fix them with from the registration books.

"4. That the defendant E. A. Barrett and wife, E. B. Barrett, are in the sole possession of the said lands, receiving the rents and profits of the same, and that defendant Davis holds a mortgage thereon.

"5. The plaintiffs insist that upon the foregoing facts they are entitled to judgment prayed for in their complaint, for that the deed from the plaintiffs to R. B. Bynum is void on account of the defective probate and registration.

"6. The defendants insist that upon the foregoing facts they
(129) are entitled to have judgment rendered in their favor, for that the defect in probate of deed from plaintiff to R. B. Bynum (if it shall be found that any defect exists), was cured by the Act of 1893, and that plaintiffs are estopped by their deed, and under no circumstances are they entitled to recover in this action.

"It is agreed that if the Court shall be of opinion with the plaintiffs, upon the whole case, that they are entitled to recover the possession of the lands in this action, together with their portion of the rents and profits, judgment shall be entered for them; but if the Court shall be of opinion that the plaintiffs are not entitled to recover, then judgment shall be entered for the defendants."

His Honor rendered judgment for plaintiffs and defendants appealed.

Messrs. H. G. Connor and J. F. Bruton for plaintiffs.
Messrs. Jarvis & Blow for defendants (appellants).

CLARK, J. The acknowledgment and privy examination of the wife having been taken prior to the proof of the execution of the deed by the husband, the probate was insufficient, under The Code, sec. 1256; *McGlennery v. Miller,* 90 N. C., 215; *Ferguson v. Kinsland,* 93 N. C., 337; *Southerland v. Hunter, ibid.,* 310; *Lineberger v. Tidwell,* 104 N. C., 506. A registration had upon an unauthorized probate is invalid. *DeCourcy v. Barr,* 45 N. C., 181; *Todd v. Outlaw,* 79 N. C., 235; *Duke v. Markham,* 105 N. C., 131. And if third parties acquired rights, as by liens, against the grantor or conveyances from him, registered before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by the curative statute. *Robinson v. Willoughby,* 70 N. C., 358; *Smith*
(130) *v. Castrix,* 27 N. C., 518; *Gordon v. Collett,* 107 N. C., 362; *Long v. Crews,* 113 N. C., 256; *Williams v. Kerr, ibid.,* 306; *Quinnerly v. Quinnerly,* 114 N. C., 145. Here, however, the proceeding is between the grantors and the grantee of the grantee, and no question arises of the rights of third parties claiming under a subsequent lien against, or

grant from the grantor acquired prior to the curative act. As between the parties, the deed is valid without registration. *Leggett v. Bullock,* 44 N. C., 283.

The *feme* plaintiff signed the deed and her privy examination was properly taken. There is no controversy on these points. The sole defect is that the privy examination was taken a few minutes or hours before the husband's acknowledgment on the same day of the execution of the deed by him. The power of the Legislature to cure such defects, as between the parties, has not only been recognized by this Court in cases above cited, but elsewhere; Cooley Const. Lim. (6 Ed.), 463, 464, and numerous cases there cited. It is true, as insisted by plaintiff's counsel, that the curative act, 1893, chap. 293, makes valid probates where the wife's privy examination was had prior to the husband's "acknowledgment," but we must take it that this embraces, in the true intendment of the act, cases like the present, in which the execution of the deed by the husband was proved by a subscribing witness, and not by his technical acknowledgment. "The Legislature may abolish all the incapacities of married women and give them full power to contract as *femes sole*" (subject only to the constitutional restriction that conveyances of their property can not be made without the written assent of their husbands), *Bank v. Howell,* 118 N. C., 271, citing *Pippin v. Wesson,* 74 N. C., 437, 445. Whatever the effect of the privy examination of a married woman at common law, since the Constitution of 1868 (Art. X, (131) sec. 6), it is a mere statutory requirement, which any Legislature can abolish at will, except in conveyances of the homestead, Cons., Art. X, sec. 8. The Legislature has power to pass, repeal or modify the laws regulating the manner of executing, proving or recording conveyances, and the exercise of such power to cure defective compliance with former statutes can not be an interference with vested rights as between the parties to such instruments. *Tatom v. White,* 95 N. C., 453, 459. It only becomes so when third parties have acquired rights which would be impaired by the act which is intended to cure the defective execution, probate or registration. The deed having been signed by the wife for the purposes therein set forth, and her privy examination before a proper officer having disclosed the fact that she had done so voluntarily and still assented thereto, we can not agree with her able, learned and zealous counsel that such deed was void or that the Legislature infringed upon the judicial department in passing the curative statute. There was merely a defect in the probate, which, until cured, rendered the registration invalid. It is competent for the Legislature to provide what mode of probate shall be valid, and when it does so it can affect past as well as future probates, except that the rights of third parties, claiming prior to the validating act, can not be divested. Retrospective legislation is not

necessarily invalid. It is only so to the extent it would divest vested rights. The *feme* grantor had no vested rights in the land which she had conveyed away by her deed with the assent of her husband, which is all that the Constitution requires, except in conveyances of the homestead.

Reversed.

Cited: Miller v. Alexander, 122 N. C., 721; *Slocomb v. Ray,* 123 N. C., 574, 575; *McAllister v. Purcell,* 124 N. C., 264; *Lance v. Tainter,* 137 N. C., 250; *Anderson v. Wilkins,* 142 N. C., 159; *Penland v. Barnard,* 146 N. C., 381; *Powers v. Baker,* 152 N. C., 719; *Wood v. Lewey,* 153 N. C., 402; *Reid v. R. R.,* 162 N. C., 358.

(132)

B. J. LANGSTON AND CALLIE LANGSTON, ADMINISTRATRIX, v. GREENVILLE LAND AND IMPROVEMENT CO. ET AL.

Corporation—Mortgage—Existing Debts—Stockholder Dealing with Corporation.

1. A mortgage made by a corporation being invalid as against existing creditors who commence action within sixty days after the registration of the mortgage (sec. 685 of The Code), a purchaser of land at a foreclosure sale under such mortgage acquires no rights as against the creditor.
2. A stockholder of a corporation may deal with it in the same manner as any other person, provided there is no fraud in such dealings.
3. A creditor of a corporation who brings his action within sixty days after the registration of a mortgage of its property, is entitled only to an ordinary judgment for a debt and execution and not to a judgment declaring a lien on the property.

ACTION, tried before *Boykin, J.,* and a jury, at Spring Term of PITT. The facts are stated in the opinion of the Court. Judgment was rendered for the plaintiff, declaring the land of the defendant corporation, mortgaged within sixty days before beginning of the action, to be subject to the payment of the judgment. Defendants appealed.

Messrs. Blount & Fleming for plaintiff.

Messrs. Jarvis & Blow and Jas. E. Moore for defendants (appellants).

FURCHES, J. The defendant is a corporation, and for the purposes of said corporation it borrowed money of several persons and executed mortgages on its property for the purpose of securing the loans. All of the mortgages were upon the personal property, except one, made to

E. A. Moye, which included the real estate belonging to defendant corporation. This mortgage was executed 29 August, 1892, and registered 22 September, 1892, and the defendant Taliaferro is the purchaser under the mortgages. At the date of the execution of this (133) mortgage, the jury find that the defendant corporation was indebted to the plaintiff in the sum of $649.31, and that the plaintiff commenced this action on 29 September, 1892.

The plaintiff was a stockholder in the defendant corporation and its superintendent, and it was claimed by defendant Taliaferro that he was thereby estopped from enforcing his debt against this property. It was also claimed by Taliaferro that he had the right to be subrogated to the rights of the mortgagees—whatever they were.

It was admitted on the argument in this court that the plaintiff claimed nothing against the personal property, sold by the mortgagees under their mortgages hereinbefore mentioned. And the only question is as to whether the real estate, conveyed to Moye, is still liable to the plaintiff's debt, and we are of opinion that it is.

There is no question of subrogation involved in the case. There was no necessity for him to pay any debt of the defendant to protect any rights or liens he had on the property. And, in fact, he has paid no debt of the defendant corporation. He has bought the property of the defendant corporation, and the money he paid for it has been applied to the payment of the mortgage debts. So we see the money he paid was for the property he bought. It is true that it was subject to the plaintiff's debt (unless plaintiff is estopped) and it appears from the case that he had notice of plaintiff's claim before he bought.

Nor do we see any ground upon which the plaintiff is estopped. There is no allegation that he did anything to induce the defendant to buy. Indeed, it seems that the plaintiff was there asserting his claim. It is true that the defendant was a stockholder in the defendant company. But this defendant was a corporation, and the plaintiff (134) had the same right to deal with it that any one else had. And certainly so, where there is no allegation of fraud in the dealings. This being so, the "real estate" of defendant corporation remained liable to plaintiff's debt, notwithstanding the mortgage of defendant corporation to Moye, sec. 685 of The Code, which section has been construed in *Coal Co. v. Electric Light Co.*, 118 N. C., 232.

But there is error in the judgment which declares a lien on the property of the corporation. Sec. 685 of The Code does not authorize the declaration of a lien, but only puts the mortgage out of the way of plaintiff's collecting his debt, and leaves the property in the same condition, so far as this debt is concerned, as if no mortgage had been made. *Coal Co. v. Electric Light Co., supra.* The judgment should have been the

ordinary judgment in an action of debt, which may be enforced as other judgments are, and as if the mortgage to Moye had not been made. Thus reformed the judgment is

Affirmed.

Cited: Howard v. Warehouse, 123 N. C., 92; *R. R. v. Burnett, ib.,* 213; *Pelletier v. Lumber Co., ib.,* 599, 602; *Glass Plate Co. v. Furniture Co.,* 126 N. C., 892; *Bank v. Bank,* 127 N. C., 434; *Graham v. Carr,* 130 N. C., 273; *Fisher v. Bank,* 132 N. C., 777.

W. G. MIZZELL v. G. A. MCGOWAN ET ALS.

Action for Damages—Draining Swamp Lands—Natural Water Courses —Upper and Lower Landowners.

1. The privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenant to this easement, are the natural incidents to the ownership of land.

2. The owners of swamps, whose waters naturally flow into natural water courses, can make such canals, as are necessary to drain them of the water naturally flowing therein, although in doing so the flow of water in the natural watercourse is increased and accelerated so that the water is discharged on the land of an abutting owner.

(135) ACTION, tried before *Graham, J.,* and a jury, at December Term, 1896, of PITT. The facts are stated in the opinion of the Court. From a judgment for the plaintiff the defendants appealed.

Mr. James E. Moore for plaintiff.

Messrs. Jarvis & Blow and Blount & Fleming for defendants (appellants).

FAIRCLOTH, C. J. The plaintiff instituted this action for damages to his land by reason of ditches or canals cut by the defendants, collecting large quantities of water and discharging the same upon plaintiff's land in unusual quantities and with greater rapidity and force than before.

By the statement of the case we are informed that Broad Creek, about thirty or forty feet wide at its mouth, empties into Tar River, Moyes run into Broad Creek, and that Baldwin, Canon, and Cooper swamps naturally enter into Moyes run; that plaintiff's farm, alleged to be damaged, is bounded on the east and north by Broad Creek and Moyes

run; that prior to the cutting of the canal complained of, the waters of Moyes run never overflowed plaintiff's land, but since then they have, in ordinary rains, overflowed and damaged plaintiff's lands; that in high freshets the waters of Tar River backed up and overflowed plaintiff's land, before and since the cutting of the canal; that Moyes run and Broad Creek "are natural water courses; that Moyes run is a swamp two or three hundred yards wide, with a well defined water course running through it and emptying into Broad Creek"; that the waters on the upper swamp lands, owned by the defendants, naturally flowed into Moyes run, and some of the defendants cut the canal "for clearing and cultivating said lands, and have cleared and are cultivating the same and have used said canal for the purpose of draining the surface waters from their lands into Moyes run, and that prior to cutting (136) said canal the said Baldwin swamp was a natural depression or swale 200 or 300 yards wide, in which was no water course through which the said surface waters, flowing from said lands, naturally drained into Moyes run; that the said swamp, through which said canal was cut, was a natural drainway and drained into Moyes run."

The nature of Cannon and Cooper swamps was the same as Baldwin swamp. There is no allegation of negligence or unskillfulness in constructing the ditches or canal, nor is the question of damages for diverting water on the plaintiff's land before us. The sole act laid for damages is that the defendants, in the manner above stated, have discharged the waters with more force and rapidity than the natural flow and thereby damaged plaintiff's property. This is a difficult and delicate question in all similar actions. The natural condition of the eastern part of the State makes it so. The people and the Legislatures at an early day saw at once this difficulty. It was a matter of serious concern how to utilize these most valuable properties without ruin to the servient tenants. The agricultural interest of that part of the State demanded a remedy, and in 1795 the "Drainage" and "Mill" acts were passed, now found in The Code, secs. 1997 and 1846, and several acts since 1883. In the east it is well known that there are hundreds of thousands of flat surface swamp lands, which can not be relieved of the ordinary waters and made useful for living and cultivation without artificial canals or ditches leading into some creek or river, necessarily passing through intervening lands of riparian owners, and if these canals could be cut only by permission of the owners of the outlets, then vast acres would forever remain unpopulated, uncultivated and valueless to those who bought them from the State. These "Drainage" and "Mill" acts are therefore of public value to the present and future ages. (137)

The rights of parties under these legislative acts, however, do not affect the present question, and we express no opinion as to whether

the plaintiff could have availed himself of these acts under the conditions above stated. He selects his common-law remedy upon the facts before cited.

The defendants asked the Court to charge the jury that if they find from the evidence that Broad Creek and Moyes run are natural water courses and that the waters of the upper swamps naturally flow therein, and were susceptible of drainage for agricultural purposes, then the defendant had a right to make such canals in these swamps as were necessary to drain them of the water naturally falling thereon, although in so doing the flow of water in Moyes run was thereby increased and accelerated, and the flow of water was increased on the plaintiff's land. This prayer embraces the substance of all the prayers. His Honor modified the prayer by saying "provided he does not thereby damage said land." Defendant excepted.

We think his Honor should have given the defendants' prayer in substance without the proviso. A water course is well defined by Angel on Watercourses, sec. 4 (7 Ed.), and the evidence in this case shows that Broad Creek and Moyes run are natural and well defined water courses, according to that definition. This question has been much discussed in many courts. The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenant to this easement are the natural incidents to the ownership of the
(138) soil. The lower surface is doomed by nature to bear this servitude to the superior and must receive the water that falls on and flows from the latter. The servient tenant can not complain of this, because *aqua currit et debet currere ut solebat.*

The upper owner can not divert and throw water on his neighbor, nor the latter back water on the other with impunity. *Sic utere tuo, ut alieum non laedas.* This rule, however, can not be enforced in its strict letter, without impeding rightful progress and without hindering industrial enterprise. Minor individual interest must sometimes yield to the paramount good. Otherwise the benefits of discovery and progress in all the enterprises of life would be withheld from activity in life's affairs. "The rough outline of natural right or liberty must submit to the chisel of the mason that it may enter symmetrically into the social structure." Under this principle the defendants are permitted not to divert, but to drain their lands, having due regard to their neighbor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural streams through or by the lands of the plaintiff. This license must be conceded with caution and prudence.

This question was well considered and decided in *Waffle v. R. R.*, 53 N. Y., 11; *Hughes v. Anderson,* 68 Ala., 280; *Peck v. Harrington,* 109 Ill., 611. The same question has frequently been incidentally remarked upon by this Court. It was fully considered and decided and authorities cited in *Staton v. R. R.,* 109 N. C., 337; *Jenkins v. R. R.,* 110 N. C., 438.

Porter v. Durham, 74 N. C., 767, was a case solely for diverting water from its natural course and throwing it on the plaintiff. That question was reserved by the Court and is not before us. We need not consider the question of evidence in the view we take. There was (139) error in refusing the defendants' prayer for instruction on the question we have considered.

New trial.

Cited: Parker v. R. R., 123 N. C., 73; *Mizzell v. McGowan,* 125 N. C., 440; *S. c.,* 129 N. C., 94; *Parker v. R. R.,* 143 N. C., 295; *Clark v. Guano Co.,* 144 N. C., 77; *Briscoe v. Parker,* 145 N. C., 17; *Roberts v. Baldwin,* 151 N. C., 408; *Barcliff v. R. R.,* 168 N. C., 270.

L. A. AND G. A. McGOWAN v. H. C. HARRIS.

Practice—Lost Record—New Trial.

Where it appears that an appellant has been guilty of no laches or fraud and the trial judge certifies, after an appeal, that his notes of the trial have been lost, that he is unwilling to trust to memory to set forth the evidence in detail, as should be done in fairness to both parties, and requests that a new trial be ordered, it is the well settled practice to grant the request and order a new trial.

ACTION, tried before *Graham, J.,* at December Term, 1896, of PITT. There was judgment for the defendants and plaintiff appealed. His Honor addressed the following statement to this court:

"The notes taken by myself, which were very copious, were not sent to me with the other papers in the cause, and upon inquiry, I find they have been mislaid or lost.

"In a cause of this importance I am not willing to trust to my memory to set forth the evidence in detail as should be done, in justice to both parties, and I therefore request your Honorable Court to order a new trial."

Messrs. Blount & Fleming for plaintiffs (appellants).

Mr. James E. Moore for defendant.

DOUGLAS, J. In this case the Judge below certifies that the notes taken by him on the trial have been mislaid or lost; that he is not willing to trust to his memory to set forth the evidence in detail, as should (140) be done, in justice to both parties, and he therefore requests this Court to order a new trial. There is no appearance of laches or fraud on the part of the appellants, and in such cases it is the well settled practice of this Court to order a new trial. In the leading case of *S. v. Powers,* 10 N. C., 376, the opinion delivered by *Taylor, C. J.,* says: "It appears from the certificate of the Judge that a case presenting the points was intended to have been made up, but was prevented from his having lost his notes of the trial. Under these circumstances there is no other mode by which the justice of the case can be attained but by awarding a new trial." Cited and approved in *Isler v. Haddock,* 72 N. C., 119; *Sanders v. Norris,* 82 N. C., 243; *Burton v. Green,* 94 N. C., 215; *Simmons v. Andrews,* 106 N. C., 201; *Owens v. Paxton,* 106 N. C., 480; *Clemmons v. Archbell,* 107 N. C., 653.

There is also a line of decisions to the same effect where the trial judge died or went out of office before the case was made up, but Section 550 of The Code now makes it, in such cases, the duty of the Judge going out of office to settle the case as if he were still in office.

These cases uniformly lay down the rule that a new trial will not be ordered unless it is made to appear that the appellant is not guilty of laches. *Simmons v. Andrews,* 106 N. C., 201; *Heath v. Lancaster,* 116 N. C., 69. It would not be just to permit an appellant to obtain, simply through his own negligence or fraud, the benefit that would properly result only from the successful prosecution of his appeal. It should be made to appear affirmatively that he exercised due diligence in endeavoring to perfect his appeal, and that his failure to do so is not due (141) to any act or negligence of his own, or of another with his knowledge or consent.

While in this case no such evidence has been offered by the appellants, the finding and request of his Honor, who tried the case, is taken as sufficient.

The appellants are entitled to a new trial and it is so ordered.

New trial.

Cited: S. v. Robinson, 143 N. C., 625.

SARAH F. SPRUILL v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Action on Life Insurance Policy—Life Insurance—Contract—Suicide by Insured—Sane or Insane—Trial—Presumption—Rebuttal—Directing Verdict—Sufficiency of Evidence—Burden of Proof.

1. A clause in a policy of insurance inserted and intended to protect the insurer from all liability for any form of suicide, whether the assured be sane or insane, is not illegal or contrary to any well settled rule of public policy or morals.
2. Where a policy of life insurance provides that it shall become void if the assured shall die by his own hand, whether sane or insane, it is immaterial what the mental condition of the assured who dies by his own hand is at the time of his death, the liability of the insurer not being affected by the degree of insanity; and in the trial of an action on such a policy testimony as to the mental condition of the assured, who died by his own hand, was properly excluded.
3. Where there is no evidence, or a mere *scintilla* of evidence, or the evidence is not sufficient, in a just and reasonable view of it to warrant an interference of any fact, the Court should direct a verdict against the party upon whom the *onus* of proof rests.
4. In the trial of an action on a life insurance policy which provided that it should be void if assured died by his own hand, sane or insane, within two years from date of policy, the only issue was, "Did the assured die by his own hand within two years from the date of the policy sued on?" A *prima facie* case being made for the plaintiff by proof of the issuance of the policy and death of the assured, the defendant read in evidence the "proof of loss" furnished it by plaintiff, in which it was stated that the cause of death was "a pistol shot in his own hand," within two years from date of policy. Such statement was neither contradicted nor explained by plaintiff. *Held*, that the proof of such statement and admission in the "proofs of loss" shifted the burden of proof upon the plaintiff and, there being no contradiction or explanation of such statement, it was not error to direct a verdict against the plaintiff.
5. The expression, "died by his own hand," in a policy of insurance or proof of death thereunder is equivalent to "suicide."

ACTION, tried before *Boykin, J.*, and a jury, at April Term (142) 1896, of FRANKLIN. The nature of the action and the facts are stated in the opinion of the Court.

Messrs. F. S. Spruill and C. M. Cooke & Son for plaintiff (appellant).
Messrs. Battle & Mordecai and F. H. Busbee for defendant.

DOUGLAS, J. This is an action by Mrs. Sarah F. Spruill against the Northwestern Life Insurance Co. to recover the amount of a policy of

insurance issued to her as beneficiary upon the life of her husband, William T. Spruill. The policy issued on 2 October, 1894, provided that if, within two years from the date thereof, "the said assured shall, *whether sane or insane,* die by his own hand, then this policy shall be null and void." The assured died on 24 July, 1895, from the effects of a "pistol shot in his own hands," as stated in the proof of loss furnished to the defendant by the plaintiff, as required by the terms of the policy. The complaint, among other material allegations, alleged: "That on 24 July, 1895, at and in the county of Nash, the said William T. Spruill died," without stating in any manner the cause of his death. The answer (143) of defendant company set up, as a complete defense against any recovery, the date and terms of the policy, and the date and manner of death of the assured, as above set forth. The Court held that the burden of proof rested upon the defendant.

During the progress of the trial the plaintiff proposed to ask one W. T. Clark, her own witness, as to the mental condition of the assured at the time of the killing. The defendant objected, the objection was sustained and the plaintiff excepted. There is no error in the exclusion of such testimony, as in our view of the law, as applicable to policies like the one in suit, the mental condition of the assured at the time of the killing is entirely immaterial. It is well settled that under the old forms of life insurance policies, in which it was provided that the insurer should not be liable if the assured "committed suicide" or "died by his own hand," the policy was not vitiated when the assured was insane at the time of suicide. *Borradaile v. Hunter,* 5 Mann. and Gr., 668; *Insurance Co. v. Terry,* 15 Wall., 580; *Bigelow v. Berkshire Ins. Co.,* 93 U. S., 284, and a long line of decisions identical therewith in the large majority of the States.

In view of these decisions the insurance companies began to insert the words used in this policy, or words equivalent thereto. As the expressions "committed suicide" and "died by his own hands" were held synonymous, the words added thereto, "sane or insane," or "feloniously or otherwise," are regarded as equally synonymous and intended to protect the insurer from all liability where the assured committed suicide, whether sane or insane, and regardless of the degree of insanity.

After careful consideration, we are of opinion that such is the legal effect of the provisions of this policy. A policy of insurance is a contract and should be construed like all other contracts in such a (144) way as to carry out the manifest intention of the parties, unless some of its provisions, conditions or limitations are contrary to law or to public policy. It was clearly the intention of the policy of insurance in this case to protect the insurer from *all* liability for *any form* of *suicide,* and we do not see how such protective conditions are in any

way in violation of law or of any settled rule of public policy. Nor is the liability of the insurer affected by the degree of insanity, the word "insane" implying every degree of unsoundness of mind.

The distinction drawn by some eminent authorities in cases of self-killing by an insane person, "whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect," does not commend itself to our better judgment. It seems to belong rather to the domain of speculative psychology than to the practical administration of the law.

The determination of that shadowy line between mental twilight and night, where the last faint rays of reason, resting for a moment on the horizon of the mind, fade away into utter darkness, is practically beyond the power of finite understanding, and, to the jury, would necessarily be a matter of mere speculation, depending more upon their sympathy than their judgment. Of course the above rule does not include death by accident or mistake, such as the accidental discharge of a pistol in the hands of the assured, or poison, or an overdose of medicine taken by mistake. There must be at least physically some suicidal intent, no matter how far removed from a responsible mental operation. We believe this rule to be in accordance with the better line of decisions prevailing in the majority of courts. In the leading and well considered case (145) of *De Gogorza v. Insurance Co.*, 65 N. Y., 235, the Court says: "We have therefore only to consider the interpretation to be given to the language of the contract of insurance, for no question is made but that it was fully understood and agreed to by both parties. It can scarcely be doubted that an insurer of the life of a person may by apt language guard himself from liability for all disasters if the exemption does not contravene public policy. He may provide that if the assured shall die of the small-pox, or any other specific disease of the body, he would not be liable, and there appears to be no reason why he may not guard himself against liability if death results from any disease of the mind. Indeed, it is said by *Rapallo, J.*, in *Van Zandt v. Insurance Co.*, 55 N. Y., 169, 'that no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the assured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insurer and the insured,' and then in substance adds 'that if nothing is said with respect to insanity, the result is that a party does not die by his own hand' if his death happens from the involuntary act of a madman. This view of the question is but a very concise and accurate statement of the law as announced in cases previously adjudged. . . . The word 'insane' or 'insanity' ordinarily implies every degree

of the unsoundness of mind, and in this case we assume that the assured was in the very last degree mad or insane, so that the mere act of self-destruction was wholly involuntary."

After reviewing some of the leading cases the Court concludes: "We prefer to place our decision upon the ground that the words of the proviso in the policy before us, by plain rules of interpretation, exempt the insurer from liability. That this language, in view of previous (146) decisions, was inserted for such a purpose, can not be doubted and that it was agreed to by both the insured and the insurer is not questioned, and that it is a provision allowed by law no one denies. We are to say from these words what the parties must have intended, and we cannot properly say that additional words having no meaning were inserted in the contract, and if they mean anything it is just what the words commonly import, and that is, if death ensues from any physical movement of the hand or body of the assured, proceeding from a partial or total eclipse of the mind, the insurer goes free."

In *Scarth v. Life Society,* 75 Iowa, 346, the Court says: "We think that the better rule, and the logical conclusion of all the above cases, is, that the condition in the policy was intended to include self-destruction, no matter what the mental condition of the insured was at the time of the act which caused the death. Of course, the policy was never intended to include death by accident, as by taking poison by mistake, the accidental discharge of a gun or pistol held in the hands of the insured, or the like. It means all suicidal acts, whether such as are demonstrated as criminal or such as are the offspring of insanity." This construction appears to have been subsequently followed in the Supreme Court of the United States, as well as New York and the majority of the leading insurance States. *Bigelow v. Insurance Co., supra; Insurance Co. v. McConkey,* 127 U. S., 661; *Insurance Co. v. Akens,* 150 U. S., 468; *Riley v. Ins. Co.,* 25 Fed., 315; *Billings v. Ins. Co.,* 64 Vt., 78; *Chapman v. Ins. Co.,* 6 Bissell, 238; *Penfield v. Ins. Co.,* 85 N. Y., 318; *Adkins v. Ins. Co.,* 70 Mo., 27; *Pierce v. Ins. Co.,* 34 Wis., 389; *Life Asso. v. Payne* (Texas Civ. App.), 32 S. W., 1066.

In *Ins. Co. v. Akens, supra,* the Court, while affirming the judgment in favor of the plaintiff, distinctly recognized the principle herein (147) adopted by the following distinction (p. 475): "The clause (then under construction) contains no such significant and decisive words as 'die by suicide, sane or insane' as in *Bigelow v. Berkshire, etc., supra,* or 'by suicide, felonious or otherwise, sane or insane' as in *Insurance Co. v. McConkey,* 127 U. S., 661."

In the case before us any possible hardship arising from the exclusion of all liability for death from suicide is met by the termination of this condition after the lapse of two years from the date of the policy, which

then becomes incontestible. The question of the possible waiver of such a condition by the acceptance of premiums after the insured was wholly or partially insane, or threatened with insanity, is not before us.

The only exception remaining for us to consider is that of the plaintiff to the action of the trial judge in directing the jury to answer the issue in the affirmative. The only issue was as follows: "Did William T. Spruill die by his own hand within two years from the date of the policy sued on?" The force of this exception depends upon the consideration of several important principles. The action of the Judge can be sustained only under the doctrine, firmly established in this State, that where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the Court should not leave the issue to be passed upon by the jury, but should direct a verdict *against the party upon whom the burden of proof rests. Covington v. Newberger,* 99 N. C., 523, citing *Brown v. Kinsey,* 81 N. C., 245; *Best v. Frederick,* 84 N. C., 176; *S. v. White,* 89 N. C., 462; *S. v. Powell,* 94 N. C., 965. That the verdict should be directed *against* the party on whom rests the burden of proof, is the essence of the rule. We have examined (148) the large number of citations in the elaborate brief of the learned counsel for the defendant and cannot find a single case of a direction to the contrary. In *Purifoy v. R. R.,* 108 N. C., 100, the direction was in favor of the defendant upon a counterclaim as well as the original cause of action, but they both depended upon the same state of facts, and as there was *no conflict* in the testimony, the case practically resolved itself into mere questions of law. The doctrine under discussion is of English origin and of comparatively recent acceptance in this State. *Wittkowsky v. Wasson,* 71 N. C., 451, was apparently the first authoritative exposition of the doctrine in this State, as it now stands, although citing the case of *S. v. Vinson,* 63 N. C., 335. The former case, emphasized by the qualified assent of Justice Reade and the unqualified dissent of Justice Bynum, cites with the warmest approval the following quotation from the opinion of *Welles, J.,* delivered in the English Court of Exchequer Chamber, towit: "There is in every case a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case, but it is now settled that the question for the Judge (subject of course to review is as stated by *Maule, J.,* in *Jewell v. Parr,* 13 C. B., 916; 76 E. C. L., 909),

not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." *Reade, J.*, assenting, says: "I assented to the deci-
(149) sion as delivered in the opinion of Brother Rodman, upon the explanation therein, that it was not to be interpreted as an innovation upon the established rule that the jury are the *sole* judges of the *weight* of evidence without any intimation of opinion on the part of the Judge." The rule laid down in that opinion is now too firmly established to be questioned, but it can be carried no further without dangerously infringing upon constitutional provisions.

His Honor had already ruled that the burden of proof rested upon the defendant, and we think properly so. The presumption is always against suicide, as it is contrary to the general conduct of mankind. *Mallory v. Ins. Co.*, 47 N. Y., 54, cited and approved in *Insurance Co. v. McConkey, supra; Insurance Co. v. Akens, supra.*

It is further held that where the words of a policy do not clearly indicate the intention of the parties, the courts should lean to that interpretation which is most favorable to the assured. *McConkey's case, supra,* citing a large number of cases.

If the verdict of a jury is, in the opinion of the Court, against the weight of evidence, it can be set aside, and to the proper exercise of this discretion there can be no objection. But to permit the Judge to pass upon the *sufficiency* of the evidence necessary to rebut a legal presumption without submission to the jury would infringe upon the exclusive powers of the jury. *Hardison v. R. R., post* 492. The determination of the necessary character and legal effect of that evidence belongs to the Court as a question of law, but its weight must be left with the jury as a matter of fact. *Wittkowsky v. Wasson, supra; Best v. Frederick,* 84 N. C., 176; *S. v. Powell,* 94 N. C., 965; *S. v. McBryde,* 97 N. C., 393; *Powers v. Erwin,* 108 N. C., 522; *State v. Chancy,* 110 N. C.,
(150) 507; *Young v. Alford,* 118 N. C., 215, and numerous other cases.

The rule laid down in some authorities, that wherever the Judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina, and never can be under our present Constitution. "The ancient mode of trial by jury," guaranteed by the Constitution, is that at common law, and is none the less the right of the citizen than it was of the subject. Direction of a verdict and granting a new trial are essentially different in nature and effect. The one regulates the trial by jury, the other denies it; the one recommits the case to the jury, the other takes it away completely; the one merely reopens the case for a fairer trial, while the other ends it without redress, save the precarious

method of appeal, where findings of fact can be reviewed only from the meager notes of the Judge and the uncertain recollection of counsel. The mere fact that the Judge can never, save by waiver or consent, *render* a verdict, but can direct it only in the name of the jury, shows the intent and spirit of the law.

These principles are "fundamental," and "a frequent recurrence" thereto is of constitutional obligation.

The issuing of the policy and the death of the assured, alleged in the complaint and admitted in the answer, made a *prima facie* case for the plaintiff. The *onus* was thus shifted by the pleadings to the defendant, and was assumed by it. After the conclusion of its oral testimony, the defendant read in evidence the proof of claim sent on to the defendant by the plaintiff, in which it was stated that the cause of death of the assured was "pistol shot from his own hand." This statement, unexplained, was an admission of suicide, and at once shifted the burden of proof upon the plaintiff. *Insurance Co. v. Newton,* 22 Wall., 32; *Insurance Co. v. Higginbotham,* 95 U. S., 380. The cause of (151) death as given, when unexplained, negatives the *accidental* discharge of the pistol, for the expression, "died by his own hand," which, in its broadest sense, might include accidental death, has been uniformly given by the courts a well recognized meaning as being equivalent to "suicide." The plaintiff, though she went on the stand herself, in no wise contradicted this import of the words; nor did she testify to any facts tending to show she had used them by mistake or inadvertence. Her admission, unexplained and uncontradicted, justified his Honor's direction to the jury.

No error.

Cited: Edwards v. Phifer, post 406; *Hodges v. R. R., post* 556; *Collins v. Swanson,* 121 N. C., 69; *Barbee v. Scoggins, ib.,* 143; *Epps v. Smith, ib.,* 165; *Eller v. Church, ib.,* 271; *Caldwell v. Wilson, ib.,* 466; *Everett v. Receivers, ib.,* 521; *Bank v. School Com., ib.,* 109; *Barber v. Buffaloe,* 122 N. C., 135; *House v. Arnold, ib.,* 222; *Mfg. Co. v. R. R., ib.,* 886; *Cable v. R. R., ib.,* 894; *Johnson v. R. R., ib.,* 958; *Whitley v. R. R., ib.,* 989; *Berry v. R. R., ib.,* 1004; *S. v. Gragg, ib.,* 1086; *Thomas v. Club,* 123 N. C., 288; *Cox v. R. R., ib.,* 607, 612; *Dunn v. R. R.,* 124 N. C., 255; *Cogdell v. R. R., ib.,* 304; *Webb v. Atkinson, ib.,* 453; *Bank v. Wilson, ib.,* 568; *S. v. Rhyne, ib.,* 853; *Gates v. Max,* 125 N. C., 141; *Cowles v. McNeill, ib.,* 388; *Brendle v. R. R., ib.,* 479; *S. v. Truesdale, ib.,* 698; *Brinkley v. R. R.,* 126 N. C., 92; *Neal v. R. R., ib.,* 637, 640, 649; *Meekins v. R. R.,* 127 N. C., 35; *Mfg. Co. v. R. R.,* 128 N. C., 285; *Boutten v. R. R., ib.,* 340; *Porter v. Armstrong,* 129 N. C., 106; *Boggan v. R. R., ib.,* 155; *Carter v. Lumber Co., ib.,* 209;

S. v. Ellsworth, 131 N. C., 775; *Caudle v. Long,* 132 N. C., 678; *Bessent v. R. R., ib.,* 943, 944, 946; *Lewis v. Steamship Co., ib.,* 912, 920; *Walker v. R. R.,* 135 N. C., 741; *S. v. Smith,* 136 N. C., 693; *Thaxton v. Ins. Co.,* 143 N. C., 35, 37, 40, 43; *Crenshaw v. R. R.,* 144 N. C., 320; *Horton v. R. R.,* 157 N. C., 150; *Fulghum v. R. R.,* 158 N. C., 563; *Mfg. Co. v. Assurance Co.,* 161 N. C., 100; *Heilig v. Ins. Co.,* 162 N. C., 523; *Alexander v. Statesville,* 165 N. C., 532; *McAlee v. Mfg. Co.,* 166 N. C., 456.

IN RE YOUNG (*Habeas Corpus* Proceedings).

Testamentary Guardian—Custody of Ward.

Where a testator, by his will, appointed guardians of the persons and estate of his children, with directions that the latter should be placed with his sister S. until after their majority, and the children had been placed with her, but been taken from her by their maternal grandparents, and in a proceeding by *habeas corpus* it appeared that the deceased had for some time before his death boarded with his said sister, knew her disposition and habits of living, and it also appeared that she was unable, by reason of her circumstances in life and the allowance made by the will for the support of the children, to give them proper attention: *Held,* that, in the absence of a finding that the sister S. was an unsuitable person to have their custody, the children should be restored to her until she voluntarily surrenders her trust or proves unworthy of it, in which latter case the guardians or the Court will terminate it at the instance of any person interested in the matter.

CLARK, J., concurring in the reversal of the order which committed the children to the grandparents, is of the opinion that they should not be restored to S., but should be committed to the care of the guardians to exercise their discretion as to whether they shall put them again with S. or dispose of them otherwise.

FAIRCLOTH, C. J. and DOUGLAS, J., concurring substantially, in the views of Mr. Justice Clark, are of the opinion, nevertheless, that in no event should the children be again placed with S.

(152) PETITION for *Habeas Corpus,* by Ernest F. Young and H. G. Connor, guardians, and Bettie R. Seltzer, to have the persons of their wards committed to them, pending in WILSON Superior Court, and heard before *Robinson, J.,* at chambers, in Goldsboro, on 1 January, 1897. From an order dismissing the petition the petitioners appealed.

Messrs. Shepherd & Busbee and H. G. Connor for petitioners (appellants).

Messrs. Aycock & Daniels and S. A. Woodward, contra.

MONTGOMERY, J. In his last will and testament, the testator, C. A. Young, named H. G. Connor, one of the petitioners, his executor, and

also appointed him guardian of his three children, Charles, Harry, and Frank Young, of the respective ages of fifteen, five, and three years. The following is the language of the will in reference to the guardianship: "I hereby expressly instruct and direct the guardian of my said sons to place my said sons in the sole and exclusive charge, control and custody of my sister, Mrs. Betty R. Seltzer, who shall have the sole and exclusive care, control and custody of my said sons, with the assistance and counsel of the said guardian, until each of my said sons shall arrive at the age of twenty-one years. I direct and impress upon the said guardian the duty of executing this provision of my will. I also direct the said guardian to pay to my sister a fair compensation for the board and care of my said sons, and to furnish her with all such sums as may be necessary for their welfare and comfort. I also direct the said guardian, with the counsel and advice of my said sister, to provide for the education of my said sons in such way and at such schools as my said sister and said guardian shall think best for my said sons. (153) I hereby nominate and appoint my friend H. G. Connor, of Wilson, N. C., my true and lawful executor to this my last will, and confer upon him all the powers and impose upon him all the duties incident to the provisions of this said will. I hereby nominate and appoint my said friend, the said H. G. Connor, guardian of the persons and estate of my said children, Charles, Harry, and Frank Young, with the powers and duties incident to said trust, and direct him to execute the provisions of this will in regard to the custody of my said sons." Later, by codicil, the testator named his brother, E. F. Young, another of the petitioners, a co-executor and guardian of his children, "to have equal power and rights in every respect with my said friend, H. G. Connor, in the execution of said will and the duties of guardian." It was further provided in the codicil that the sum of $40 per month was to be paid to Mrs. Seltzer, the other petitioner, as a compensation for the board and care of the children as long as they should remain with her.

The children had been living with Mrs. Seltzer after the testator's death until 13 December last, when they were taken by their grandparents of the maternal line, the respondents, without the knowledge and consent of Mrs. Seltzer or of the guardians. In justification of this course, the respondents averred that the children were not receiving proper attention and care from Mrs. Seltzer. Upon the hearing of the matter *Judge Robinson* ordered that the custody of the infants be given to the respondent, Calvin Barnes, until the further order of the Court. The order was based on the following facts, which his Honor had found upon the investigation:

1. That during the time the infants remained with the petitioner, Mrs. Seltzer, they did not receive the same care and attention they would

(154) have received at the home of the respondent; that while with Mrs. Seltzer they were not properly clothed, and their persons were allowed to remain unclean.

2. That Mrs. Seltzer conducts a boarding house in Wilson, and has a large family of her own, and is unable to give the infants proper personal attention.

3. That the respondent and his wife are the grandparents of the infants, and are greatly attached to them; that the infants, in presence of Court, showed affectionate attachment for the grandparents, who were in every way well fitted to properly care, provide for and rear said infants.

We think the order was erroneous. There is not a word in the finding of facts nor in the whole record intimating that the petitioner, Mrs. Seltzer, was not a fit and suitable person, morally and socially, to have the care and nurture of the children. In fact the petitioners (guardians) pray for the return of the children to Mrs. Seltzer, and allege that "she is amply able and willing to discharge the trust reposed in her by the testator in regard to the care and control of the infants," and that "she is in every way a discreet and suitable person to have care of the infants." The petitioners show that the testator, at and before his death, lived in the same house with Mrs. Seltzer, and that the brother and sister consulted freely and fully on the matter of her taking care of the children after his death. He knew well his sister, her manner of housekeeping, and all her ways of life, and it is not shown in the findings of fact, or anywhere else in the record, that she had undergone any change in her manner of life or in her character since her brother's death. The amount of money, $40 per month, as compensation for the board and care of the children, is evidence that the testator, though a rich man, intended that his children should be reared in a very plain and (155) economical way. He knew that $40 per month would not be sufficient for the children to be indulged in fashionable clothing, a sumptuous table or constant baths. Mrs. Seltzer has done probably the best she could on the amount allowed for the support of the children. And, here it may be remarked, by the way, that should it turn out in the experience of the guardians that $40 per month could not be sufficient for the necessary and reasonable wants of the children, the guardians would be justifiable in making such further expenditures, out of the large income of their wards' estate, as would be proper and just, considering always the intention of the testator that the rearing and training of the children should be arranged on an economic and unostentatious basis.

But besides all these matters, the order of the Judge can not be upheld, for the reason that the petitioners Connor and Young are the guardians of the persons and property of the children by the very terms of the will —"I hereby nominate and appoint my said friend, H. G. Connor, guard-

ian of the persons and estates of my said children, with the powers and duties incident to the said trust." And the other petitioner, Young, by the codicil, is given "equal power and rights in every respect with my friend H. G. Connor in the execution of said will and duties of guardian." The clear intention of the testator was that as long as the sister, Mrs. Seltzer, lived she was to have the personal care and keeping of the children until their majority. If, on the other hand, her treatment of the children should become unkind, or if she should fail to provide things suitable for them, according to the allowance made in the will, it would then be the duty of the guardians, under the provisions of the will, and as matter of law, to interpose, and either stop abuses or take the infants from her keeping. In case of the death of Mrs. Seltzer, it can not be doubted that the guardians, under the requirements of the will, (156) would be invested at once with the legal custody of the children. These guardians, by the will, were to share in the labors of Mrs. Seltzer in bringing up the children, and as we have said, in case of her death they could not, if they desired, escape the responsibility of the guardianship of the children. They were, as we have said, the duly appointed testamentary guardians of the persons and estates of these children, and that authority and trust, in its fullest import, was only limited to the extent that while Mrs. Seltzer lived and remained in her character and manner of living as she was when the testator placed the children under her care, and did the best she could for the infants upon the amount allowed to her, she should have the care and keeping of the persons of the children.

So, we conclude that his Honor was not authorized by the law to make an order under his findings of fact, whereby the children should be kept out of the care and custody of the petitioner, Mrs. Seltzer; and we also conclude that, if good cause had been shown why the custody and care of the children should have been taken from Mrs. Seltzer, it could not be that the claims of the guardians, under this will, could have been set aside in favor of the grandparents or any one else, without a proceeding for that purpose directed against the guardians and in the proper jurisdiction. We both respect and admire the grandparents' tender love for the orphan children of their favorite daughter, who is deceased. Our sympathies are enlisted in their behalf over the grievous disappointment they meet with in this decision, and we would be glad to be the instruments of making their declining years peaceful and happy, but the law is not sentiment nor is it always religion.

The children must be returned to the custody and care of the petitioner, Mrs. Seltzer. If it should turn out that she does not (157) desire the further custody of the infants she can give up the trust, and the guardians can then make other arrangements for their care. If she should abuse her trust the guardians are charged with the duty of

putting an end to it, and if they should decline to do their duty, the courts are open for proceedings against them by any person interested in the matter.

Error.

CLARK, J., concurring. I concur in the conclusion that the judgment appealed from, which committed the custody of the children to the grandparents, was erroneous. The testator appointed H. G. Connor and his brother, E. F. Young, "guardians of the persons and estates" of his children. There is neither allegation, proof, nor even suggestion that they are unfit for, or have been derelict in the performance of that trust, and I see no warrant of law to discharge them from any part of it. The will instructed them to place the children with Mrs. Seltzer. If such sub-agent proved unfit this would not relieve the guardians of the trust as to the persons of the children, unless the guardians were shown to have connived at or been responsible in some way for the shortcomings of their agent. The will does not give the custody of the children to Mrs. Seltzer, but to the guardians, with instructions to place them with her. In view of this fact and the findings of his Honor, that while with Mrs. Seltzer the children "were not properly clothed, and their persons were allowed to remain unclean," and that she is "unable to give the infants proper personal attention," I cannot concur in the order that the children should be returned to the custody of Mrs. Seltzer. I am of
(158) opinion that the order of the Court below giving the custody to the grandparents should be set aside, and the children should be returned to the custody of H. G. Connor and E. F. Young, whom the will creates "guardians of the persons and estates of the said children." Whether or not the said guardians shall continue to observe the directions of the will, to entrust the care of the children to Mrs. Seltzer, is a matter resting in the sound discretion of the guardians, subject to the supervision of the Court under proper application. There can be no doubt that they, knowing the facts and circumstances thoroughly, will place the children with her or some one else, according as their best interests will require, and for sufficient reason, which will be satisfactory to a court of chancery.

DOUGLAS, J. I substantially concur in the concurring opinion of *Mr. Justice Clark,* except in its conclusion. In view of the findings of his Honor at the hearing below, I think it would be manifestly improper for the testamentary guardians, Connor and Young, to again place the children in the custody and care of Mrs. Seltzer, whose inability to take proper care of the children, from whatever cause it may arise, has been passed upon as a fact by a court of competent jurisdiction.

FAIRCLOTH, C. J., concurs with DOUGLAS, J.

(159)

MARGARET M. McKAY v. L. B. CHAPIN.

Injunction—Trespass—Cutting Timber—Injunction Bond.

1. An allegation, in an action for an injunction, that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient, if true, to authorize an injunction and the appointment of a receiver.
2. Since the enactment of chapter 401, Acts of 1885, it is not necessary to allege the insolvency of the defendant in an application for an injunction when the trespass is continuous in its nature or consists in the cutting or destruction of timber trees.
3. A restraining order issued without a bond from plaintiff, as required by section 341 of The Code, is irregular, but not void.
4. Although a bond in an application for a restraining order is mandatory, the irregularity in the writ without bond is cured by the subsequent execution of a proper undertaking, which will be allowed, even in this court.

MOTION to continue a restraining order granted by *McIver, J.*, at chambers, 8 February, 1896, and for the appointment of a receiver heard before him at chambers, in Lillington, N. C., on 8 February, 1896. The defendant filed a counter affidavit denying the material allegations in plaintiff's affidavit, and moved to vacate said restraining order on the ground that no complaint had been filed showing facts sufficient to entitle the plaintiff, or that the affidavit filed, if true, was not sufficient to entitle plaintiff to relief. His Honor refused the motion and defendant excepted. The defendant then moved to vacate said restraining order on the ground that said order had been improperly granted, for the reason that it was issued without requiring as a condition precedent the filing of an undertaking, indemnifying defendant against such damage as he might sustain by reason of the issuing of said order.

His Honor refused said motion, and signed the order continuing the restraining order until the final hearing in this cause, and for the appointment of a receiver, and the defendant excepted and (160) appealed.

Mr. W. E. Murchison for plaintiff.
Messrs. L. B. Chapin and F. P. Jones for defendant (appellant).

CLARK, J. The allegation that the defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off, and threatens to continue to do so, to the irreparable damage of the plaintiff,

is sufficient, if true, to authorize an injunction to issue, and the appointment of a receiver. *Dunkart v. Rhinehart,* 87 N. C., 224; *Lumber Co. v. Wallace,* 93 N. C., 22. Indeed, it is not now necessary to allege insolvency in such case. *Ousby v. Neal,* 99 N. C., 146; Acts 1885, ch. 401. There is no allegation or exception that the defendant tendered the bond authorized by Acts 1885, ch. 94; *Lewis v. Lumber Co.,* 99 N. C., 11; besides, the act vests the acceptance of such bond from the defendant in the discretion of the Court.

It is true, the restraining order should not have issued without filing the undertaking required by The Code, sec. 341, but this renders the order irregular, not void. *Sledge v. Blum,* 63 N. C., 374. The subsequent granting of the injunction to the hearing upon the execution of a proper bond renders it now of no import that the restraining order was irregularly granted, without the preliminary bond. While the bond is mandatory, if the plaintiff offers to supply it this will be allowed even in this court. *James v. Withers,* 114 N. C., 474; *Miller v. Parker,* 73 N. C., 58, 60.

No error.

Cited: Kistler v. Weaver, 135 N. C., 390; *Yount v. Setzer,* 155 N. C., 217.

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(161)

S. D. PIPKIN ET AL. v. J. W. PIPKIN.

Proceedings for Partition—Tenants in Common—Improvements by One Tenant in Common—Report of Commissioners—Practice.

1. In partition proceedings, where one tenant in common has improved a part of the land in good faith, he is entitled to have it allowed to him at a valuation made without regard to the improvement.

2. Where commissioners appointed in partition proceedings were ordered to report the evidence taken before them and their findings of fact, failed to do so, it was error to confirm their report as to the division of the land, in the face of an exception thereto on the ground that they ignored the order of the Court.

PROCEEDING for the partition of the land of Lewis Pipkin, deceased, heard, on appeal from the Clerk, before *McIver, J.,* at Spring Term, 1896, of HARNETT. From a decree confirming the report of the commissioners, the defendant J. W. Pipkin appealed.

Messrs. L. B. Chapin and F. P. Jones for plaintiff (appellant).
Mr. W. E. Murchison for defendant.

MONTGOMERY, J. One of the numerous and complicated exceptions filed by the defendant J. W. Pipkin to the first report of the commissioners last appointed, which was overruled by the Clerk—whose action was sustained by the Judge presiding, at the August Term of the Superior Court following—is meritorious, and ought to have been sustained.

The exception was made to the failure of the commissioners to allot to the defendant his share, that part of the real estate of his deceased father which the defendant had improved and made more valuable than the other part. It is well settled that in partition proceedings where one tenant in common has improved a part of the land, he is not entitled to have it allotted to him at a valuation made without (162) regard to the improvement. *Cox v. Ward,* 107 N. C., 507; *Collet v. Henderson,* 80 N. C., 337. Another exception was made by the defendant to the second report of the commissioners of date of 5 September, 1895, upon the hearing of which, on appeal from the Clerk's decision, at the November Term following, the Judge presiding made an order that the matter be recommitted to the commissioners without prejudice, and that they report the evidence taken by them and their findings of fact to the Court. The commissioners afterwards made a report under this order without the evidence or their findings of facts. The defendant excepted to the report because of the failure of the commissioners to obey the order of the Court. The exception was overruled by his Honor, and the entire action of the commissioners, in reference to the partition of the land, confirmed. There was error in this. The report of the commissioners showed upon its face a failure on their part to perform the duties required of them by the Court's order. They reported no evidence, they found no facts; they simply recited conclusions.

The commissioners will be instructed by the Court below to report (1) Whether or not the defendant has improved any particular part of the land held in common with the other parties in this proceeding, and if he has, why the same was not allotted to him in the partition. (2) The commissioners will be ordered also to proceed with the duty required of them in the order made by *Judge Timberlake,* at the November Term, 1895, to report the evidence heretofore taken on the question as to whether or not the defendant had been allotted lands about which there is, or may be, dispute, as to the title thereto; and to hear and report any new testimony on this matter which may be offered by the defendant, or any of the parties interested, and their findings of (163) facts. The statement of the case on appeal has contained a great many errors of dates, misplacement of exhibits and errors in names of parties.

It is complicated, further, with the difficulties attendant upon the restoration of the substance of the pleadings, which were lost by fire,

and where the record had to be supplied by a reference to a commissioner for that purpose, because of contradictions and inconsistencies between the statement of the defendant and those of the plaintiffs. We think, however, that we have gotten at the bottom of the controversy, and that substantial justice has been done to the parties in the decision which we have made. There was error in the proceedings in the respects pointed out in this opinion.

Error.

PEGGY SPIVEY ET AL. v. HENRY ROSE ET AL.

Action to Recover Land—Deed—Privy Examination of Married Women, Validity of—Registration of Deeds, Extension of Time for—Witness —Competency—Transactions with Deceased Persons—Section 590 of The Code.

1. The probate of a deed and the privy examination of a married woman taken in July, 1868, before the chairman of the old county court when the court was not in session, was valid under chapter 35, Acts of 1868-'69.

2. Statutes extending the time for the registration of conveyances of land are valid, and deeds of gift are embraced in their provisions.

3. Where, in the trial of an action to recover land, the defendants claim under a deed alleged to have been made by the plaintiff to their ancestor, the plaintiff is not competent (under section 590 of The Code) to testify that the deed was a forgery.

4. A *feme* plaintiff in action to recover land against defendants who claim under a deed alleged to have been made by her and her husband to the ancestor of the defendants, is not disqualified, under section 590 of The Code, as a witness to prove that she never appeared before the officer who certified the probate of deed alleged to have been signed by her, and was never privily examined by him, such officer being dead and no representative being a party to the action. In such case, however, the proof necessary to impeach the certificate of probate should be strong, clear and convincing.

(164) ACTION, to recover land, tried at March Term, 1896, of JOHNSTON, before *McIver, J.*, and a jury. The facts appear in the opinion of the Court. There was a verdict, followed by judgment for the defendants, and plaintiffs appealed.

Messrs. Pou & Pou for plaintiff (appellant).
No counsel contra.

MONTGOMERY, J. The plaintiff introduced, without objection, a deed for the land, executed 22 October, 1852, by Windsor Watkins to herself. The defendants offered in evidence a deed covering the same land, which purported to have been made by the plaintiff, to Incil Watkins, on 1 June, 1867, and which had been admitted to probate on 7 January, 1868, and registered 21 August, 1883. The plaintiff objected to the admission of this deed in evidence on the ground that the probate appeared to have been taken before B. R. Hinnant, chairman of the Court of Pleas and Quarter Sessions, at a time when the court was not in session. The objection was properly overruled.

By an Act of Assembly, ratified 2 March, 1867, the chairmen of the Courts of Pleas and Quarter Sessions were authorized to take privy examinations of *feme covert* in the conveyance of real estate. Chapter 35, Laws 1868-'69, ratified 8 February, 1869, referring to the Act of 1867, recites that whereas "under some misconstruction of the (165) law, such examination was made in various instances at a time when the court was not in session, and at a place other than at the courthouse, since which, doubts have arisen as to the legality and binding force of such examination—therefore, the General Assembly of North Carolina do enact—sec. 1. That every such examination made by any chairman of the County Court of this State, at any time when the said County Court was not in session, and at any place other than at the courthouse of each county, shall have the same effect as if the said examination had been made during the session of the court at the courthouse and in conformity to the law in all other respects."

The plaintiff further objected to the admissibility of the deed on the ground that it was void in law, in that it appeared to be voluntary on its face, being a deed of gift and had not been registered within two years after its execution. His Honor committed no error in overruling this objection. The General Assembly has regularly, every two years, enacted statutes extending the time for the registration of conveyances of real estate, since the execution of this deed up to the time of its registration, the first one on 31 March, 1871, before the death of the testator—even before the will was made. Such acts have been declared by this Court to be in the discretion of the Legislature, and deeds of gift embraced in their provision. *Jones v. Sasser,* 14 N. C., 378; *Scales v. Fewell,* 10 N. C., 18.

The defendants then offered in evidence, without objection, the will of Incil Watkins, the grantee in the deed from the plaintiff. In the will Incil Watkins devised the land to his widow, now deceased, for life, with remainder in fee to his son Thomas Watkins, the father, now deceased, of the defendants and under whom they claim as his heirs at law.

The case states that under the will the choses in action belonging (166)

to the estate were bequeathed to certain of his children, among whom was the *feme* plaintiff, and that she was also one of the residuary legatees. But it does not appear that any question of estoppel was raised against the *feme* plaintiff on account of her having received the articles of personal property under the residuary clause of the will, and no ruling was made on it by the Court.

The *feme* plaintiff was introduced as a witness in her own behalf and offered to testify that the deed from her and her husband to her father, Incil Watkins, was a forgery, and that she never signed it or authorized it to be signed. The Court sustained the objection on the ground that the evidence was incompetent, under section 590 of The Code. There was no error in this ruling.

The deed was not signed in the proper handwriting of the grantors, but was signed with their cross marks, and if the offered testimony had been admitted, its effect would have been to declare that the grantors had not executed the deed—which would have been testimony as to a personal transaction with the deceased grantee. How it might be if the deed had been signed in the proper handwriting of the grantors, we are not called upon to decide.

The plaintiff then offered to testify that she had never acknowledged the deed before Hinnant, the chairman of the County Court, and that she had never been privily examined by him. Hinnant was dead at the time of the trial. The Court sustained the objection. There was error in this ruling. In *Ware v. Nesbit,* 94 N. C., 669, the Court held that the acknowledgment of the execution of a deed by a married woman with her privy examination, no longer carried with it the con-
(167) clusiveness of a judicial proceeding, and that her deed, like that of any other person, could be impeached if the grounds were sufficient.

If a married woman could impeach her deed because of fraud or duress, we cannot see why she should not prove, if she can, that she never appeared before the officer who certified the probate. No person representing any interest of Hinnant's estate is a party to this action, and no judgment that could be made in it would bind his representatives. Because of the refusal of the Court to allow her to testify to the alleged false certificate of the probate there must be a new trial.

Of course the proof necessary to impeach the certificate of the officer to the probate of that deed should be strong, clear, and convincing.

New trial.

Cited: Bright v. Marcom, 121 N. C., 87; *Hallyburton v. Slagle,* 130 N. C., 484.

JEFFRIES & SHELTON v. AARON & KORNEGAY.

Practice—Irregular Judgment—Motion to Set Aside Judgment—Valid Defense.

1. Where a judgment "final," instead of "by default and enquiry," was rendered on an open account on failure of the defendants to appear, it was error to set aside on motion which was not put upon the ground of mistake, surprise or excusable neglect, or upon a showing of a valid defense. In such case the validity of the defense is for the Court and not for the party to determine.

2. In such case, any questions of lien, homestead rights, etc., that might arise, cannot be considered until execution shall have been issued.

MOTION to set aside a judgment rendered by default final on an open account on the failure of defendants to appear and answer. The judgment sought to be set aside was as follows:

"This case coming on to be heard, it appearing to the Court that the summons on each of the defendants has been served, and there being no answer filed by the defendants, and the complaint has (168) been duly verified, it is therefore ordered, adjudged and decreed by the Court: That the plaintiff recover of the defendant the sum of two hundred and thirty-nine dollars and eighty-five cents, of which two hundred and eleven dollars and ninety-five cents is the principal, and twenty-seven dollars and ninety-five cents is the interest, with interest on two hundred and eleven dollars and ninety-five cents until paid.

"It is further ordered, adjudged and decreed: That the plaintiffs are entitled to an execution against the real estate described in the complaint as the property of the defendant Julia D. Aaron, and the Clerk of the Superior Court is directed to issue execution to the sheriff of Wayne County, directing him to sell the above-mentioned real estate for the satisfaction of the above-mentioned judgment, and for costs of this action."

An execution upon this judgment was issued by the Clerk.

At September Term, 1896, of WAYNE, before *Boykin, J.*, the defendant Julia D. Aaron moved the Court to set aside the judgment upon proper notice and affidavit on the grounds:

"1. That the said judgment is irregular and contrary to the course of the courts in that the action is upon an open account for goods sold and delivered, and it is not alleged that the defendants agreed to pay any particular sum therefor, but simply alleges that they were reasonably worth the amount demanded; and the judgment was rendered 'by default final' instead of 'by default and inquiry.'

(169) "2. That said judgment is declared to be a lien upon the real estate described in the complaint, and orders its sale for the satisfaction thereof, without its appearing either in the complaint or answer that the defendant had no personal property out of which said judgment might be satisfied, or whether there was any firm property out of which it might be satisfied, or without providing for the sale of said property before resorting to the sale of the real estate.

"3. That it provides for setting aside no homestead exemptions to the defendant Julia D. Aaron.

"4. That there are no facts set forth in the complaint which justify an order of sale of said land, or to declare that the same is a lien upon the same; and it being a judgment by default for the want of an answer, it could only be such a judgment as was justified by the complaint."

His Honor granted the motion and plaintiffs appealed.

Mr. S. W. Isler for plaintiffs (appellants).
No counsel contra.

FAIRCLOTH, C. J. As we understand it, the plaintiffs obtained a judgment "final on an open account," the defendants having failed to answer the complaint. This was irregular. Code, secs. 385, 386; *Witt v. Long*, 93 N. C., 388. The judgment should have been by "default and inquiry." At a subsequent time the defendants made a motion to have the judgment vacated and set aside on the ground of irregularity in entering a judgment "final."

The motion is not put upon the ground of mistake, surprise or excusable neglect. The Court vacated and set aside the judgment. This was error. The Court having jurisdiction of the subject and the parties, there is a presumption in favor of its judgment, and the burden of overcoming this presumption is with the party seeking to set aside the judgment. He must set forth facts showing *prima facie* a valid defense, and the validity of the defense is for the Court and not with the party.

(170) Although there was irregularity in entering the judgment, yet, unless the Court can now see reasonably that defendants had a good defense, or that they could now make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now, and then be called upon soon thereafter to render just such another between the same parties? To avoid this, the law requires that a *prima facie* valid defense must be set forth. *Jarman v. Saunders*, 64 N. C., 367; *English v. English*, 87 N. C., 497; *Mauney v. Gidney*, 88 N. C., 200.

In this case the affidavit does not suggest that there is any mistake in the amount, nor that there is any defense that can be made.

The question of lien, homestead rights and some others are suggested in the case, but these will not call for consideration until further proceedings are had below. About these matters the parties will proceed as they are advised, when the judgment is restored and executionary process has been issued.

The order vacating the judgment is reversed.

Reversed.

Cited: Junge v. McKnight, 135 N. C., 117; *Glisson v. Glisson,* 153 N. C., 188; *Currie v. Mining Co.,* 157 N. C., 220; *Hardware Co. v. Buhmann,* 159 N. C., 513; *Harris v. Bennett,* 160 N. C., 347; *Hyatt v. Clark,* 169 N. C., 179; *Miller v. Smith, ib.,* 210.

W. R. CHAMBLEE ET ALS. v. W. H. BROUGHTON ET ALS.

Devise—Life Estate—Rule in Shelly's Case—Will, Construction of—Evidence—Insanity of Mortgagor—Collateral Attack on Judgment—Innocent Purchaser.

1. The rule in *Shelly's case,* though antiquated and based upon reasons which have long ceased to exist, is in force in North Carolina; and hence, a devise to a person "during his natural life and at his death to his bodily heirs," vests in him a fee simple estate.
2. A deed executed by a testator to one child several years before the date of his will and having no connection therewith, is not admissible to explain the terms of a devise, contained in the will, to another child.
3. In the trial of an issue as to the insanity of a mortgagor, evidence that, at the time of former proceedings against him for the foreclosure of a mortgage, he was in poor health and could not attend to ordinary business and occasionally had fits and spasms and had been declared an inebriate, was insufficient to go to the jury.
4. Where a judgment of foreclosure was rendered in an action in which the question of the insanity of the mortgagor was raised, the mortgagor is estopped thereby and such judgment cannot be collaterally attacked thereafter on the ground of his insanity.
5. A *bona fide* purchaser at a foreclosure sale without notice that the mortgagor defendant in the action was insane, will be protected though the judgment, in proper proceedings for the purpose, should be set aside on the ground of such insanity.

ACTION, by W. R. Chamblee and others, children of B. D. Chamblee, and B. D. Chamblee and wife, against W. H. Brough- (171)

ton, William Boylan, and others, for the value of timber cut from land claimed by the plaintiff, for injunction, and to set aside a former judgment of foreclosure and for a resale of the land, tried before *Boykin, J.*, and a jury, at October Term, 1896, of WAKE.

The land in controversy had been devised by Rayford Chamblee to B. D. Chamblee for life, with remainder to "his bodily heirs." B. D. Chamblee and wife conveyed the land by way of mortgage to Miss C. Boylan, who, in default of payment of the note secured by the mortgage, advertised and sold the land in February, 1894, the defendant William Boylan being the purchaser. Thereafter, in order to clear the title of the cloud cast upon it by alleged claims of the children of B. D. Chamblee, an action of foreclosure was brought by the mortgagee and the purchaser, William Boylan, against B. D. Chamblee, his wife and children. In that action the insanity of the mortgagor was pleaded (although no testimony was introduced on the issue) as well as the claim of the children of B. D. Chamblee to the fee simple estate in the
(172) land. The issues were found in favor of the plaintiffs in that action, and under a judgment of foreclosure the land was sold by a commissioner and purchased by and conveyed to the defendant William Boylan, who, after repeated and liberal offers to the mortgagor to resell to him for the amount of the debt, sold to the defendant Broughton, who, in turn, sold the standing timber on the land to the defendant Whitley. Thereupon, this action was brought by the children of B. D. Chamblee and by B. D. Chamblee and wife for the purposes above stated.

Plaintiffs offered in evidence the will of Rayford Chamblee annexed to the complaint and admitted in the answer. They also offered in evidence a deed from Rayford Chamblee, father of B. D. Chamblee, to Elvira Richardson, a daughter referred to in the will, said deed bearing date 18 February, 1859, and registered. The deed was offered in evidence to show the intent of the testator in the use of the words "fee simple," "heirs of the body," and "during the natural life," occurring in the will. Defendants' objection was sustained and plaintiffs excepted. Plaintiffs then offered in evidence the answer of defendants and the report of the commissioners in the case of *Boylan v. Chamblee,* and upon the suggestion by the defendants that the whole record be put in the entire record in said case was offered in evidence by the plaintiffs.

The plaintiffs introduced W. H. Chamblee, who testified in substance as follows: "I am the brother-in-law of B. D. Chamblee, I know him and the land he lives on; it contains about 367 acres, half of it timbered, oak and long-leaf pine; it is twenty miles from the railroad. The defendants Broughton and Whitley went on the land in the spring of 1895 and have cut timber from 100 acres. The timber is worth about 66 cents per hundred when sawed, and about 10 cents per hundred

growing. Whitley has a sawmill on the land. I think the land is (173) worth $3,000. I would have given $1,500 for it if I had been satisfied as to the title. I showed five lawyers the will and they said the title was all right. Mr. Pace, a lawyer, told me if I bought it I would probably have a law suit. I declined to give $400 for one hundred acres of it after talking with Pace. When the papers in the other suit were served on B. D. Chamblee, I did not think he was in a position mentally to attend to business. He had fits, and was not able to do much for his family. He was injured; did not visit much; came to my house occasionally; had a spasm there once. His eyes rolled, and he bit his tongue. Four of the children were under age at the time of the sale. Timber growing is worth 10 cents per hundred feet. I suppose there were 2,000 feet cut; do not know positively. The lumber has been used by Broughton in building a house on the land." Upon being recalled, the witness testified: "I do not know when the first case was begun, or when it was tried. Chamblee did not transact much business. I do not know how his mind was when he had fits. He knew right from wrong. At times he acted like a crazy man, but not so all the time. I do not know how he was at the time of trial. Once, when he had a spasm, I saw him throw something in the fire. Two years before he moved to Durham he acted as if he was crazy; could not transact his ordinary business. I and another justice of the peace adjudged him an inebriate."

J. C. L. Harris testified that he knew B. D. Chamblee; had seen him two or three times. Witness is a lawyer, and was employed by his (Chamblee's) wife, one of the plaintiffs, on the trial of the former case. Chamblee was in poor health. No evidence was introduced as to his insanity on the former trial. The judgment was against the defendant. "I urged an appeal, but his wife said that she did not (174) have the money to pay for the transcript. I never spoke to Chamblee about the case."

Plaintiffs asked that the following issues be submitted: "(1) Have defendants committed trespass and waste on plaintiff's land, as alleged in the complaint? (2) What damage is plaintiff entitled to recover? (3) Was B. D. Chamblee incapable of transacting business because of mental infirmity at the trial of this action, and at the time the summons was served on him and continuously during said time? (4) Was he made a party to the foreclosure proceeding? (5) Is B. D. Chamblee estopped by the decree in said proceeding? (6) Ought a resale of the land be ordered by the Court upon the whole testimony?" A jury was empaneled and sworn, and the Court, after hearing the evidence, intimated that plaintiffs were not entitled to recover, and the Court answered the first issue, "Nothing"; the third and sixth issues, "No"; and the fourth and fifth issues, "Yes." Defendants objected. The plaintiffs asked the

following special instructions: "(1) Under all the evidence the plaintiffs are entitled to have a resale of the land. (2) There has been no fair and adequate price bid on the land, and equity is constrained to order its resale by another commissioner to be appointed by the Court. (3) Considering the doubt cast upon the title, the inadequacy of the price, the qualified recommendation of the commissioner, and all the other facts in the case, a resale must be ordered. (4) If the evidence is believed by the jury, the third issue must be answered "Yes," and the fourth issue "No." The Court declined to grant these prayers and plaintiffs excepted and the Court answered the issues as appears above. Plaintiffs excepted. The following judgment was rendered: "It is adjudged that none of the plaintiffs have any interest or title in the land, and that defend-
(175) ant W. S. Broughton is the owner and entitled to possession thereof, and that he recover of the plaintiffs and their sureties the costs of action." Plaintiffs excepted and asked that upon the pleadings, exhibits and other records, judgment be entered for the plaintiffs. Motion overruled and plaintiffs excepted and appealed.

Messrs. F. H. Busbee and W. B. Snow for defendants.
No counsel for plaintiffs (appellants).

CLARK, J. The main question presented is, whether the devise to "B. D. Chamblee during his natural life and at his death to his bodily heirs" conveyed a fee simple or not. It clearly does under the rule in *Shelly's case,* and that rule is still in force in North Carolina. *Dawson v. Quinnerly,* 118 N. C., 188; *Nichols v. Gladden,* 117 N. C., 497; *Starnes v. Hill,* 112 N. C., 1; *Leathers v. Gray,* 101 N. C., 162, in which cases the rule is stated, thoroughly considered and affirmed. It applies to devises equally with conveyances. 1 Fearne Rem., 89. The rule originated in the Feudal law, and a case construing it was reported in Coke's Reports, 94 (though the rule itself is found as far back as Year Book, 18 Edward II), and is based upon reasons which have long since ceased to exist. 1 Fearne Rem., 84; Williams R. P., 254, note. It is true, the rule contradicts and thwarts the intent of the grantor or devisor whose expressed purpose to confer an estate for life only upon the first taker is enlarged by an arbitrary rule of law into a fee simple, and the expressed purpose to confer all except the life estate upon the heirs is restricted so as to give them nothing. Still, it is a long established rule of property and cannot be changed except by legislative enactment. This, it seems, has been done in a majority of the States, but it has not been done in North Carolina. The rule being in force when the will was executed, the will was in contemplation of law drawn with reference
(176) thereto. The deed made to one of the daughters had no connec-

tion with the will, having, in fact, been made several years before, was not competent and was properly excluded.

The Court below properly held that B. D. Chamblee was estopped by the judgment in the foreclosure proceeding. There was not sufficient evidence to go to the jury as to the alleged insanity of B. D. Chamblee, and if there had been, the former judgment against him could not be impeached in this collateral way, but could only be attacked by a direct proceeding. *Thomas v. Hunsucker,* 108 N. C., 720, and *Brittain v. Mull,* 99 N. C., 483, and certainly the purchaser without notice would be protected, even if the judgment could be set aside. *Odom v. Riddick,* 104 N. C., 515; *Thomas v. Hunsucker, supra.*

Affirmed.

Cited: Edgerton v. Aycock, 123 N. C., 136; *Marsh v. Griffin,* 136 N. C., 335; *Tyson v. Sinclair,* 138 N. C., 24; *Bees v. Smith,* 149 N. C., 144; *Price v. Griffin,* 150 N. C., 528; *Robeson v. Moore,* 168 N. C., 389.

C. W. GRANDY & SON v. N. J. GULLEY, ASSIGNEE OF B. W. BALLARD.

Controversy Without Action—Necessary Affidavit—Jurisdiction.

In order to give the Court jurisdiction of a controversy submitted without action under section 567 of The Code, it is necessary that the affidavit required by the statute must be made showing that the controversy is real and the proceeding in good faith and that the Court would have had jurisdiction if the proceeding was by summons.

CONTROVERSY without action, submitted upon facts agreed, and heard before *Boykin, J.,* at October Term, 1896, of WAKE. The affidavit required by section 567 of The Code was not made or does not appear in the record. Judgment was rendered for the plaintiffs and defendant appealed.

Mr. T. W. Hawkins for plaintiff. (177)
Mr. R. C. Gulley for defendants (appellants).

FAIRCLOTH, C. J. This controversy was submitted without action, under The Code, sec. 567, upon an agreed state of facts. We cannot enter into the merits of the controversy, for the reason that the affidavit required by the statute was not made or does not appear in the record. This mode of proceeding is unknown to the common law, and unless the positive requirement of the statute is observed the Court is without jurisdiction.

It must appear by affidavit that the Court would have jurisdiction if the proceeding was by summons; also that the controversy is real and the proceeding is in good faith. *Jones v. Commissioners,* 88 N. C., 56; *Arnold v. Porter,* 119 N. C., 123.

In *Bank v. Loan & Trust Co.,* 119 N. C., 553, on motion, the defendant being present in this Court and not objecting, the plaintiff was allowed to file the required affidavit, and the Court proceeded to hear the case.

Proceeding dismissed.

MARTHA H. BLAKE v. D. C. BLAKE ET AL.

Action to Recover Land—Transaction With Deceased Person—Section 590 of The Code.

In an action to recover land the children of a deceased mother were parties plaintiff and defendant, plaintiff claiming as devisee of the mother. On the trial the defendants offered to testify that the mother had agreed to hold the land in trust for life, with remainder to plaintiff and defendants as tenants in common: *Held,* that they were incompetent, under section 590 of The Code, to testify to the alleged agreement on the part of their deceased mother, the plaintiff not having offered to give evidence concerning the matter.

(178) EJECTMENT, tried at October Term, 1896, of WAKE, before *Boykin, J.,* and a jury.

Defendants set up an equitable claim to the lands, alleging in their answer that the deed upon which plaintiff relied was made to her mother through a mistake, and that the defendant paid for the land. The plaintiff offered in evidence the will of her mother, Minerva Blake, and also a deed of one Andrews, reciting that the purchase money was paid by her mother. The defendant testified that their father died intestate, seized of the land, and that their mother, Minerva Blake, had her dower laid off therein; and defendant, D. C. Blake, testified that he and his mother and the other heirs of his father agreed to sell the land which descended to them, and invest the money in the land which their mother bought of Andrews, and agreed with their mother that she was to take the same interest in the land purchased from Andrews that she had in the land they sold, and no more, towit, a dower interest. The plaintiff and the defendants are the children of Minerva Blake, and tenants in common, but there was no actual ouster, the plaintiff claiming the land as the devisee under the will of her mother.

The plaintiff objected to the testimony of the defendants concerning the agreement, as incompetent under section 590 of The Code. There was a verdict followed by judgment for the defendants and plaintiff appealed.

Mr. M. A. Bledsoe for defendants (appellants).
No counsel contra.

CLARK, J. The defendants were incompetent under section 590 of The Code to testify to any alleged personal agreement or transaction between them and the mother, now deceased, under whom the plaintiff claims. Indeed, it would be difficult to find a case falling (179) more directly within the very words of the statute. That the plaintiff herself is alleged to have been a party to the agreement (which she denies), does not affect the matter, as it is not the plaintiff's assent, but the agreement of her deceased ancestor, which was sought to be shown, in order to correct the fee simple deed taken by such ancestor into a trust for life to her, with remainder as tenant in common to the plaintiff and the defendants. *Barbee v. Barbee,* 108 N. C., 581.

Peacock v. Scott, 90 N. C., 518, and *Johnson v. Townsend,* 117 N. C., 338, are clearly distinguishable. In those cases the personal transaction or communication was had with two or more persons associated in interest, and it was held that the death of one of them does not prevent such transaction being given in evidence when the associates of the deceased are living and parties to the action. Here the transaction was between the children (now the plaintiff and defendants) on one side, and the mother alone on the other. She left no living associates to narrate her side of the transaction, as in the two cases above cited. It is true the plaintiff is her devisee, but this brings the case within the very words of the statute which forbids the transaction with a decedent being given in evidence by the opposite party to the transaction, unless the person claiming under the deceased as executor, devisee, etc., is first "examined in his own behalf." The transaction with the deceased, she having no associates, could not be given in evidence by the defendant unless the plaintiff, her devisee, had gone on the stand, and the fact that the plaintiff is alleged to have been a party with the defendants in making the agreement with the deceased, does not render it competent to show what passed between them and the deceased. It would be admissible to show any agreement between the plaintiff and the defendants, but not that the deceased assented to it, *Halyburton v. Dodson,* 65 N. C., (180) 88, unless the party claiming under the deceased has elected to give evidence in regard to the matter. *Sic ita scripta est lex.* There have been many cases where the executor or other person claiming under

the decedent could have testified as to the transaction between the decedent and the opposite party, but unless such executor or devisee, etc., elects to testify the opposite party cannot. *Armfield v. Colvert,* 103 N. C., 147.

Error.

Cited: Peterson, In re, 136 N. C., 18; *Hall v. Holloman, ib.,* 36.

D. L. RUSSELL, GOVERNOR, v. H. W. AYER, STATE AUDITOR.

Mandamus—State Officer—Performance of Duty—Constitutional Law —Statutes—Error in Statute—Taxation.

1. Under sub-sections 1 and 2 of section 3320 of The Code, which empower and require the Governor of the State to "supervise the official conduct of all executive and ministerial officers," and to "see that all offices are filled and duties thereof performed, or in default thereof apply such remedies as the law allows," as well as under the general law, as announced in decisions of this Court, the Governor has the right to bring mandamus proceedings against the State Auditor to compel the performance of the ministerial duties prescribed by statute which do not involve any official discretion.
2. The equation of taxation being fixed by the Constitution, any sections or parts of sections of an act of the General Assembly which violate or disturb such equation are void, and the courts can lend no aid by judicial decision, but must declare the offending provisions void.
3. Sections 2 and 3 of chapter 168, Acts of 1897 (Revenue Act), fixing the poll tax at $1.29 and the property tax at 46 cents on the $100 valuation, being in conflict with section 1, Art. V, of the Constitution, which provides that the poll tax shall be equal to the tax on $300 of property, are both void, and the executive department cannot levy a poll tax at the constitutional ratio to the property tax fixed.
4. Sections 2 and 3 of chapter 168, Acts of 1897 (Revenue Act), being void in so far as they violate the constitutional equation of taxation, the corresponding parts of sections 2 and 3 of chapter 116, Acts of 1895, are unrepealed and in full force and effect.

(181) ACTION by Daniel L. Russell, Governor of North Carolina, against Hal. W. Ayer, State Auditor, for a peremptory mandamus, commenced in the Superior Court of WAKE, and heard on complaint and demurrer before *Adams, J.,* at chambers, in Raleigh, in April, 1896. The complaint was as follows: "The plaintiff, complaining, alleges—

"1. That he is Governor of North Carolina, and as such it is his duty to supervise the official conduct of all executive and ministerial officers and to see that the duties of all officers are performed, and in default thereof to apply such remedy as the law allows.

"2. That the defendant, Hal. W. Ayer, is Auditor of the State of North Carolina.

"3. The General Assembly of North Carolina, at its session of 1897, duly passed an act which was ratified on the 9th day of March, entitled 'An Act to Raise Revenue,' in words and figures (in part) as follows, towit:

" 'Section 1. That the taxes hereinafter designated are payable in existing national currency, and shall be assessed and collected under the rules and regulations prescribed by law and applied to the payment of the expenses of the State government, the appropriations to charitable and penal institutions, other specific appropriations made by law, and the interest on the four per centum consolidated debt of the State.

" 'Sec. 2. On each taxable poll or male between the ages of twenty-one and fifty years, except the poor and infirm whom the county commissioners may declare and record fit subjects for exemption, there shall be annually levied and collected a tax of one dollar (182) and twenty-nine cents, the proceeds of such tax to be devoted to the purposes of education and the support of the poor, as may be prescribed by law, not inconsistent with the apportionment established by section two of Article five of the Constitution of the State.

" 'Sec. 3. There shall be levied and collected annually an *ad valorem* tax of twenty-two and two-thirds cents for State purposes, three and one-third cents for pensions, twenty cents for public schools, making forty-six cents on every one hundred dollars value of real and personal property in this State, and moneys, credits, surplus, reserve funds, undivided profits, investments in bonds, stocks, joint stock companies, or otherwise, required to be listed in "an act to provide for the assessment of property and collection of taxes," subject to exemption made by law, and no city, town, or other municipal corporation shall have power to impose, levy, or collect any greater sum on real and personal property than one per centum of the value thereof, except by special authority from the General Assembly.'

"4. That of the twenty-two and one-third cents levied for State purposes, five and one-sixth cents were levied to pay the interest on the four per centum consolidated debt of the State, which debt existed prior to the Constitution of North Carolina of 1868.

"5. That said act duly passed by both Houses of the General Assembly provided for the levy of a poll tax of one dollar and thirty-eight

cents, but that by a mistake of the enrolling clerk the act as enrolled levied a tax of one dollar and twenty-nine cents.

"6. That under article five of the Constitution of North Carolina the said capitation tax equal to property valued at three hundred dollars, towit: one dollar and thirty-eight cents, should have been levied.

"7. That, as plaintiff is advised and insists, the General
(183) Assembly, having levied a tax on property of forty-six cents on the one hundred dollars worth of property, thereby fixed the amount of the capitation tax, and having undertaken to levy a capitation tax, such tax is by the Constitution fixed at one dollar and thirty-eight cents. That therefore, such a tax in law has been levied.

"8. That it is by law the duty of the Auditor to prepare forms to be used for assessing and listing property for taxation by the assessors and list-takers in accordance with said act, and the Constitution—Article 5, section 1—fixing the rate of taxation at forty-six cents on every one hundred dollars value of real and personal property, and one dollar and thirty-eight cents upon each taxable poll, and it is also his duty to transmit said forms to the clerks of the Boards of Commissioners of each county.

"9. That the plaintiff has requested the said Auditor of the State to prepare such forms, and to observe the constitutional equation by fixing the capitation tax on each taxable poll at one dollar and thirty-eight cents, and to transmit the same as required by law. But that the said Auditor has refused to prepare said forms, fixing the capitation tax at one dollar and thirty-eight cents, upon the ground, as he claims, that it is his duty in preparing said forms to fix the said capitation tax at one dollar and twenty-nine cents.

"Wherefore, the plaintiff makes this application, praying—

"1. That a peremptory writ of mandamus be issued out of this court, directed to the defendant, commanding him to prepare said forms to be used in assessing and listing property for taxation by the assessors and list-takers under the said act, fixing the capitation tax at one dollar and thirty-eight cents, and also commanding him to transmit said forms to the clerks of the Boards of Commissioners of each county, as re-
(184) quired by law.

"2. For other and further relief.

"3. For the costs and disbursements of this action."

The defendant demurred to the complaint on the ground that "the facts set forth in the complaint for mandamus do not entitle the plaintiff to the relief asked for therein."

His Honor overruled the demurrer and adjudged, "that a peremptory writ of mandamus do issue out of this court, directed to the defendant, commanding him to prepare forms to be used for assessing and listing

property for taxation by the assessors and list-takers according to law, fixing the rate of taxation at forty-six cents on every one hundred dollars value of real and personal property, and one dollar and thirty-eight cents upon each taxable poll, and to transmit said forms to the clerks of the Boards of County Commissioners of each county in the State."

Messrs. J. C. L. Harris, J. W. Hinsdale, Cook & Greene for plaintiff.
Messrs Zeb. V. Walser, Attorney-General, and A. C. Avery for defendant.

MONTGOMERY, J. The General Assembly of North Carolina, at its session of 1897, in an act entitled: "An Act to Raise Revenue," laid the capitation tax at one dollar and twenty-nine cents, and a tax of forty-six cents on every one hundred dollars value of real and personal property. Section 1 of Article V of the Constitution, provides that "The General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash, * * * and the State and county capitation tax combined shall never exceed two dollars on the head." Upon the face of the Act of Assembly it (185) appears at a glance that the equation fixed by the Constitution between the capitation tax and that on property has not been preserved. The Auditor of the State, who is required to prepare and send out to the several counties the forms to be used by the assessors and list-takers of property for taxation, deemed it his duty to follow the plain words of the act, and to place on the forms the capitation tax as fixed by the act, at one dollar and twenty-nine cents, and was at the commencement of this proceeding about to send the forms out to the various counties. The plaintiff, in whom is vested by the Constitution, the supreme executive power of the State, believing that the property tax having been levied by the General Assembly to the amount of forty-six cents on the one hundred dollars worth, and that body having undertaken to levy a capitation tax, though an erroneous one, the Constitution itself adjusts and fixes the capitation tax at one dollar and thirty-eight cents, notwithstanding the erroneous levy of $1.29 for that purpose, has brought this action (mandamus) to compel the Auditor to place the amount of the capitation tax on the forms at one dollar and thirty-eight cents—the amount of the tax laid by the act on three hundred dollars worth of property—instead of one dollar and twenty-nine cents as appears in the act. There is no allegation in the complaint of willful or contumacious refusal on the part of the Auditor, the plaintiff simply alleging that the defendant's idea of what his duty under the law is is erroneous. There can be no serious question concerning the power of the Governor to bring an action of the

nature of this one against the defendant if the defendant had failed or refused to perform a specific duty expressly required of him by an Act of Assembly. The right to bring such an action by the Governor (186) is conferred upon him by subsections 1 and 2 of sec. 3220 of The Code. By those sections he is empowered and required to "supervise the official conduct of all executive and ministerial officers," and to "see that all offices are filled and duties thereof performed, or in default thereof apply such remedies as the law allows."

Besides this express statutory authority for the commencement of mandamus proceedings against a public officer in cases where he refuses to perform a specific duty required of him by law, this Court in *R. R. v. Jenkins, Treasurer,* 68 N. C., 502, citing *Kendall v. U. S.,* 12 Pet., 524, said: "It is settled that, when an act of the legislative branch of the government directs an executive officer to do a specific act which does not involve any official discretion but it is merely ministerial, * * * a mandamus will be ordered, and in *County Board v. State Board,* 106 N. C., 81, it was decided that an action could be maintained to compel public officers to discharge mere ministerial duties not involving an official discretion."

The plaintiff has performed his duty with the best interests of the State in view in commencing this proceeding, and the decision of this Court will no doubt be a great relief to the defendant.

The demurrer of the defendant raises the question whether or not those parts of secs. 2 and 3 of chap. 168 of the Acts of 1897, entitled "An Act to Raise Revenue," which fix the amount of capitation tax and the tax on property, are repugnant to the Constitution because of their violation of the constitutional equation between the tax on property and that on the poll. And if these parts of those sections are unconstitutional, then, of course, the act which the plaintiff seeks to have performed by the Auditor cannot be done, and the demurrer should (187) have been sustained. Sec. 2 of the Act referred to fixes the capitation tax at one dollar and twenty-nine cents, without condition and without reference to any other of its sections or provisions. There is, therefore, no room for enquiring into the intention of the law makers. It cannot be said that when they wrote "one twenty-nine," they meant "one thirty-eight." It must be presumed that they knew what they were doing and that they meant to do what they did. The act was perfectly regular on its face, had passed its several readings and was duly ratified, and no proof as to mistake or error can now be heard in this Court to contradict its provisions. *Carr v. Cooke,* 116 N. C., 223. So we arrive at the conclusion that upon the face of the act the Auditor's duty would be to send out the forms with the amount of the capitation tax fixed

at one dollar and twenty-nine cents, the amount specified in the Act, if that portion of the Act is in accordance with Article V, Sec. 1 of the Constitution.

We will now discuss that part of the question.

The capitation tax under the Constitution can never exceed two dollars, and the tax on each head subject to taxation shall be equal to the tax on property valued at three hundred dollars. The position of the plaintiff in this action is that the language of the Constitution makes the tax on property the basis from which the capitation tax is calculated and determined; that one thing cannot be said to be equal to another thing, unless the other is clearly known and certain; and that, therefore, the tax on property is *first* to be levied and fixed before the capitation can be adjusted to fit it (the property tax) under the Constitution; that the General Assembly followed this course, placed the property tax at forty-six cents on the one hundred dollars worth, and by mathematical calculation apportioned the tax on property to the several purposes of the State necessities in detail, *i. e.*, twenty-two and two- (188) thirds cents for State purposes, three and one-third cents for pensions, twenty cents for public schools; and that although that body on the face of the Act, failed to preserve the constitutional equation when they levied the poll tax at one dollar and twenty-nine cents, and the tax on $300 worth of property at $1.38, yet they nevertheless in the attempt to levy a poll tax, having fixed the tax on property at $1.38, on the $300 worth of property, the capitation tax is by force of the Constitution itself fixed at $1.38, and that therefore the same is to be read into the Act and deemed in law to have been levied.

The claim of the plaintiff means simply this: That although the General Assembly, in language entirely free from doubt, has violated the provisions of the Constitution by disturbing the equation of taxation, yet the Auditor can be compelled to give force to a law unconstitutional on its face, because the Constitution has fixed the equation. The Constitution does not levy any tax upon anything. That instrument simply provides that public revenue may be raised by taxation, and fixes the equation to be observed by the General Assembly between the poll and property taxes, and leaves the General Assembly, solely, the duty of levying the public taxes and the discretion of fixing the amount necessary, always keeping in mind the limitations prescribed. If the General Assembly should at any session levy a tax on property, but fail to levy a capitation tax, it could not be contended that the provisions of the Constitution in regard to the equation of taxation could supply the omission and read into the defective law a capitation tax equal to the property tax levied on $300 value of property. Such a section in a revenue law would be void because of the failure of the law makers to levy the

(189) taxes under the constitutional requirements. Neither can the Constitution be invoked in a case like the one before us to fix the poll tax in a different amount from that prescribed in the act, on the alleged ground that, as the General Assembly had fixed the tax on property, therefore the constitutional provision by its own force applies its corrective influence, overrules the amount fixed by the General Assembly and adjusts the question. The Constitution is a chart which must be consulted and followed, but in the matter of taxation it is absolutely indispensable that the General Assembly, by proper enactment, give life and effect to the provisions of the Constitution by making the levy and providing the machinery for collection. If the legislature fails to discharge its duty there is no help. If in its action it disturbs the equation of taxation, the section or parts of sections containing the violation are void, and the courts can lend no aid by judicial decision, but must declare the offending provision of law void.

In view of the great public interests concerned, we think it proper to say (though not necessary to a decision of this case) that while the parts of secs. 2 and 3 of the Act above referred to, which concern the amounts of the capitation tax, are void, because they disturb the equation between property and poll taxes, yet the remainder of the Act is valid; and that, although the revenue act of 1897 contains a clause which repeals all acts and parts of acts contrary to its provisions, yet, the parts of secs. 2 and 3 of the Act of 1897 being unconstitutional and void, it follows that those parts of secs. 2 and 3 of chap. 116 of the Acts of 1895, which levy the amount of capitation and property tax are unrepealed and are in full force and effect. The revenues which the treasurer will receive from the tax on property levied in 1895 of course will be less than they would have been under the levy of 1897, and the Treasurer will of course disburse the same for the various purposes set out in sec. 3 of the Act of 1897,
(190) *pro rata,* and according to law, the regular expenses for the conducting of the State government first to be considered.

There was error in the ruling of the judge below. The demurrer ought to have been sustained.

Error.

CLARK, J., dissenting: The Constitution, Article V, Sec. 1, provides: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal to the tax on property valued at $300 in cash * * * and the State and county capitation tax combined shall never exceed two dollars on the head." It will be perceived by this that, as to *limitation,* the capitation tax is the standard, and a levy exceeding two dollars on $300 is invalid as to the excess, because the capitation tax, State and

county, can never exceed two dollars. Opinion of *Pearson, C. J.*, in *University v. Holden,* 63 N. C., 410, 412. But, as to the *equation,* the property tax is the standard. The Constitution says "the capitation tax shall *be equal to* the tax on property valued at $300." When it is required that anything shall be "equal to" something else, that makes the latter the standard.

The legislature always levies four kinds of taxes: the license taxes, usually called "Schedule B," and privilege taxes, usually known as "Schedule C," the property tax, and the capitation tax. The revenue act of 1897 does this and contains at its end this provision: "All laws and clauses of laws in conflict with this Act are hereby repealed." There is no contention that the "Schedule B" and "Schedule C" taxes of 1897 are not substituted for "Schedule B" and "Schedule C" taxes of 1895, the latter being repealed. The legislature of 1897 further saw fit to place the tax on property at forty-six cents on the $100. This is in conflict with sec. 3 of the Acts of 1895, chap. 116, which places (191) the property tax at forty-three cents on the $100, and as completely repeals it as the "Schedule B" and "Schedule C," of 1897 repeal those of 1895. There can be no question of the power of the legislature to fix the property tax at forty-six cents, and the courts have no power to set it aside. The Constitution makes the property tax in no wise dependent upon the poll tax or upon anything else, and the legislature has placed these two taxes in different and independent sections of the Revenue Act. The power of the legislature to levy the property tax has only one limitation in the Constitution, that it shall not exceed two dollars on $300 worth of property. The "Schedule B" and "Schedule C" taxes, and the property tax of 1897, being levied within the powers of the legislature, are all alike beyond the supervision of the courts, and are the only taxes of those kinds that are valid and subsisting, the taxes of those kinds levied by the previous legislature being expressly repealed. The only tax remaining is the capitation tax. That, unlike the other two, is not left to legislative discretion, but by the express requirements of the Constitution is to be measured by the property tax. It "shall be equal to," says the Constitution, in words too plain to be misunderstood, "the tax on $300 of property." This provision was inserted in the Constitution of 1868 as a guarantee to the property holders of the State that they would not be oppressed by inordinate taxes laid by representatives elected by the newly enfranchised blacks, who had small property to be taxed and whose representatives might otherwise be tempted to levy excessive taxes on property (*Rodman, J.*, 63 N. C., at page 427), and for the nearly thirty years since this breakwater was put into the Constitution, it has never been lost sight of.

The verified complaint in this action avers that the bill actually passed by both houses respected the constitutional provision, and,
(192) in fact, placed the poll tax at $1.38, but that in some unexplained manner sec. 2 of the bill as ratified had been altered to read "$1.29 poll tax." The demurrer admits the allegation to be true, but we cannot consider it, for the majority opinion in *Carr v. Coke,* 116 N. C., 223, has held that, conceding such to be the fact, the courts are bound by the signatures of the speakers. We must, therefore, take it, as beyond question, that the legislature passed the act in the form in which it is enrolled and printed—placing the property tax at forty-six cents and the poll tax at $1.29. Does that invalidate the property tax? There is not a word in the Constitution to give us power so to declare. There is not a word in that instrument making the property tax dependent upon anything else. Indeed, the property and the capitation tax are in different sections of the act, as usual. Nor is there anything in the Constitution to restrict the discretion of the legislature to fix the amount of the property tax save that it must not exceed the limit of $2 on $300 of property, and that has not been done. Whence, then, has the Court the power to read into the Constitution any other control over the property tax, or to declare it void, except as to an excess above the limitation? As to the poll tax, the Constitution is different. It says *it shall be equal* to the property tax on $300. If it is not, then the capitation tax is unconstitutional, and we should so declare it. It is surely illogical when the legislature has levied a property tax clearly within its power, and which is not to be measured by anything, to declare it unconstitutional because another tax in another clause of the act, which must be measured by the property tax, does not comply with the standard marked out by the Constitution.

The Constitution requires that "the General Assembly shall levy a capitation tax on every male inhabitant over twenty-one and under fifty years of age." This has been done. It further provides that such
(193) capitation tax "shall be equal to the tax on property valued at $300." This has not been done. As the Constitution is the higher law and more powerful than a simple enactment of the Legislature, it is the duty of the court to see that the Constitution is observed and to direct the Auditor, as prayed, to print in his blanks the poll tax (which the Legislature did not fail to levy) at a rate equal to that which the Legislature has levied on $300 of property, for the Constitution, greater than any legislative enactment, has decreed that such shall be the case as long as the Constitution itself exists. The courts cannot control the Legislature in a matter resting in legislative discretion. But when that body has no discretionary power, and has fixed a standard by which something else must be measured, the courts will require conformity to the standard.

It is a rule of construction always recognized, *"ut res magis valeat quam pereat."* Applying that maxim to this very statute, no objection has been urged as to any part thereof except that which fixes the rate of taxation. On observing that, we find that the "Schedule B" and "Schedule C" taxes and the property tax are unquestionably valid. We find that the Legislature has also obeyed the constitutional mandate by levying a capitation tax. But as to this latter, we find that it is defective in that it does not come up to the requirement that it "shall be equal to the property tax on $300." The simple duty asked of the court is to say to the auditor, "Obey the Constitution, and not the act of the Legislature." While placing in his blanks the certainly valid property tax of forty-six cents, the Auditor should therefore be commanded to write in the column for capitation tax the $1.38 required by the Constitution, and not the $1.29 provided by legislative enactment, an enactment which from comity to a coördinate department we would presume to be due to an inadvertence or the act of some subordinate, even if such fact did not appear in the complaint and was not admitted by the defendant. (194) The Legislature of 1897 was entrusted with fixing the rate of taxation. They were within their power when they fixed the property tax at forty-six cents and repealed the 1895 levy of forty-three cents. They were unmindful of the constitutional restriction if they intentionally fixed the poll tax at $1.29, and the remedy is to conform the rate of the levy for poll tax to $1.38, as required by the Constitution, and not a judicial repeal of the property tax of 1897, and a judicial reënactment of the "poll tax of $1.29, and property tax of forty-three cents," as levied by the Legislature of 1895. That levy was found insufficient in the judgment of the Legislature of 1897, who repealed it by express enactment. The courts have no power to declare the property tax levy of 1897 void, and to revive that of 1895. The tax levy of 1897 was admitted on the argument to be already largely insufficient to meet the appropriations made for public purposes. We judicially know the tax valuation of the property of the State and the number of polls. The loss of 3 cents per $100 on the property tax and 9 cents on the poll, caused by a reverter to the taxation of 1895, will cause in this year and the next an additional deficit of $150,000 unless a special session of the General Assembly should be called, at great expense, to correct the inadvertence of some clerk. When such consequences can be averted by taking the unquestionably valid levy of 46 cents made on property by the Legislature, and directing the Auditor to observe the unmistakable requirement of the Constitution by inserting under the poll tax, levied by the Legislature, an amount which "shall be equal to the property tax on $300," it would surely seem that it should be done. It is a matter in which the Legislature had no discretion. If it had, the court could not control it.

(195) They had a discretion as to the property tax, and therefore the court has no power to set it aside, nor call into being a property tax enacted by another Legislature, and which this Legislature has repealed. But as to the poll tax, when the Legislature fixed the property tax, the Constitution, more powerful than the Legislature, fixed the poll tax at a sum "equal to the property tax on $300." The unconstitutionality is not in fixing the property tax, but in the rate of the poll tax. It is the latter, not the former, which should be disregarded and set aside. To set aside the property tax of 46 cents as to which the Legislature had discretionary power, and to fail to make the poll tax, as to which the Legislature had no discretion, conform to the Constitution, is for the court to intervene where it has no power, and to fail to do so where it has; it is to "do those things we ought not to do and to leave undone those things we ought to do." When the tax levy exceeds $2 on the poll, the whole tax is not unconstitutional, but only the excess over the limitation. In like manner, when the equation is not observed, the power of the court is not to set aside the whole of the tax levy nor the standard—the property tax—but to observe the Constitution by requiring the poll tax to be entered on the tax list at a rate "equal to the tax on $300 of property."

The learned and able counsel for the defendant frankly admitted that, if the Legislature had omitted to levy any poll tax, the court could enforce the constitutional guarantee by a mandamus to the Auditor requiring him to place on the tax list the poll tax "equal to the tax laid on $300 of property." If this were not so, the constitutional provision, instead of being a guarantee to property owners, the purpose for which alone it was placed in the organic law, would be a nullity and a delusion.

(196) If the Constitution had contained a provision—"the poll tax shall be $1.38"—the court would command the Auditor to put that upon the tax list whether the Legislature should repeat it in the Revenue Act or not. If the Legislature should venture to put it in as "$1.29 poll tax" this would not repeal the constitutional provision, nor would it render void any other tax. So, when the Constitution requires the Legislature to fix the property tax, which it does at 46 cents, then the Constitution *eo instanti* fixes the poll tax at $1.38 as imperatively as if that sum were named in the Constitution. What harm can come from enforcing a constitutional provision as to a matter not left to legislative power or discretion?

Among the many cases recognizing self-executing constitutional provisions, may be cited the following: *Reynolds v. Taylor,* 43 Ala., 420; *Miller v. Marx,* 55 *ib.,* 322; *Woodward v. Cabaniss,* 87 *ib.,* 328; *McDonald v. Patterson,* 54 Cal., 245; *People v. Hoge,* 55 *ib.,* 612; *Donahue v. Graham,* 61 *ib.,* 296; *Oakland v. Hilton, ib.,* 69 Cal., 479; *S. v.*

Woodward, 89 Ind., 110; *Hills v. Chicago,* 60 Ill., 86; *People v. Bradley, ib.,* 398; *People v. McRoberts,* 62 *ib.,* 38; *Kine v. Defenbaugh,* 64 *ib.,* 291; *Mitchell v. Ill.,* 68 *ib.,* 286; *Law v. People,* 87 *ib.,* 385; *Cook Co. v. Chicago,* 125 *ib.,* 540; *Washingtonian Home v. Chicago,* 157 Ill., 414; *Beard v. Hopkinsville,* 95 Ky., 239; *Thomas v. Owens,* 4 Md., 189; *Beechy v. Baldy,* 7 Mich., 488; *Willis v. Mabon,* 48 Minn., 40 (citing many other Minnesota cases); *Green v. Robinson,* 5 How. (Miss.), 80; *Glidewell v. Hite, ib.,* 110; *Brien v. Williamson,* 7 How. (Miss.), 14; *Schools v. Patten,* 62 Mo., 444; *ex parte Snyder,* 64 *ib.,* 58; *Householder v. Kansas City,* 83 *ib.,* 488; *S. v. Weston,* 4 Neb., 216; *S. v. Babcock,* 19 *ib.,* 150; *Bass v. Nashville,* Meigs (Tenn.), 421; *Yerger v. Rains,* 4 Humph. (Tenn.), 259; *Friedman v. Mathis,* 8 Heisk. (Tenn.), 488; *Johnson v. Parkersburg,* 16 W. Va., 402; *Blanchard v. Kansas City,* 16 Fed., 444; *McElroy v. Kansas City,* 21 *ib.,* 257; Cooley (197) Const. Lim. (6 Ed.), 99, 100.

The power to issue a mandamus to the State Treasurer to execute an ordinance of the convention, notwithstanding subsequent legislation, was held in *R. R. v. Jenkins,* 65 N. C., 173. Mandamus to the Treasurer to discharge a purely ministerial duty was recognized in *R. R. v. Jenkins,* 68 N. C., 502, and as to the Governor, in *Cotton v. Ellis,* 52 N. C., 545, and as to other officers, *County Board v. State Board,* 106 N. C., 81, though of course it will not issue when any discretion by the officer is to be exercised. *Burton v. Furman,* 115 N. C., 166; *Boner v. Adams,* 65 N. C., 639; *Brown v. Turner,* 70 N. C., 93. But when the Constitution prescribes that the poll tax is to be equal to that levied on $300 of property, and the latter is fixed by the Legislature at 46 cents, as they had a right to do, then by a standing constitutional enactment, which no Legislature can repeal or impair, the Auditor should be commanded to place in the same tax list $1.38 poll tax. This is not a matter of discretion in the Auditor. Nor indeed with the Legislature; the neglect or inadvertence of that body will not repeal this constitutional provision when this would not have been accomplished if they had directly so enacted. Nor will their neglect in sec. 2 of the Act to provide the proper rate of poll tax invalidate the property tax properly, correctly, and legally levied in sec. 3.

It is a far greater exercise of power by the court and a far greater interference with the legislative authority to declare void the property tax, which has been fixed within the undeniable limits of legislative power, and to declare in force a property tax of a previous Legislature, which has been repealed, than, respecting these discretionary exercises of legislative power, merely to require the poll tax, as to which the Legislature can exercise no discretion, to conform to the Constitution. Besides, if the court can assume the power to set aside the prop- (198)

erty tax, it must do the same as to Schedules "B" and "C," for the Legislature is presumed to exercise the power of taxation to provide for the legitimate needs of the State government, and it has fixed those schedules with knowledge that the property is 46 cents. If the property tax is reduced to 43 cents, contrary to legislative enactment, then Schedules "B" and "C" should have been higher. To judicially reënact the tax laws of 1895 is to reëstablish a taxation which the legislative department has changed because unsatisfactory and insufficient, and has expressly repealed. Nor can the court direct how the Treasurer shall *prorate* the fund. The Legislature alone has power to direct the disbursement and application of funds.

There are many instances in which the courts have required a levy of taxes which had been omitted by the Legislature, and even where the Legislature had passed an act against their power forbidding it. 1 Hare Constitutional Law, 647, and numerous cases there cited; Cooley on Taxation, 733, 735; High Extraordinary Remedies, sec. 124A. The power to grant a mandamus to the Auditor to place a tax charge on the lists sent out by him was tacitly admitted, though not expressly decided, in *Belmont v. Reilly,* 71 N. C., 260. The court recognized the cause of action by not dismissing the proceeding, which the many eminent counsel appearing for the defendant would surely have moved for if there had been the least doubt on the subject. The judge below correctly held that the mandamus should issue as prayed for.

FURCHES, J., concurring: This appeal involves a constitutional question of much importance and, while I concur in the judgment of
(199) the court, I deem it not improper that I should state briefly my reasons for so concurring.

Article V., sec. 1, of the Constitution of North Carolina, provides that, "The General Assembly shall levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, which shall be equal on each to a tax on property valued at $300 in cash, * * * and the State and county capitation tax combined shall never exceed $2 on the head."

The Legislature of 1897, in an "Act to Raise Revenue," enacted that "on each taxable poll, or male, between the ages of 21 and 50 years, * * * there shall be annually levied and collected a tax of $1.29." And in the next section of the same Act is provided that "there shall be levied and collected annually an *ad valorem* tax, * * * making a tax of 46 cents on every $100 value" of property in the State. This presents the question for our consideration and determination.

The Constitution says the poll tax shall be equal to the *ad valorem* tax on $300 valuation of property—*equal to*—no more and no less; or you

may turn it over and say the *ad valorem* tax on $300 valuation of property shall be *equal to, no more, no less,* than the tax on one poll, and you have precisely the same result—the equilibrium established by the Constitution between taxable property and taxable polls. They must be absolutely *equal.* In this Act the poll tax is fixed at $1.29. This is plainly written in the Act and cannot be construed to mean anything else, as it refers to nothing else and depends upon nothing else. The property tax is as certainly fixed by the Act as is the poll tax. It is declared that this tax shall be 46 cents on the $100 valuation of property. Three times 46 cents is $1.38; and as $1.29 is not equal to $1.38, the equation required by Article V, sec. 1, of the Constitution has not been observed. These provisions of the Act, and Article V, sec. 1, of the Constitution do not stand together. They are in conflict, and one or the other (200) must give way; and the Constitution being the superior, the legislative act must give way. Then what shall we do when we find an act of the Legislature in conflict with the provisions of the Constitution? What can we do but to declare it void and of no effect? We find that this is what was done in *University v. Holden,* 63 N. C., 413; *Barnes v. Barnes,* 53 N. C., 366; *Hoke v. Henderson,* 15 N. C., 1; and in every case to be found in the judicial history of this State. I do not hesitate to say that not one can be found where the court has not declared the act, or that part of it found to be in violation of the Constitution, to be void.

But in this case it is contended, to do this—to declare this part of the Act void—to do what every court in this State without a single exception has done, "is judicial legislation." And, as I am free to admit, indeed, I declare that we have no power to legislate. Then, as we cannot legislate the offending act into constitutional shape, and cannot declare it void without "judicial legislation," what can we do? Our mouths are closed, and we should be as silent as the tomb. This contention would utterly destroy the powers of the court on any constitutional question. I can agree to no such position.

But, again, it is contended that the Constitution requires that the equation between the poll tax and the *ad valorem* tax on $300 should be preserved and that, as this has not been done in the Act of 1897, this court should proceed to write into the Act $1.38 on the poll instead of $1.29. And it is contended that this would not be "judicial legislation," while it would be judicial legislation to declare it void. I must again say that I cannot assent to this proposition. To assent to these two propositions—that to declare the Act void would be judicial legislation, but for us to make the poll tax $1.38 instead of $1.29 would not be judicial legislation—would be to destroy every idea of logical (201) deduction I have ever had.

It is contended that the property tax is the standard and the poll tax must be made to conform to this. *Chief Justice Pearson,* in *University v. Holden, supra,* says just the contrary—that the poll tax is the standard by which the equation is to be fixed. What more constitutional warrant have we for saying the property tax governs the poll, than we have for saying the poll governs the property? If the tax on the poll shall be equal to the tax on $300, why does it not equally follow that the tax on $300 shall be equal to the tax on one poll? *Judge Pearson* thought so in *University v. Holden, supra,* and I can see no reason why each is not equally dependent upon the other.

But suppose this contention is correct—that the property tax governs. What difference does it make? They are still in conflict with the Constitution, just the same. And we have no more power to change and amend the Act if the property tax governs than we would have if the poll tax governed. The result is the same, whether regulated by one or the other—a violation of the Constitution.

It is contended that, if the court declares sections 2 and 3 of the Act of 1897 unconstitutional and void, this destroys and renders the whole Act void. I have always understood the law to be otherwise; that it was declared by this court as early as the 4 N. C., 128, in *Berry v. Haines,* that one or more sections of an Act might be unconstitutional and void, and the rest of the Act constitutional and valid. This opinion has been followed and approved in *McCubbins v. Barringer,* 61 N. C., 554; *Johnson v. Winslow,* 63 N. C., 552, and in other cases.

(202) It is further contended that sections 2 and 3, though unconstitutional, repeal the corresponding sections of the Revenue Act of 1895, and the court cannot by "judicial legislation" reënact that part of the Act of 1895. I most thoroughly agree to the proposition that this court cannot legislate the Act of 1895 or any other act into life, that has been repealed. The court, as I maintain, cannot legislate at all. But if the Act of 1895, or any part of it, has not been repealed, it is in force, not by judicial legislation of this court, but by force of *legislative* legislation. The Act of 1895 is in force unless it has been repealed. The only Act that it is contended repeals the Revenue Act of 1895, is the Revenue Act of 1897. This Act of 1897 repeals all Acts and clauses of Acts in conflict with the provisions of the Act of 1897. And I admit that sections 2 and 3 of the Revenue Act of 1897 are in terms in conflict with the corresponding sections of the Act of 1895. And if these sections in the Act of 1897 are law, then I admit the corresponding sections of the Act of 1895 are repealed, and that it would be a gross and flagrant act of "judicial legislation" for this court to "reënact them." But this all depends upon the fact as to whether sections 2 and 3 in the Revenue Act of 1897 are or ever have been law.

If they are unconstitutional, they are absolutely *void,* are not, and never have been, any part of the law of this State.

Mr. Cooley says: "Indeed the term *unconstitutional law,* as employed in American jurisprudence is a misnomer and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all." Cooley Const. Lim., 6th Ed., p. 5. Therefore, sections 2 and 3 of the Revenue Act of 1897 never have been the law. They have not and cannot repeal any law heretofore enacted. And sections 2 and 3 of the Revenue Act of 1895 are still the law by virtue of the legislature, and not by any judicial legislation on the part of this (203) court.

But it is further contended that even if sections 2 and 3 of the Revenue Act of 1895 be reënacted and declared in force, there would be a loss of revenue to the State, estimated from $50,000 to $150,000 annually. I know the same amount of revenue cannot be raised under sections 2 and 3 of the Revenue Act of 1895, that could have been raised under sections 2 and 3 of the Revenue Act of 1897, if the poll tax had been put at $1.38 so as to make the Act constitutional. But I have no means of knowing what the difference would be, and, for the purposes of my opinion in this case, I do not want to know. I cannot allow my judgment upon a constitutional question to depend upon the amount of revenue an act will or will not produce. This kind of argument was brought to bear upon *Chief Justice Ruffin* in the now celebrated case of *Hoke v. Henderson, supra,* to which that great judge replied as follows: "To a court, the impolicy, the injustice, the unreasonableness, the severity, the cruelty of a statute by themselves merely, are and ought to be urged in vain. The judicial function is not adequate to the application of those principles, and is not conferred for that purpose. It consists in expounding the rules of action prescribed by the Legislature, and when they are plainly expressed, or plainly to be collected, in applying them honestly to controversies arising under them, between parties, without regard to the parties or the consequences." "In the Act under consideration, as far as it concerns the controversy between these parties, there is no ambiguity; the words are plain, the intention unequivocal, and the true exposition infallibly certain. We cannot, under the pretence of interpretation, repeal it and thus usurp a power never confided to us, which we cannot usefully exercise, and which we do not desire." *Chief Justice Pearson* says, in *Barnes v. Barnes, supra,* at p. 369, the court being pressed with the policy of what was called the "stay law," passed, as it was contended, for the protection of the people en- (204) gaged in war, in response to the question of policy: "Whether in the present condition of the country the statute be expedient, is a question of which we have no right to judge. Our province is to give judg-

ment on the question of the constitutional power of the Legislature to pass the statute." In both cases the Act was declared unconstitutional and void.

I feel that I will be pardoned for making these lengthy quotations from the opinions of two of the Chief Justices who have left behind them reputations at least equal to any of the other great judges who have presided over this court. I quote them to show that the court is not guilty of judicial legislation in rendering its judgment in this case, and has only done what has always been done when the court declared an Act of the Legislature unconstitutional.

It is said there is no limitation except that the poll tax shall never exceed $2, and that there is no limit on the property tax except that $300 worth shall never exceed $2; and that, as the property tax levied in the Act of 1897 does not amount to $2, it is constitutional. This cannot be true as a proposition of law; it leaves out of consideration the question of equation. When the poll tax does not amount to as much as $2, its limit is as much a limitation on the property tax as if the amount of the poll tax had been written in the Constitution. That is, when the poll tax was fixed at $1.29, the tax on $300 valuation of property can no more exceed $1.29 than if that amount had been written in the Constitution; and any levy of taxes in excess of $1.29 is *ultra vires*, in conflict with the Constitution and void. There is error in the judgment appealed from.

DOUGLAS, J., dissenting: There seems to be no question that (205) mandamus is the proper proceeding in this matter, and that this court has full jurisdiction of all the questions involved.

The Revenue Act of 1897 provides, in section 2, that "on each taxable poll or male between the ages of 21 and 50 years, except the poor and infirm whom the County Commissioners may declare and record fit subjects for exemption, there shall be annually levied and collected a tax of *one dollar and twenty-nine cents*, * * *" and in section 3, that "there shall be levied and collected annually an *ad valorem* tax of twenty-two and two-thirds cents, for State purposes, three and one-third cents for pensions, twenty cents for public schools, making *forty-six cents* on every one hundred dollars value of real and personal property in this State. * * * " The Constitution provides, in section 1, Article V, that "the General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash, * * * and the State and county capitation tax combined shall never exceed two dollars on the head."

It is evident that this section creates two standards, one of limitation and the other of equation. As the poll tax is the only one having any limitation affixed to it, it is of necessity the standard of limitation, and as it must be *equal* to the *ad valorem* tax on $300 of property, it is *measured* by the latter, which of equal necessity becomes the constitutional standard of equation. These conclusions seem to me in entire harmony with the principles laid down in *University v. Holden,* 63 N. C., 410, a leading case remarkable not only from the full and able discussion on all the principles involved, but from the further fact that all five judges filed separate opinions, in which apparently not a single proposition received the full concurrence of the entire court. The expression of *Judge Pearson,* that "the tax on poll is the (206) standard," occurs immediately after a discussion of the *limitation* and should be construed in connection therewith. From this case as well as all the other authorities it is evident that the standard of equation must be strictly maintained until the limitation of two dollars upon the poll shall have been reached, and that thereafter any extraordinary taxation for State and county purposes must be levied upon property alone. In the case at bar the limitation has not been reached, but it is admitted that the equation has not been preserved. The *ad valorem* tax levied on property is 46 cents on each $100, while the capitation or poll tax is only $1.29 instead of $1.38 as required by the constitutional equation. We are, therefore, brought to the vital question as to what was the meaning and intent of the Legislature, as the *legislative* intent is the basis of the construction of all statutes.

It is apparent that the General Assembly intended to put the property tax at 46 cents, as this amount is not only expressly stated in the Act, but is also the correct sum of the different amounts specifically set forth in the Act for the purposes therein expressed. There is no practical possibility of mistake or clerical error where the sum of three specified amounts is set out with mathematical correctness. Having thus arrived at the evident legislative intent as to the *standard* of equation, we are called upon to construe the same intent as to the capitation tax. While there seems to be a technical distinction between the terms "interpretation" and "construction," the latter being perhaps the more comprehensive, they are so alike in their practical results and are used so interchangeably, as to have become almost synonymous.

I must respectfully dissent from the opinion of the court where it says "There is, therefore, no room for inquiring into the intention of the law makers. It cannot be said that where they wrote $1.29 they meant $1.38. It must be presumed that they knew what they were doing, and that they meant to do what they did." If this be true, then they simply meant to violate the Constitution. Surely there must (207)

be "room for inquiry into the intention of the law makers," when the *literal* meaning of the Act is utterly inconsistent with any *lawful* intention. It is undoubtedly the legal presumption that the law makers know the organic law, but it is equally the presumption that they do not intend to exceed their powers. Black Int. Laws, sec. 42; Endlich on Int. Stat., sec. 178; Sutherland on Stat. Const., sec. 331. The Constitution is binding equally upon every citizen of the State, no matter how lowly his condition or exalted his position, and we cannot for a moment presume that any legislator would, for personal or political considerations, knowingly do or permit any act in violation of that sacred instrument which he had solemnly sworn to support. This criticism is not captious, as it is the very essence of this opinion that an unconstitutional intent cannot be imputed to the Legislature. I am not disposed to question the first rule laid down by Vattel and so universally approved, that "It is not allowable to interpret what has no need of interpretation," but his 15th and 16th rules of construction have been equally approved, which are as follows: "15. Every interpretation that leads to an absurdity ought to be rejected. 16. The interpretation which renders a treaty or statute null and void cannot be admitted; it is an absurdity to suppose that, after it is reduced to terms, it means nothing." See also Endlich, *supra,* sec. 264; Black, *supra,* sec. 48; *Oates v. Bank,* 100 U. S., 239. The rule that statutes should be construed *ut magis valeat quam pereat* that it shall *prevail* rather than *fail,* has become axiomatic, and needs no citations from the long line of authorities. As it is evident that a

(208) literal interpretation of the words of the statute will lead inevitably to a nullification of its most important provisions and the stultification of its makers, we must look to other rules of construction. Blackstone tersely says that, to interpret a law, we must inquire after the *will* or *intention* of the maker, which is collected from the *words,* the *context,* the *subject matter,* the *effects* and *consequences,* or the *spirit* and *reason* of the law. This rule, with more or less of amplification, is practically of universal acceptance. Let us apply it to the Statute under construction. We have seen that the words cannot be strictly followed. From the *context* we see that it was the unquestionable intention of the Legislature to put the *ad valorem* tax on property at 46 cents, and, therefore, its only possible *legal* intent must have been to place the capitation tax at three times that amount, which is $1.38. This amount alone will meet the constitutional equation, and exactly corresponds with the specific levies in the Act itself. The *subject matter* of the Act is *taxation* by which to raise sufficient revenue for the expenses of the State. All *revenue* acts are in *pari materit* with the *appropriation* Acts, as the one is necessarily dependent upon the other. In the absence of an accumulated surplus, of which there is no suggestion, the State cannot pay out

what it does not collect. As we know that the appropriations have been largely increased, we must presume a legislative intent to give legal effect to its increased levies, which can be done only by making the capitation tax $1.38.

The *effects* and *consequences* of the construction placed upon this Act by the court will be of the gravest nature. The loss to the State will be over $75,000 a year, the greater part of which will fall upon the common schools, the higher institutions of learning, and the asylums. The treasurer, in the face of a bankrupt treasury, will be compelled to refuse payment of appropriations lawfully made by the General Assembly and essential to the welfare of the State. (209)

We finally come to the *reason* and *spirit* of the law. This is what is known as the Revenue Act, passed in accordance with the fixed custom of our biennial legislative sessions, and was intended to raise, by proper methods of taxation, revenue sufficient for the purposes of the State, and to readjust the taxes in accordance with the increased appropriations and reassessment of taxable property. As it is entirely for public purposes and of the highest public importance, it is more reasonable to suppose that the legislators intended to effectuate its provisions by fixing the capitation tax at the constitutional ratio of $1.38, rather than to place upon the Statute books a law fatally defective in its essential features, which would accomplish no practical purpose save to remain as a monument to their incapacity or bad faith. It is certainly not within the *spirit* of the law that its construction should be simply its nullification. And why is it unreasonable to say that $1.29 is a merely clerical error, and was intended for $1.38, as is alleged in the complaint and admitted by the demurrer? Such a correction, for which we have ample precedent, would preserve the integrity of the law and violate no constitutional or statutory provision. "Exceptional or Presumptive Construction," resorted to for the purpose of effectuating the legislative will, permits the interpolation, elimination, modification and transposition of words, dates and figures, when justified by clear implication. Endlich, *supra,* secs. 298 to 304; Black, *supra,* secs. 37 to 54; Sedgwick, *supra,* p. 298; Sutherland, *supra,* secs. 222, 223, 230.

A few examples will suffice: Where a Statute provided for an indictment "on conviction" of bribery, the words "on conviction" were eliminated. *U. S. v. Stern,* 5 Blatchford, 512. In a Statute in- (210) tended to confer jurisdiction, the word "not," which, if retained, would have rendered the Act meaningless, was eliminated. *Chapman v. State,* 16 Texas App., 76. Where an amendatory Act referred to the date, title, and subject matter of a former Act, the erroneous date and title held immaterial. *Madison v. Reynolds,* 3 Wis., 287. "An Act passed in 1839, ch. 205," was held to mean the Act of 1838. *Pue v. Hetzell,* 16 Md.,

539. The "act of 17 March, 1836," was held to mean 16 June, 1836. *Bradberry v. Wagenhurst,* 54 Pa. St., 180. An amendment referring in terms to section 293 of an earlier act was construed as referring to section 296, the alternative of such construction being the nullification of the amendment. *People v. King,* 28 Cal., 265. "And" is construed to mean "or" and *vice versa* in numberless cases. The plural was taken for the singular; the word "venue" for "venire"; "Dunn's Mills" for "Dennis Mills"; "South" for "North"; "final" judgments for "penal" judgments; *"ad respondendum"* for *"ad satisficiendum";* "1st Monday in July" for "1st day of July"; "4th Monday" for "5th Monday," etc. Endlich, *supra,* 319; Black, *supra,* secs. 37, 39, 40, 48; Am. & Eng. Enc., 421. In *Byrd v. Comm.,* 95 Ky., 195, an Act requiring that the "width" of the macadam on a turnpike should not be less than 8 inches nor more than 15 inches, was held to apply to the "depth" and not to the "width" of the macadam. Where a penalty was fixed at "not less than *one* nor more than *three hundred* dollars," the word "hundred" was interpolated by construction so as to make the minimum penalty one hundred dollars. *Worth v. Peck,* 7 Pa. St., 268. If the Supreme Court of Pennsylvania could raise the expressed amount in a Statute *ninety-nine dollars,* why cannot we raise *nine cents* to maintain the equa-
(211) tion and save the Statute? Such was the controlling construction adopted by the Supreme Court of the United States in construing the so-called "Alien Contract Labor Law." *Rector v. U. S.,* 143 U. S., 57, in which the Court says: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." It should be remembered that the oft quoted decision of *Lord Tenderden* in *King v. Inhabitants of Barham,* 8 Barn. & C., 99, has no application to this case. As England has no written Constitution, so the ordinary English statute can have no constitutional construction. With us, the maxim, *Ita lex est scripta,* applies rather to the Constitution than to the statute, as the former is the superior and controlling instrument.

In *Bank v. Commissioners,* 119 N. C., 214, this Court, distinguishing *Carr v. Coke,* says: "This case has no analogy to *Carr v. Coke,* 116 N. C., 223. That merely holds that where 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. 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."

I am clearly of the opinion that the Legislature intended to fix the

capitation tax at $1.38, as alleged and admitted in the pleadings; that it so appears from the entire Act itself, and that it should be so construed by this Court. I will cite only three more authorities which seem peculiarly fitting in this case: Coke lays down the maxim *Lex* (212) *semper intendit quod convenit rationi;* Lieber, in his work on Hermeneutics, says "There can be no sound interpretation without good faith and common sense." In *Graham v. R. R.,* 64 N. C., 631; *Pearson, C. J.,* speaking for the Court, says: "This *résumé* is made in order to show that the word 'venire' in Laws 1868-9, chap. 527, is used in the sense of 'place of trial,' adopting the idea of the Code of Civil Procedure. The word is inartificially used and the draftsman was not an expert in technical terms, *but it is the only construction by which to make any sense of it, and the Court must adopt it.*" Upon these eminent authorities and by my own clear conviction, I am forced to respectfully dissent from the opinion of the Court, and adopt the only construction which, in my opinion, is not only consistent with the Constitution of our State, but equally so with the spirit of her laws, the honor of her legislators and the welfare of her people. I think the judgment should be Affirmed.

Cited: Rodman v. Washington, 122 N. C., 42; *Greene v. Owen,* 125 N. C., 222; *Bennett v. Comrs., ib.* 470; *Jackson v. Commission,* 130 N. C., 415; *Board of Education v. Comrs.,* 137 N. C., 313; *R. R. v. Comrs.,* 148 N. C., 225; *Withers v. Comrs.,* 163 N. C., 34; *Fisher v. Comrs.,* 166 N. C., 240.

Overruled: Kitchin v. Wood, 154 N. C., 565, 568, 569.

STATE ON THE RELATION OF ZEB. V. WALSER, ATTORNEY-GENERAL, AND W. R. WOOD AND OTHERS v. J. C. BELLAMY AND OTHERS.

Public Office—Property in Office—Abolition of Office—Statute—Repeal and Amendment of Statute.

1. An office is property and is the subject of protection like any other property under the provisions of section 17 of Article I of the Constitution, subject to the qualifications that it cannot be sold or assigned or the performance of its duties (as a rule) deputed to another, and that for misfeasance and malfeasance the holder may, by competent authority, be deprived of the same.
2. A public office being private property, so long as the office is in existence, the term for which the holder has been elected or appointed cannot be lessened to the prejudice of the incumbent, unless he has committed some act which works a forfeit.

3. An office created by the Legislature may be abolished at its discretion, in which event the officer loses his office and his property in it, he having taken it with the implied understanding that the continuance of the office is a matter of legislative discretion.

4. The re-enactment by the Legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but is a reaffirmance of the former law whose provisions are thus continued without any intermission.

5. Chapter 265, Acts of 1897, entitled "An Act to charter the Eastern Hospital for the Colored Insane, and the Western Hospital for the Insane, and North Carolina Insane Asylum at Raleigh, and to provide for their government," which purports to repeal the charters of the institutions mentioned in sections 2240, 2241, 2242, 2243, 2244 of The Code, and to abolish the offices of the superintendent and directors of such institutions and to re-charter them under other names and to create offices to be filled by officers under other designations, but does not substantially change the government or the duties of the officers, is, in effect, only an amendment to, and not a repeal of, the charters of the institutions named in said sections, and is invalid in so far as it attempts to abolish the offices of superintendent and directors of such institutions, or to deprive the holders thereof before the expiration of the terms for which they were respectively elected and appointed.

(213) ACTION by the State of North Carolina on the relation of Zeb. V. Walser, Attorney-General, W. R. Wood, and others, against J. C. Bellamy and others, to have the relators, other than Attorney-General and W. R. Wood, declared to be the trustees of the Central Hospital for the Insane, near Raleigh, and W. R. Wood declared to be the principal and resident physician of said hospital and to compel the defendants, who claim to be the directors and superintendent of such hospital, to deliver it and the property thereof to relators, heard on a case agreed, before *Adams, J.*, at chambers, in Raleigh, in April, 1896. The statement of facts agreed to is as follows:

"(1) That the General Assembly, on 8 March, 1897, passed an act, a copy of which is hereto annexed, and on 9 March, 1897, another act, a copy of which is annexed, known as the 'Appropriation Act.' (2)
(214) That on 9 March, 1897, the Governor nominated the relators as trustees of the Central Hospital for the Insane, and that on said 9 March, 1897, the Senate duly confirmed the nomination of said relators as such trustees. (3) That thereafter, on the said 9 March, 1897, three of the relators met at the capitol at Raleigh, and having called one of their number to the chair, for want of a quorum, adjourned to meet in Raleigh on 18 March, 1897. That, prior to the confirmation of the relators, the Governor notified them by wire that their nominations had been sent to the Senate, and requested them to meet in Raleigh, 9 March, but no notice was given to any of the relators after their confirmation, except M. L. Wood, Dr. Phil. J. Macon, and Dr. B. S. Utley. (4) That

on the said 18 March, 1897, pursuant to the adjournment, the said relators, each and every one of them, being nine in all, met in Raleigh, and qualified by taking the oath of office before W. H. Martin, a justice of the peace in and for Wake County, and organized by electing Dr. P. John, President, and M. L. Wood, Secretary, and then elected Dr. W. R. Wood, of Fairfax County, Principal and Resident Physician for four years from and after his election. (5) That the defendants, other than Dr. George L. Kirby, are the directors of what was designated under chap. 2, vol. 2, of The Code, as the North Carolina Insane Asylum, elected and qualified under chap. 2, vol. 2, of The Code, and acts amendatory thereof, whose terms of office have not expired, unless they are put to an end by the legislation and facts set forth in this case; and that the defendant George L. Kirby was elected by said board on 7 March, 1894, to fill the unexpired term of six years of Dr. W. R. Wood, resigned, said Wood's term beginning on 8 March, 1893, as will (215) appear from an extract from the minutes of the Board of Directors at their meeting held on 8 March, 1894, the salary of said Kirby being fixed at $2,800 per annum. That R. N. Cotton, R. H. Speight, and John R. Smith constitute an executive committee (if they are still in office, under the legislation and facts hereinbefore set forth), who receive $4 each per day, when in session, as compensation. (6) That the defendants are in possession and in control of all the property belonging to the said institution for the insane, near Raleigh, by whatever name it should be called, claiming to be the properly constituted authorities and custodians thereof under the law. (7) That on 18 March, 1897, the relators made due demands on the defendants for the possession, management and control of the said asylum and all of its property, which demand was refused by the defendants. (8) That the defendant John R. Smith was duly appointed and qualified on the __ day of March, 1895, as a director of said North Carolina Insane Asylum for the term of six years. That he was appointed and qualified as Superintendent of the State Penitentiary on the __ day of March, 1897. (9) That the original charters of the said asylum, chaps. 1 and 2, Laws 1848, and chaps. 73 and 74, Laws 1858, and all Acts amendatory thereof, and other private or other laws relating to said asylum, shall be considered as a part of this case."

His Honor rendered judgment as follows:

"This cause coming on to be heard upon an agreed statement of facts and the complaint and answer, and the Court being of opinion against the right of the relators or any of them to recover and so holding, it is thereupon considered and adjudged that this action be dismissed, and that the defendants go without day and recover their costs to be taxed by the Clerk. It is further considered and adjudged that the defend-

(216) ant John R. Smith, by accepting the office of Superintendent of the State Penitentiary, has vacated the office of trustee or director of the State Insane Asylum, near Raleigh." From this judgment the plaintiffs appealed.

Messrs. A. C. Avery and J. C. L. Harris for plaintiffs (appellants).
Messrs. Shepherd & Busbee for defendants.

MONTGOMERY, J. The defendant Kirby, at the time of his election, and the other defendants, at the time of their appointment, were public officers and they are entitled to hold their offices, their terms not having yet expired, unless their right to the same has been divested by an Act of the last General Assembly, ratified 8 March, 1897, and entitled "An Act to charter the Eastern Hospital for the Colored Insane and the Western Hospital for the Insane and North Carolina Insane, at Raleigh, and to provide for their government." In examining that Act with the view of arriving at its construction and effect, we are not disposed to inquire into the motives of the legislators in enacting the bill into a law, nor is it necessary to do so to arrive at a proper legal conclusion. If the General Assembly has in some of the provisions of the statute gone beyond its powers, such a course may be attributed to another motive than a willful attempt to violate the Constitution. In the great opinion delivered in the case of *Hoke v. Henderson,* 15 N. C., 1, *Chief Justice Ruffin* said for the court: "All men are fallible, and in the dispatch of business, the heat of controversy and the wish to effect a particular end, may inadvertently omit to scrutinize their powers and adopt means inadequate indeed to the end, but beyond those powers."

Before proceeding to an examination of the statute it will be in (217) order to announce that, after full and able argument and after careful examination of authorities cited by counsel from the courts of this and other States, we adhere to the opinion that an office is property and is the subject of protection like any other property under the provisions of sec. 17, Art. I, of the Constitution. *Hoke v. Henderson, supra; King v. Hunter,* 65 N. C., 693; *Cotten v. Ellis,* 52 N. C., 545; *Bailey v. Caldwell,* 68 N. C., 472; *Bunting v. Gales,* 77 N. C., 283. And yet it is true that public offices being for the public good and convenience, are not so completely the subject of property as are many other species of possession. Property in an office is qualified to some extent by the duties which the holder owes to the public in their performance. As, for instance, a public office cannot be sold or assigned. The holder cannot, as a rule, depute to another the performance of the duties of the office. And for misfeasance or malfeasance, the courts or other competent authority under such laws as may be in force on the subject, may deprive the holder of the same. But, if such limitations and restric-

tions be excepted, a public office is as much the subject of property as a man can have in anything. The emoluments of the office are private property "as much," as was said in *Hoke v. Henderson, supra,* "as the land which one tills, or the horse he rides, or the debt which is owing to him."

The emoluments of a public office being then private property, it would seem to follow logically, that, the terms for which the defendants were elected and appointed, respectively, not having expired, they could not be ousted except for cause, for the committal of some malfeasance in office, or unless they had failed and refused to perform the duties of their office, or unless the offices themselves had been abolished. As long as the office is continued, the term of office, it does seem in (218) reason and justice, ought to be the private property of the holder; and to take it from him and give it to another by legislation is in effect and reality a judicial act, and the sentence is pronounced without trial and without a hearing. And the law is to that effect. It is clearly decided in *Hoke v. Henderson, supra,* and approved in *Bunting v. Gales,* 77 N. C., 283, that, as long as the office is in existence, the term likened to a grant for which the holder has been elected or appointed cannot be lessened to the prejudice of the grantee. In *Cotten v. Ellis, supra,* it appeared that the office of Adjutant General had not been abolished, but that the duties of the office had been transferred to another before the plaintiff's term had expired, and *Chief Justice Pearson,* delivering the opinion of the Court, said: "The legal effect of the (first) appointment was to give the office to the applicant (in *mandamus*) and he became entitled to it as a 'vested right' for the term of three years, from which he could only be removed in the manner prescribed by law and of which the Legislature had no power to deprive him. This is settled. *Hoke v. Henderson,* 15 N. C., 1."

In *King v. Hunter, supra, Judge Reade,* who delivered the opinion of the Court, said: "Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the State that he will discharge the duties of the office—and he is pledged by his bond and his oath; and that he shall have the emoluments—and the State is pledged by its honor. When the contract is struck it is as complete and binding as a contract between individuals, and it cannot be abrogated or impaired except by the consent of both parties." And in *Bailey v. Caldwell,* the opinion was in these words: "The case of *Cotten v. Ellis,* 52 N. C., 545, is directly in point. Cotten had been appointed Adjutant General (219) for three years, with a salary of $200. The Legislature passed an act repealing the law under which Cotten had been appointed, both as to his appointment and salary. Cotten served out his term and de-

manded pay, which the Governor (Ellis) refused. And this Court decided that he was entitled to it. The principles of that case are the same as in this, and it is unnecessary to repeat them."

So that, whatever the law may be in other States, it is settled beyond question in North Carolina that a public office is property, is a vested right, exists by contract between the State and the holder, and that as long as the office is continued the holder cannot be deprived of his term against his consent, unless he has committed some act which works a forfeiture. We have no desire to disturb the decisions of our court on this subject. They are founded on the principles of justice and of safe public policy.

But the plaintiffs further contend that the offices which the defendants hold were abolished by the Act of 1897, and that they themselves are now the persons entitled to the same. It is undoubtedly the law in North Carolina that an office can be abolished, and that as a result the officer loses his office and his property in it. This is no breach of the contract on the part of the State. The holder accepted the office subject to this contingency. No one could contend that, because an office was in the estimation of the Legislature useful and necessary at the time of its creation, such an office would continue to be forever a public necessity. If an office once useful should become useless and an unnecessary charge upon the people, it is not only a right of the Legislature to abolish it, but it is its duty to do so. And, as we have said, every man elected or appointed to an office created by the Legislature takes it with the
(220) implied understanding that the continuance of the office is a matter of legislative discretion, the office depending upon the public necessity for it. In *Hoke v. Henderson, supra,* it is said that, "It may be quite competent to abolish an office; and true that the property of the office is thereby of necessity lost. Yet it is quite a different proposition that, although the office be continued, the officer may be discharged at pleasure and his office given to another. The office may be abolished because the Legislature esteems it unnecessary."

Of course, an office created by the Constitution cannot be abolished by the Legislature.

We are now brought to the consideration of the contention of the plaintiffs that the offices which the defendants have been, and are now in possession of, have been abolished by the Act of 1897. The first section of the Act provides "That Sec. 2240 of The Code be *amended* by striking out the following words: * * * 'Eastern North Carolina Hospital, located near Goldsboro, * * * and the State Insane Asylum, near Raleigh.' * * *" The insane asylums near Goldsboro and Raleigh are not known by the names of "Eastern North Carolina Hospital" and "State Insane Asylum," in Sec. 2240 of The Code. The

draftsman of the bill seemed to be ignorant of the corporate names of the different insane asylums in this State. Ordinarily, the failure of an act to give the complete and full name of a corporation where there could be no reasonable doubt as to which institution was meant, would be of no significance; but where it is undertaken by legislative enactment to change the names of such institutions and to confer new names upon them, it does seem that pains would be taken to at least find out the true corporation names of those discarded. And when such is not done, the presumption of fact arises that the change was of no material consequence or importance in the mind of the Legislature. Such carelessness would not have happened if the legislators themselves had thought the matter of any importance. Throughout this act, and also the one passed at the same session providing for the support of these institutions, the old and new names of incorporation are frequently used, interchangeably. But suppose the true corporate names had been called in sec. 1 of the act and the new names properly conferred, could any reasonable man imagine that the change in the names of these asylums could possibly have altered the foundations of them or affected the duties and rights of any person officially connected with them? Surely, no one would answer in the affirmative.

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But the plaintiffs further contend, because the act declares that the office of Superintendents of the old corporations is abolished, and the office of principal and resident physician substituted therefor, the latter elected for four years instead of six, as was the Superintendent, and that because the government of the new corporation shall be under the management of nine trustees, called the Board of Trustees, elected for a term of four years instead of in classes of three for six years, the terms expiring at different times, as under The Code, and are called the Board of Directors, the offices under the old corporation are abolished and the new ones take their places. This contention cannot be sustained.

The Legislature of 1870-'71, upon the return to power of one of the political parties, undertook to remove the officers of the North Carolina Institution for the Deaf and Dumb and the Blind, who were of another political faith, and in the act for that purpose (chap. 55) resorted to this same device of changing the names of the offices to carry out their purpose. The Act (1870-'71) called the new board, which it created, the *Board of Trustees,* in substitution of the old board, which was called the *Board of Directors,* and used the very word used in the Act of 1897, "abolished." It declared that the Board of Directors should be *abolished* and the powers, rights and duties heretofore prescribed by law to said board shall hereafter be granted to and imposed upon the Board of Trustees. It seems that the new board, called the Board of Trustees, took possession of the property and affairs of the

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corporation, but upon an action being commenced by the old Board of Directors against the Board of Trustees, and brought to this court on appeal it was held that the legislative appointment was invalid, and that the title to the offices was in the old Board of Directors. It was also held that the Legislature had the right to change the name of the board by which the institution was governed, from the Board of Directors to that of the Board of Trustees, but that in doing so it left the board the offices to be filled by officers. *Nichols v. McKee,* 68 N. C., 429. The act did not in fact abolish the offices changing the name of the board, although the act declared that the Board of Directors was abolished. The offices were left as before, and the abolition of the Board of Directors was one of words only.

The draftsman of the Act of 1897 would have done well to look at the Act of 1870-'71 and the decisions of this court upon it. We have examined the Act of 1897 carefully, and there is not one single duty required of the new Board of Trustees that was not required of the old Board of Directors. There is no change as to duties, rights or powers. There is nothing in the act but the same old offices with changed names, with the same duties, rights, and privileges as were provided under the old law.

In fact, the latter part of sec. 3, which amends Secs. 2241, 2242,
(223) 2243, and 2244 of The Code, by striking out the old names of the asylums and substituting new ones, declares that "Those sections of The Code thus amended, and Chap. 2, Vol. II, of The Code, except as hereinafter provided, are reënacted." There follows the above proviso no other provision except the one changing the name of the office of Superintendent to that of Principal and Resident Physician. And the latter part of sec. 6 of the act provides, "that Chap. 2, Vol. 2, of The Code, shall in all respects apply to the corporation hereby created, except as modified by sec. 8 of this act"—sec. 8 being in these words: "It is not the intention of the General Assembly that the trustees herein provided for shall be officers within the meaning of Sec. 7 of Art. XIV of the Constitution, and they are declared to be special trustees for the special purposes of this act." These places have been held to be offices, as we have declared in this opinion, and the Legislature by simply declaring that they shall not be offices does not change the nature of the thing.

In the case of *Clark v. Stanley,* 66 N. C., 60, *Chief Justice Pearson,* delivering the opinion of the Court defining what a public office is, said: "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. The essence of it is the duty of performing an agency, that is, of doing some act or acts or series of acts for the State." It is idle, under the decisions of this court, to say that such a position as these defendants hold is not an office, as

it would be to say that a horse is not a horse because one may choose to call him some other animal.

We are of the opinion, upon a careful examination of the act, that it is an amendment, as it declares itself to be, of Chap. 2, Vol. II, of The Code, and not a repeal of that chapter. It is true, that in the first section it declares that the charters of said hospitals, by whatever (224) name, and all acts amendatory of said charters, are hereby repealed," yet, with the exception of a change in the names of the offices and of the institutions (with some insignificant details about the salaries of the superintendents and the appointment of the directors), the whole of Chap. 2, Vol. II, of The Code, is reënacted, or, as the act itself declares, "And the provisions of Chap. 2, Vol. II, of The Code, applicable to the directors of the North Carolina Insane Asylum, not in conflict with the provisions of this act, are hereby made applicable to the Board of Trustees of this State Hospital for the Insane and the Western Hospital for the Insane, and as modified by this act, are hereby reënacted."

In *State v. Williams,* 117 N. C., 753, it is said: "The reënactment by the Legislature of a law in the terms of a former law at the same time it repeals the former law, is not in contemplation of law a repeal, but is a reaffirmance of the former law whose provisions are thus continued without any intermission." The effect of the act, then, is that it has only a prospective operation as to the change of the name of the institution and the names of the offices connected with it, and that the defendants (the incumbents) are entitled to hold on to their offices—the defendant Kirby, for the term for which he was elected, and the other defendants for the terms for which they were appointed and until their successors are duly elected and appointed and qualify.

There is no error in the judgment of the court below and the same is affirmed, except that part of the judgment as to the right of John R. Smith, which is set out in the complaint, and is therefore set aside, that matter not being before the court.

Affirmed.

Cited: Lusk v. Sawyer and *Person v. Southerland, post* 225; *Ward v. Elizabeth City,* 121 N. C., 3; *Robinson v. Goldsboro,* 122 N. C., 214; *Mfg. Co. v. R. R., ib.,* 886; *Day's case,* 124 N. C., 366, 372-386; *Bryan v. Patrick, ib.,* 661, 3; *R. R. v. Dortch, ib.,* 664, 679; *Wilson v. Jordan, ib.,* 692, 4, 9, 709, 720; *Cherry v. Burns, ib.,* 765; *Greene v. Owen,* 125 N. C., 215, 226; *McCall v. Webb, ib.,* 248; *Abbott v. Beddingfield, ib.,* 261, 263, 264, 265; *Dalby v. Hancock, ib.,* 327; *White v. Auditor,* 126 N. C., 578, 592, 593; *Taylor v. Vann,* 127 N. C., 246; *Jackson v. Commission,* 130 N. C., 400; *S. v. Knight,* 169 N. C., 349.

Overruled: Mial v. Ellington, 134 N. C., 159, 168.

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LUSK ET AL. V. SAWYER ET AL.

Messrs. A. C. Avery and J. C. L. Harris for plaintiffs (appellants).
Messrs. R. O. Burton and F. I. Osborne for defendants.

Per Curiam: For the reasons assigned in *Wood v. Bellamy,* the judgment of the court below is
Affirmed.

Overruled: Mial v. Ellington, 134 N. C., 159.

PERSON ET AL. V. SOUTHERLAND ET AL.

Messrs. MacRae & Day for plaintiffs (appellants).
Messrs. W. C. Monroe, Aycock & Daniels and I. F. Dortch for defendants.

Per Curiam: For the reasons assigned in *Wood v. Bellamy, ante,* 212, the judgment of the court below is
Affirmed.

RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY v. E. B. STURGEON.

Action to Recover Land—Railroads—Right of Way—Acquirement of Title—Easement.

1. Where the charter of a railroad company provides that, where no contract is made with the company in relation to lands through which its road may pass, it shall be presumed that the land on which the road may be constructed, together with 100 feet on each side of the centre of the track, has been granted to the company by the owner, unless he shall, within two years from the completion of such portion of the road, apply for an assessment of damages, and in the trial of an action by the company against an occupant of a part of the right of way it appeared that the company had made no contract concerning the land and no application had been made by the owner for assessment of damages: *Held,* that the company acquired only an easement in the land taken and is entitled to possession of the whole right of way only when it shall appear that it is necessary for its purpose in the conduct of its business, and, where the complaint in such action fails to allege that such necessity exists, the action should be dismissed.

2. Generally, the right which railroad companies acquire in lands condemned or purchased for their right of way amounts to an easement only and not to the purchase of the estate of the owner therein.

3. While land included in the right of way of a railroad company, not necessary for the purposes of the company, may be cultivated by the servient owner, the crop must not be of such inflammable or combustible nature, when matured or maturing, as to endanger the safety of the company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from the company's engines, for, in such case, the company would have the right to enter and remove such crops.

ACTION, to recover part of plaintiff's right of way in the town (226) of Apex, which was claimed by defendant, tried before *Boykin, J.*, and a jury, at October Term, 1896, of WAKE.

The ordinary issues in ejectment (except as to damages) were submitted and found in favor of the plaintiff, and from the judgment thereon defendant appealed.

Messrs. L. R. Watts, J. B. Batchelor, and MacRae & Day for plaintiff.
Messrs. Armistead Jones and H. E. Norris for defendant (appellant).

MONTGOMERY, J. The plaintiff company did not acquire its right of way by either condemnation or purchase. Its claim to the title and absolute and actual possession of the whole of the one hundred feet on both sides of its track is founded upon what it contends is the legal effect of one of the provisions of its charter, Sec. 9, Chap. 26, Laws 1863, which is in the following words: "That in the absence of any contract or contracts with said company in relation to land through which (227) the said road may pass, it shall be presumed that the land on which the said road may be constructed, together with one hundred feet on each side of the centre of the track, has been granted to the company by the owner, and the said company shall have good title and right thereto, and shall hold and enjoy the same as long as the same may be used for the purposes of the company, unless said owner, at the time of finishing the part of the road on his land, shall apply for the assessment of the value of the land within two years next after the finishing of such portion of the road; and said owner, for the want of such application within said two years, shall be barred from said recovery." The contention of the plaintiff is that, as the company had no contract concerning the land embraced in the right of way with the defendant, or those under whom he claims, and as no application for the assessment of the value of the land was made within two years next after the finishing of such portion of the road, the words of the statute (the company's charter) vest the estate of the owner in the company as effectually for all intents and purposes as if a grant for the land had, in fact, been issued. In support of

its contention, the plaintiff relies on the decision in *R. R. v. McCaskill,* 94 N. C., 746. In that case it does seem to be decided that under a provision of a charter, substantially like the one before us, the facts being about the same as in this case, that the title to the land passed to the company and that it was entitled to recover the possession whether necessary for the company's purposes or not. Yet, there seemed to be a doubt as to the correctness of the position in the mind of the Court. In that case the Court said, "A permissive use of part of it (right of way) by another, when no present inconvenience results to the (228) company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances would be a needless and uncalled for injury. This may suspend, but does not abridge the right of the company to demand restoration *when the interests of the road may require its use."* The effect of that decision was weakened by the opinion of the Court in *Ward v. R. R.,* 109 N. C., 358, where it is said, "We take notice of the fact that whatever may be the privilege of railroad companies to exercise dominion over their whole right of way, the universal custom has been to allow the abutting owner, whose land has been taken for the use of the public, to cultivate up to the side ditches that are kept open for the purpose of proper drainage by the company." In the same opinion it is declared to be the duty of railroad companies, in the construction of their roads, to cut down large trees that might, from age or storms, fall upon their track, yet it intimates that a company would not be required to take actual possession of any part of its right of way not needed for the company's purposes, to remove from its crops high grass or bushes that might grow or spring up immediately outside of the ditches and grow high enough to conceal an animal from the view of the engineer who is approaching with a train.

In *Blue v. R. R.,* 117 N. C., 644, it was distinctly announced that the right which railroad companies acquire in lands condemned for their rights of way amounts to an easement, and not to the purchase of the estate of the owner. In that case the Court said, "The right of way of railroad companies is by judgment of condemnation made subject to occupation where, and only where, the corporation finds it necessary to take actual possession in furtherance of the ends for which the company was created. The damages are not assessed upon the idea of a (229) proposed actual dominion, occupation and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional track, ditches and houses to be used for stations and section hands. Unless the land is needed for some such use, the occupation and cultivation by the owner

of the servient tenement will be disturbed only when it becomes necessary for the company to enter, in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property."

If *McCaskill's case* has not been overruled by the subsequent decisions of this Court above referred to, we are at least in a position to discuss without much embarrassment the question whether or not the right acquired by railroad companies in their rights of way under such charters as the one before us, is an easement or a conclusive presumption of conveyance of the estate of the owner. Under the statute (charter) where there is no contract between the parties, and after two years from the completion of the road over the owner's land, there is a presumption that the land taken for the right of way "has been granted to the company by the owner, and the company shall have good title and right thereto and shall hold and enjoy the same as long as the same may be used for the purposes of the company. * * *" What reasonable meaning can be attached to the words "for the purposes of the company," except that the land should be used for such purposes as are conducive and necessary to the conducting of the business of the company, that is, of safely and rapidly transporting and conveying passengers and freight over its railroad? That is the whole business of the company. They (230) need land for no other purpose than to properly construct their road beds and drain them, build side-tracks, when necessary, and houses for their employees, warehouses and station houses, with convenient egress and ingress, and, perhaps, for a few other purposes that may have escaped our attention. If the company should need the whole of the right of way for these purposes, it has the right to use the whole. This is what was in contemplation when the railroad charters were granted, when the right of way was laid out and when the road was constructed. Such lands have been condemned on the ground that they were for the use of the public, and they cannot be used for any other purposes than those contemplated when they were condemned. It must be understood, however, that if lands belonging to the right of way not necessary for the purposes of railroad companies should be cultivated by the servient owners, the crops must not be of such inflammable or combustible nature, when matured or maturing, as would endanger the safety of the company's passengers, or might likely cause injury to adjoining lands in case of their ignition by sparks and fire from the company's engines. In such case the companies would have a clear right to enter and remove such crops from their right of way.

Our opinion, therefore, is that in the case before us the plaintiff has only an easement in the land in dispute. The company would be entitled to the possession of the whole of the right of way if it appeared

that such possession was necessary for its purposes in the conduct of its business. But such did not appear to be the case on the trial. The complaint did not allege that the land occupied by the defendant was necessary for the purposes of the company, and the motion of defendant's counsel to dismiss the action for that reason must be allowed.

(231) Action dismissed.

FAIRCLOTH, C. J., dissents.

Cited: Winkler v. R. R., 126 N. C., 373; *Neal v. R. R.,* 128 N. C., 149; *Shields v. R. R.,* 129 N. C., 3; *Dargan v. R. R.,* 131 N. C., 625; *Brinkley v. R. R.,* 135 N. C., 656; *Barker v. R. R.,* 137 N. C., 220, 221; *R. R. v. Olive,* 142 N. C., 265, 274, 275; *Parks v. R. R.,* 143 N. C., 293; *McCullock v. R. R.,* 146 N. C., 319; *S. c.,* 149 N. C., 309; *Earnhard v. R. R.,* 157 N. C., 364; *R. R. v. McLean,* 158 N. C., 500; *Torrence v. Charlotte,* 163 N. C., 565; *Coit v. Owenby,* 166 N. C., 138; *R. R. v. Mfg. Co., ib.,* 180; *R. R. v. Bunting,* 168 N. C., 580.

T. D. WALLER v. J. M. SIKES, CLERK OF THE SUPERIOR COURT OF GRANVILLE COUNTY.

Contempt—Clerk of Superior Court—County Commissioners—Appointment—Jurisdiction of the Judge of the Superior Court.

Section 5 of chapter 135, Acts of 1895, authorizing the presiding or resident Judge of the Superior Court to appoint additional county commissioners on its being certified to him by the clerk of the court that the petition for such appointment was properly signed, did not, like section 7 of chapter 159, Acts of 1895, confer upon the judge any unusual power to proceed by a rule in the first instance to compel the clerk to act, *mandamus* being the proper remedy.

On 5 December, 1896, T. D. Waller, an elector and tax-payer of Granville County, made and filed the following affidavit before *Graham, J.,* at OXFORD, N. C.:

"T. D. Waller, being duly sworn, alleges and says: That according to Chap. 135, Laws 1895 (sec. 5), providing the way in which two additional county commissioners may be appointed, he, with others, went before J. M. Sikes, Clerk of the Superior Court of Granville County, with the necessary papers drawn according to law; and that the said Sikes thereupon refused to accept the affidavit, whereupon, a rule was issued by your Honor, and made conclusive, compelling him, the said

Sikes, to accept said affidavit. That then the said Sikes still refused to certify the papers as he was required by law to do, giving as a reason that he had no way of knowing that the signers are freeholders. That thereupon the said Waller produced to him a certified copy of the tax books, which showed 100 of the signers of said petition free- (232) holders, as is required by law. That thereupon the said Sikes refused to certify said papers, as was required by law, whereupon the said Waller and others offered to produce to him (the said Sikes) the original tax books, that he might examine said tax books, and see for himself that 100 of said signers were freeholders. That the said Sikes refused to accept evidence or inform himself of the fact that these men are freeholders, and still refuses to certify the papers, to the end that the two additional commissioners may be appointed: wherefore, the affiant prays your Honor that a rule may issue against the said Sikes to show cause why he should not perform his duty in this matter.

"T. D. WALLER.

"Sworn to and subscribed to before me, this 5 December, 1896.

"S. V. ELLIS, J. P."

Upon reading and considering the foregoing affidavit of T. D. Waller, his Honor, A. W. Graham, resident in the Fifth Judicial District, made and issued an order or rule upon J. M. Sikes, Clerk of the Superior Court of Granville County, to show cause why he should not discharge his duty, and make said certificate. Said rule was made returnable at the office of the Register of Deeds, in the courthouse in Oxford, on 5 December, 1896, at 8 o'clock P. M. (said order or rule cannot be found), at which time and place said Sikes appeared in person and by attorney, and moved for time to file an answer, upon which motion said cause was continued until 9 P. M., at which time said Sikes again appeared, and filed the following answer:

"To the Hon. A. W. Graham, Judge, etc.: In answer to the rule this day served upon me, I beg leave to certify to your Honor, that as no evidence sufficient to satisfy me has been offered to me (233) by the petitioners, who requested your Honor to appoint two honest and discreet citizens of Granville County commissioners of said county, in addition to the three county commissioners who were duly elected to said office by the people of said county, on the 3d day of November last, that two hundred of said petitioners are electors of said county, and that one hundred of them are freeholders, I therefore respectfully certify to your Honor that two hundred electors of said county did not sign said petition, nor are one hundred of them who did sign said petition freeholders. This 5 December, 1896. J. M. Sikes, Clerk Superior Court of Granville County."

Which said answer of J. M. Sikes to said rule was adjudged insufficient; and it was thereupon ordered by the Court that the registration books for said county, together with the tax books of said county, be brought into court; whereupon the said tax books were produced, and all the registration books, except those for the two precincts of Bell Town and Geneva, the said Clerk of said court, the lawful custodian of said books, alleging that the registrars for said two precincts had failed to return said books; and S. V. Ellis, deputy register of deeds, Thomas D. Waller, and others being sworn, the Court proceeded, in the presence of said Clerk to compare the said petition with said registration books, when it was ascertained that all of the petitioners, except those who reside in the said precincts of Bell Town and Geneva, are electors in said county; and it appearing from said tax books and from oral testimony, in the presence of the Court and of said J. M. Sikes, Clerk as aforesaid, that one hundred and eleven of said petitioners are freeholders in said county, it was thereupon ordered that said Waller and the petitioners be allowed to amend the petition by the addition of the names of other electors of said
(234) county to supply the places of those who reside in the precincts of Bell Town and Geneva, the registration books of which were alleged by said Sikes not to be in his office, and said cause was continued until 8:30 A. M., 7 December, 1896, at which time and place, all the parties being present, the hearing of the matter was continued; and it was shown that more electors had signed said petition than those stated in said petition from Bell Town and Geneva precincts, and, upon the tax books of said county being produced, it was shown that these additional names, together with those first signing the petition, made more than two hundred electors, one hundred of whom were freeholders who signed said petition; whereupon the Court found as a fact that more than two hundred (200) electors of said county of Granville, of whom more than one hundred (100) were freeholders in said county, had signed said petition; whereupon the Court made the following order, directing the Clerk to certify forthwith:

"State of North Carolina—Granville County. Superior Court, 7 December, 1896. T. D. Waller v. J. M. Sikes.

"Order. In the above-entitled proceeding, T. D. Waller having filed with the Court on 5 December, 1896, an affidavit setting forth that he and four other electors of the county of Granville, had filed with J. M. Sikes, Clerk of the Superior Court of said county, an affidavit to the effect that they verily believed that the business of Granville County would be improperly managed if left entirely in the hands of the three commissioners of said county elected at the general election held on 3 November, 1896; and that thereupon more than two hundred electors of

said county (one hundred or more of whom are freeholders) have petitioned the Court to appoint two additional commissioners for said county, as provided by Chap. 135, Laws 1895; and that said J. M. Sikes, Clerk as aforesaid, failed and refused to certify that one (235) hundred of said petitioners are freeholders, as required to do so by said statute; and the rule having been served upon said Sikes to show cause why he should not discharge his duty and make said certificate—said rule was made returnable at the office of the Register of Deeds, in the courthouse in Oxford, on 5 December, 1896, at 8 o'clock P. M., at which time and place said Sikes appeared in person and by attorney, and moved for time to file an answer. Said cause was then continued until 9 P. M., at which time said Sikes again appeared, and filed an answer, which was adjudged to be insufficient; and it was thereupon ordered that the registration books for said county, together with the tax books of said county, be brought into court, whereupon the tax books were produced, and all the registration books, except those from the precincts of Bell Town and Geneva, the Clerk of said court, the lawful custodian of said books, alleging that the registers for said precincts had failed to return said books; and, S. V. Ellis, deputy register of deeds, Thomas D. Waller, and others, being sworn, the Court proceeded to compare the said petition with said registration books, when it was ascertained that all of the petitioners (except those who reside in the precincts of Bell Town and Geneva) are electors in said county; and, it appearing from said tax books and from oral testimony that one hundred and eleven of said petitioners are freeholders in said county, it is therefore ordered that said Waller and the petitioners be allowed to amend the petition by the addition of the names of other electors of said county to supply the places of those who reside in the precincts of Bell Town and Geneva, the books of which precincts are alleged by said Sikes not to be in his office, and said cause was continued until half past 8 o'clock A. M., 7 December, 1896, at which time and place, all parties being present, the hearing of the matter was continued, (236) and it was shown that more electors had signed said petition than those stated in said petition from Bell Town and Geneva precincts. The Court doth find as a fact that more than two hundred electors of said county, of whom more than one hundred are freeholders in said county, have signed said petition. It is therefore ordered that said James M. Sikes, Clerk of the Superior Court of Granville County, do forthwith certify to said one hundred persons being freeholders, and return said petition and all the papers in the cause to said court at once. This 7 December, 1896.

"A. W. GRAHAM,
"Judge of Superior Court,
"Resident in the Fifth Judicial District."

The defendant refused to obey said order and, upon being adjudged by the Court in contempt, appealed.

Messrs. Winston, Fuller & Biggs for plaintiff.

Messrs. Edwards & Royster and J. B. Batchelor for defendant (appellant).

MONTGOMERY, J. His Honor undoubtedly proceeded under the view that he had, under the provisions of Sec. 5, Chap. 135, Laws 1895, such a general supervisory power over the Clerks as was conferred upon the Judges of the Supreme and Superior Courts in Sec. 7, Chap. 159, Laws 1895. This was a mistaken idea of his power. Sec. 7 of the Election Law of 1895 not only gave to the Judges a general supervisory control over the clerks, but it prescribed all the machinery necessary for compelling them to perform their duties. A rule might issue, in the
(237) first instance, upon the Judge's own motion or upon the affidavit of an elector, to be followed by other rules from time to time as the occasion might require. Sec. 5, Chap. 135, Laws 1895, authorized the Judge presiding in the district, or the resident Judge, to appoint two additional county commissioners upon its being certified to him by the Clerk of the Court that the petition was properly signed, but it did not confer upon the Judge any unusual power, any power to proceed by a rule in the first instance to compel the Clerk to act. The present proceeding should have been commenced by *mandamus,* and the Clerk's conduct (which it seems was arbitrary and contumacious) inquired into the regular way. It was commenced upon affidavit and rule, and ought to have been dismissed upon the motion of the defendant. We do not pass upon the power of the Judge where the Clerk refuses to act in cases like the one before us, to find the facts and to appoint the commissioners when the petition is properly signed. The matter of contempt is the only matter before us, and we are of the opinion that there was error in the judgment and that the same ought to be

Reversed.

Cited: Lyon v. Comrs., post, 241, 252.

W. T. LYON AND G. B. ROYSTER v. THE BOARD OF COMMISSIONERS OF GRANVILLE COUNTY.

Mandamus—Quo Warranto—Ejection from Office—Restoration—Clear Legal Title to Office.

Where a plaintiff sues for an office occupied by another, his remedy is an action in the nature of *quo warranto*. If he sues to be restored to an unoccupied office, his remedy is an action for a mandamus, and he must show that he has a *present clear legal* right to the thing claimed, and that it is the duty of the defendant to render it to him. (CLARK and MONTGOMERY, JJ., dissenting.)

(Syllabus by FAIRCLOTH, C. J.)

MANDAMUS, tried before *Allen, J.*, at January Term, 1897, of (238) GRANVILLE, on an agreed statement of facts which are summarized in the opinion of the Court. His Honor adjudged as follows: "That the plaintiffs, W. T. Lyon and G. B. Royster, are entitled to be forthwith reinstated and restored to their said office as Commissioners, and the said defendants are ordered and directed forthwith, upon the service of a copy of this decree upon them by the sheriff of Granville County, which copy shall be made and prepared by the Clerk of this court, to reinstate, reinduct, and restore said W. T. Lyon and G. B. Royster to their said offices, and likewise permit said plaintiffs to be and act in all respects as Commissioners of said county, and as such to participate in the meetings of said board during the time specified in the order of *Judge Graham*, appointing to said office heretofore referred to. And it is ordered, considered and adjudged that plaintiffs recover of the defendants the costs of this action in this behalf incurred, to be taxed by the Clerk, and that a peremptory writ of mandamus issue commanding that, forthwith and without excuse or delay, the defendants above named comply with the terms of this judgment and decree, and meanwhile and until said judgment and decree is fully complied with, these defendants, and each of them, are enjoined and restrained as heretofore." From this judgment defendants appealed.

The cause had previously been heard before *Graham, J.*, at chambers, in Oxford, on 28 December, 1896, on application for *mandamus* and injunction, and the answer of the defendants having raised certain issues, they were transferred to the January Term for trial, but in the meanwhile defendants were restrained from paying out any money or incurring any debts or accepting official bonds except upon the concurrence of as many as four of the board. From so much of such order as so restrained the defendants they appealed, and from the order transferring the cause to the Superior Court in term the plaintiffs ap- (239) pealed.

Messrs. Winston, Fuller & Biggs for plaintiff.
Messrs. Edwards & Royster and Mr. J. B. Batchelor for defendants.

FAIRCLOTH, C. J. The plaintiffs instituted this action alleging that they were *duly and legally* appointed Commissioners of Granville County by the resident Judge of the Fifth Judicial District, by virtue of the power vested in him by Laws 1895, chap. 135, praying for a *mandamus* compelling the defendants to restore them to their said office and to permit them to participate in all respects in the deliberations of the Board of Commissioners for the county. The defendants deny the plaintiff's right to be inducted into office on the ground that the Judge had no authority to make the appointment, and that the same was void in law. Sec. 5 of the said Act is in these words:

"That whenever as many as five electors of the county make affidavit before the Clerk of the Superior Court, at any time after the election of the County Commissioners, that they verily believe that the business of the county, if left entirely in the hands of the three Commissioners elected by the people, will be improperly managed, that then upon the petition of two hundred electors of said county, one-half of whom shall be freeholders and so certified by the Clerk of the Superior Court, made to the Judge of the district, or Judge presiding therein, it shall be the duty of the said Judge to appoint two honest and discreet citizens of said county, who shall be of a political party different from that of a majority of the Board of Commissioners, who shall, from their (240) appointment and qualification, by taking the oath required for County Commissioners, be members of said Board of Commissioners in every respect," etc.

Facts: From the confused proceedings, it appears that five electors appeared before the Clerk and offered to file a written affidavit, as required by the said Act, with a list of petitioners. The Clerk declined to receive the papers, as not being in proper form. The affiants made an affidavit before the Judge at chambers, certifying to the Clerk's refusal. Notice was issued by the Judge to the Clerk to show cause why he did not accept the oath and affidavit offered. The Clerk certified that two hundred electors had not signed the petition, and that among those who had signed there were not one hundred freeholders. The Judge allowed the petitioners to amend the petition with other names to supply those from two townships from which the books were not in the office. The Judge then ordered the tax books and registration books to be brought into Court, and upon examination of the books and from oral testimony, "the Court doth find as a fact that more than two hundred electors of said county, of whom more than one hundred are freeholders in said county, have signed said petition." The Judge then ordered the Clerk to

"forthwith" certify to said one hundred persons being freeholders and return said petition and all other papers in the case to said Court "at once." The Clerk refused to so certify. The Judge then appointed the plaintiffs Commissioners of Granville County "with all the powers and duties of a Commissioner of said county."

The plaintiffs and defendants met together, organized and transacted some business for an hour or two, when defendants, being of opinion that the appointment of the plaintiffs was invalid and void, declined to recognize them as members of the board, and to allow them to participate in their meetings, and this action is brought to reinstate the (241) plaintiffs and have their right declared by the Court.

The written statement, from which the above facts are extracted, was offered in evidence on the trial, but excluded by his Honor, and the defendants excepted and appealed.

The identical facts, more in detail, will be found in the case of *Waller v. Sikes, ante,* 231. These facts were offered for the purpose of showing that the District Judge had no jurisdiction of the matter, when he appointed the plaintiffs as above recited and that his action was void. No summons had issued and there was no action pending in which said appointment was made.

We will not indulge in many remarks on *quo warranto* and *mandamus,* as we think that an action for *mandamus* is the proper proceeding in this case. In England it was a prerogative writ, when no other remedy could be had, and had many refinements, issuing only at the pleasure of the Court. By statute 9 Anne, chap. 20, the remedy was made one of right, and the general rules of pleading and practice were made applicable to *mandamus* as in other personal actions. At common law the return to a writ of *mandamus* could not be traversed, and if the matters set forth were sufficient in law, the defendant had judgment to go without day. If the return was false, the remedy of the person aggrieved thereby was an action on the case for making a false return; and if the plaintiff proved the matters of fact false he recovered damages and costs. By 9 Anne, chap. 20, in certain cases all or any of the material facts set forth in the return may be traversed. Our statute, 1836, Chap. 97, Sec. 5, The Code, sec. 623, extends this provision to all cases, and upon a traverse of any of the material facts "the summons, pleadings and practice shall be the same as is prescribed for civil actions," and if an issue of fact is raised by the pleadings, it must be decided by a jury. The Code, sec. 623; *Tucker v. Justices,* 46 N. C., 459. (242)

This prerogative writ has never obtained in our State. *Scire facias* and *quo warranto* are abolished, and civil action substituted (The Code, sec. 603), and *mandamus* is regulated as an action by The Code,

sec. 622. Remedies are now by action and special proceedings (The Code, sec. 125), and civil actions shall be commenced by issuing a summons. The Code, sec. 199.

When a plaintiff sues for an office occupied by another, *quo warranto* is the proper remedy, as in *Cloud v. Wilson,* 72 N. C., 155, but when the office is vacant by reason of a motion, the remedy is *mandamus,* as in *Doyle v. Raleigh,* 89 N. C., 133, and this distinction reconciles the decisions.

The plaintiffs' complaint alleges that they were "duly and legally appointed Commissioners" by the resident Judge, and this is denied by the answer. The burden of proof was on the plaintiffs, which they failed to make, and now rely upon their *prima facie* title by reason of their appointment by the Judge of the district, and the fact that they had once been in the office and afterwards excluded. The defendants offered proof of the invalidity of the plaintiffs' title, because the Judge who appointed had no jurisdiction of the matter, *i. e.,* it was *coram non judice.* It is true that the acts of *de facto* officers are conclusive on third parties, but we fail to see how such *de facto* acts tend in any degree to show jurisdiction in the appointing power or the legality of the plaintiffs' title. When the Clerk refused to certify, we think the remedy of any one of the petitioners or affiants was an action for a *mandamus* to show cause, etc., but the Judge assumed jurisdiction, heard evidence, found facts, when there was no one to contest such findings, and appointed the plain-
(243) tiffs Commissioners of the county. In order to confer jurisdiction, under Sec. 5 of the said Act, it was necessary:

1. That the affidavit be filed with the Clerk with two hundred petitioners, one-half freeholders.

2. That the Clerk shall have certified these facts to the Judge in the district.

The power of the Judge then was to appoint, and nothing more. His Honor finds as a fact that the plaintiffs failed to take an oath to support the Constitution of the State and United States as required by law. We then have the question, Can the Court order that the plaintiffs be inducted or restored to the office of Commissioner without showing a legal right to it? *Mandamus* by the statute of Anne, chap. 20 is an effectual remedy; First, for refusal of admission where a person is entitled to an office, and Secondly, for a wrongful removal where a person is *legally* possessed. 3 Bl. Com. 264. "The prosecutor (plaintiffs') must be clothed with a clear *legal and equitable* right to something which is proper by the subject of the writ, as a legal right by virtue of an Act of Parliament." Tapping on Mandamus, pp. 10, 12, 28, 321. *"Mandamus* is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the

relator has a *present clear legal right* to the thing claimed, and that it is the duty of the defendants to render it to him." *Brown v. Turner,* 70 N. C., 93. High, in his Extraordinary Legal Remedies, after discussing in detail *quo warranto,* a motion, induction, *de facto,* restoration and *mandamus,* concludes under the latter head, sec. 70: "It is to be borne in mind that the rule as above stated is applied only in favor of those who are clearly entitled *de jure* to the office from which they have been removed. And when the writ is sought to compel the restoration of one claiming the right to the office, it is not sufficient for him to (244) show that he is the officer *de facto,* but it is also incumbent upon him to show a *clear legal right,* and, failing in this, he is not entitled to the peremptory writ." 1 Chit. Gen. Pr., 791; *Worthy v. Barrett,* 63 N. C., 199. The same doctrine is asserted by the same author in the same book at secs. 9, 10, 53. The same principle is declared in *Justices v. Harcourt,* 4 B. Monroe, 501, and in *Clark v. Trenton,* 49 N. J. L. Rep., and others. In the latter it is held that "the claim of *mandamus* will not issue to seat a person in an office, even on proof of a *prima facie* title thereto, if it appears that his title is such that if seated he must be ousted from his seat upon a contest." In *State v. Justices,* 24 N. C., 430, *Gaston J.,* says: "Now, we hold it to be elementary doctrine, in support of which it is needless to refer to any of the numerous adjudged cases that acknowledge and sustain it, that a writ of *mandamus* will not be granted to a relator for his relief, except where he has a *specific legal* right and has no other specific remedy to enforce it." Affirmed in *Tucker v. Justices,* 46 N. C., 451.

The principle of these authorities seems reasonable. It is in harmony with that which governs in all other personal actions. It seems extraordinary that a Court should feel warranted in commanding the defendants to restore a person to office from which they have removed him for what appeared to them to be a sufficient cause, when the very next day they might exercise the same right on precisely the same grounds. Why restore and drive the parties to the cost and delay of another action to determine the identical issue raised by the pleadings in this action? Suppose the office was now occupied by an intruder, or otherwise, making *quo warranto* the proper action; in that event it is conceded that the relator would be held to strict proof of a clear title. Does (245) that circumstance change the *quantum* of proof because the action is called by a different name, when the object and facts are identically the same in each? If so, it must be an exception to the rule in all other personal actions.

Under our system, at this day, it appears to us that the better practice is to try the issue raised by the pleadings in the present action and save the delay, trouble and expense of another action.

Reversed.

MONTGOMERY, J., dissenting. This was an application for *mandamus,* commenced by summons and complaint to compel the defendants to restore the plaintiffs to the office of Commissioners of the county of Granville, from which office they had been ejected and removed by the defendants, who were also Commissioners of the county, elected at the general election of November, 1896. The plaintiffs had been received as commissioners by the defendants, and they had conjointly acted in the organization of the board, and in the transaction of other public business. At the time of their expulsion by the defendants, the plaintiffs were the appointees of his Honor *A. W. Graham,* a Judge of the Superior Court, who in the appointment acted by virtue of the power contained in Sec. 5, Chap. 135, Laws 1895. The old writ of *mandamus* was not abolished by the provisions of The Code of Civil Procedure, as was that of *quo warranto.* The Act of 1871-2, chap. 75, only requires that applications for *mandamus* should be commenced by summons and verified complaint. It is, however, no longer regarded as an extraordinary remedy and as one of high prerogative, but has become to be a writ of right to be
(246) issued as ordinary process in any case to which it is applicable. *Haymore v. Commissioners,* 85 N. C., 268. So that whatever rights were formerly to be had under *mandamus* proceedings are still administered by the courts. It cannot be doubted that if the defendants really had misgivings concerning the legality of the appointment of the plaintiffs by *Judge Graham,* their remedy was by a proceeding in the nature of *quo warranto,* under subsection 1 of Sec. 607 of The Code. By that manner of procedure the lawfulness of the plaintiffs' appointment would have been tested in the courts in a regular and orderly manner; and, also, during the pendency of the action the acts of the board would have been good and valid, as the appointees, even if their title to the office should have been found to be bad, would have at least been commissioners *de facto.* The conduct of the defendants in expelling the plaintiffs being wrongful, the plaintiffs must have some legal redress, for where there is a wrong there must be a remedy. And it is apparent that the nature of the proceeding, which the plaintiffs should resort to to secure their rights, is either *mandamus* or an action in the nature of *quo warranto. Quo warranto* cannot be the proper remedy, for that proceeding is applicable where there is a contest between two claimants to an office, and the title is to be tried, or where the title is to be tried by the Attorney-General for the State, or some private person against a usurper, under Sec. 607 of The Code, subsec. 1; and the pleadings here show that no successors have been elected or appointed to fill the vacancies caused by the plaintiffs' expulsion. There is no other claimant to the office with whom they could test the title to the office.

It seems, then, that *mandamus* was the proper action for the plaintiffs to have instituted upon the facts set out in their complaint. Indeed, it was admitted by defendant's counsel in the argument here that the plaintiffs could not have brought an action in the nature of (247) *quo warranto,* and that the only remedy they had was in *mandamus* proceedings, and that the action, so far as the form of it is concerned, is properly brought. But the counsel insisted that, before a judgment for the restoration of the plaintiffs could be had, the plaintiffs had to show that their title to the office was a clear and full legal title, as upon an issue submitted to try that question. The plaintiffs insist that the title to the office is not to be tried, that they only seek to be restored to the position which they occupied before they were ejected by the wrongful act of the defendants, and that all they are required to show is a *prima facie* right to the office, which appears from the appointment of *Judge Graham.* This is the point in the case. The defendants, of course, aver in their answer that the appointment of *Judge Graham* is invalid on account of certain alleged irregularities.

In support of defendants' position, we have been referred to the decisions of this court in *Worthy v. Barrett,* 63 N. C., 199; *Doyle v. Raleigh,* 89 N. C., 133; and *Ellison v. Raleigh, ib.,* 125.

The controlling fact in *Worthy v. Barrett,* was not like any fact in the case before us. There, the petitioner was a Sheriff elect, whose bond was refused, and who was denied induction into his office by the defendants, who were Commissioners of the county, on the ground that he was personally disqualified by constitutional inhibition from holding any office in North Carolina. The Court held that the matter being perfectly clear that the plaintiff could not hold the office, they would not do the vain thing of compelling the Commissioners to put a man into an office who ought not to serve. The ground of this ruling was that it appeared clearly from the admissions in the pleadings that the plaintiff was personally disqualified to hold the office; that he ought not to be (248) allowed to fill it because of disabilities imposed upon him by law.

But it does not follow that the Court would have so summarily disposed of that branch of the case if it had appeared that the plaintiff was not personally disqualified, and had been awarded the proper certificate of election. It is improbable that, if such had been the fact, the Court would have ordered a trial upon the issue whether or not the plaintiff had been duly elected. His certificate of election, doubtless, would have been regarded as a *prima facie* right and title to the office, and the defendants ordered to induct him. Without further comment on that case, we simply say that the facts there were very different from the facts here. In this case, the plaintiffs have been installed into their offices,

have acted conjointly with the defendants, and, by the admission of the defendants, in their answer, the plaintiffs were personally qualified to fill the offices to which they were appointed.

The facts in *Doyle's case, supra,* were that he was elected an alderman of the City of Raleigh, was inducted into the office, acted with the other aldermen and was ejected from the board on the ground that he was, under the Constitution, incompetent to hold the office. No successor was appointed by the board to fill the vacancy caused by his expulsion. The Court held that he sought his appropriate remedy to be restored to his office in *mandamus* proceedings. In the case before us the plaintiffs had been appointed under the authority of law, had been inducted, had acted with the defendants as a board of commissioners, and were expelled from the councils of the board, and no successors have been appointed. If *mandamus* was a proper proceeding in *Doyle's case,* certainly it is the proper remedy for the plaintiffs in this action. The Court did
(249) not decide in *Doyle's case* that the plaintiff had to prove a clear and full legal title to the office of alderman before he could be restored; it did not decide that the title to the office had to be tried before restoration could be ordered. The Court did not even discuss that question. It simply held that *mandamus* was the proper remedy because the plaintiff had been elected, had been inducted into his office, had been rejected, and that the vacancy still existed at the time of the trial; that the place which the plaintiff held was not an office, and that he ought to be restored, "even if the aldermen had jurisdiction in the premises and had proceeded in a regular way to pass upon the question of competency."

In *Ellison's case, supra,* the plaintiff was a member of the Board of Aldermen of the City of Raleigh, duly elected, and had attended three meetings with his associates. He was ejected, and his successor was appointed and qualified. *Mandamus* was resorted to by the plaintiff, and this Court held merely that the action of the Board of Aldermen was wrongful, but that the plaintiff could not be restored in *mandamus* proceedings for the reason that his successor had been appointed under color of competent authority, and was a *de facto* officer, and that the title to the office was therefore in controversy between him and his successor. The matter was narrowed down to a contest between the plaintiff and his successor for the office of Alderman, and the title had to be tried by *quo warranto.* Nothing else was decided in that case.

These decisions of our Court are in harmony with some of the best text writers on *mandamus* and *quo warranto.* In High on Extraordinary Remedies, it is said that "in cases where relief has been sought to determine disputed questions of title to and possession of public offices, the courts have almost uniformly refused to lend their aid by

mandamus, since the remedy by information in the nature of a (250) *quo warranto* is justly regarded as the most appropriate and efficacious remedy for testing the title to the office." And the same author, in the same work, at sec. 67, writes: "And *mandamus* is recognized as a peculiarly appropriate remedy to correct an improper amotion from a public office and to restore to the full enjoyment of his franchise a person who has been improperly deprived thereof." In Dillon's work on Municipal Corporations, vol. 2, at sec. 892, it is stated in substance that generally in this country, by adoption from the English law, where one is in the actual possession of an office under a claim by election or commission, and is performing the duties of the office, *mandamus* is not the proper proceeding in which to try the validity of such election or commission to admit another, but that *quo warranto* is the remedy. In the same section the author writes: "The certificate of election of an officer, or his commission coming from the proper source, is *prima facie* evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in *quo warranto* the Court will go behind the certificate or commission, and inquire into the validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts."

Decisions can be found on both sides of the question, in the courts of the different States, as to whether the plaintiff in *mandamus* should be compelled to show more than a *prima facie* case. But I am of the opinion that in cases where *mandamus* is the proper remedy, as it is in the case before us, the title to the office cannot be tried, and that when the claimant shows an appointment or certificate of election from the proper source the same is *prima facie* evidence in favor of the holder, and entitles him to be restored to the office from which he was unlaw- (251) fully removed. The counsel of the defendants, in their very excellent brief, asked this question: "Is it possible that, when one, asking to be put in an office, shows his appointment and it is apparent on the face of it that it is irregular, illegal and void, and founded on a proceeding which is patently illegal and without any warrant of law, the court must refuse all inquiry into the right and put such party into office, although it is apparent that they must put him out the next day?" The answer to the question is that it does not state the point for decision. The question is, Have the plaintiffs shown a *prima facie* right to the office which they claim, and were they unlawfully ejected therefrom by the defendants? These questions we have answered in the affirmative. The law will not permit a majority of the commissioners of a county to arbitrarily pass upon the rights of one or more of their members to the office which they claim, and remove them without a hearing and without trial. Indeed, they had no jurisdiction over the matter upon which they acted.

The object of the defendants undoubtedly was to take a short cut to thwart the action of the Judge by ejecting summarily who were his appointees, without waiting for the due process of the law. If such proceedings were tolerated, the law would soon be superseded by violence. Under the appointment of *Judge Graham* the plaintiffs were *de facto* officers, if not officers *de jure*. (But upon this question we are not passing any judgment, nor do we intend to do so in this proceeding.) The defendants or any citizen of Granville County had the clear, legal right, under Subsec. 1 of Sec. 607 of The Code, to institute a proceeding in the nature of *quo warranto* against the plaintiffs to have them removed from the office they were filling at the time of their expulsion, if it was
(252) thought that their appointment was invalid or unlawful. But, instead of following that course, the defendants resorted to a wrongful and unlawful method, and wrongfully and unlawfully removed the plaintiffs. I think the plaintiffs should be restored to their offices, and then they can take such oaths as they failed, through inadvertence, to take when they entered upon the discharge of their duties. I think there was no error in the ruling of his Honor in refusing to dismiss the action on the motion of the defendants.

CLARK, J., concurring in the dissenting opinion: The basis of the authority of the Judge to appoint the two additional commissioners is the substantive and substantial fact that two hundred electors, one hundred of whom are freeholders, have petitioned him to make such appointment, and not the merely formal requirement that the clerk has certified that such petitioners are electors and freeholders. When the petition is handed the Judge with the requisite number of names, and the fact that there are 200 electors and 100 of them are freeholders, is shown, as in this case, by better evidence than the certificate of the clerk, towit, by the primary evidence on which the clerk should have acted, it would be sacrificing substance to form to permit a contumacious clerk, who might be ignorant of his duty or perhaps moved by improper motives, to nullify an Act of the General Assembly by his veto. The Judge, having found the substantive fact that 200 electors, 100 of whom are freeholders, have signed the petition, it is a matter of no sort of consequence that the clerk has refused to make the certificate, the object of which is merely to save the Judge the labor of finding how the fact is. No part of the duty of appointment is vested in the clerk. When the Judge found that the state of facts existed which required him to appoint, it was his duty to do so. In *Waller v. Sikes*, at this term, the court held that the Judge should not have ordered the clerk to make the certificate and have put him in contempt for failure to comply. I think his certificate being
(253) only one means of enlightening the Judge, when the latter found

the facts independently of the clerk's contumacious refusal to make the certificate, the Judge should simply have proceeded without it. The certificate was no longer essential.

Cited: S. v. Sharp, 125 N. C., 633; *S. v. Midgett,* 151 N. C., 3; *Rhodes v. Love,* 153 N. C., 471; *McCullers v. Commrs.,* 158 N. C., 84; *Newell v. Green,* 169 N. C., 463.

A. E. BOBBITT v. J. G. STANTON AND GEORGE BLACKWELL.

Action to Recover Land—Mortgages—Sale of Land by Junior Mortgagee —Application of Surplus—Adjustment of Equities—Jurisdiction.

1. Upon a sale of land by a junior mortgagee under the power of sale in his mortgage, any amount in excess of his debt and expenses of sale must be paid to the mortgagor, if there be no junior liens, and if he uses it to discharge prior encumbrances he is liable to the mortgagor for the same.

2. Where, in an action by a purchaser of land at a junior mortgage sale against the mortgagor, defendant pleaded that the debt had been fully paid before foreclosure, and the junior mortgagee, upon being made a party defendant, denied the answer, alleged the validity of the sale and asked for an apportionment of the proceeds: *Held,* that the Court could, in such action adjust the equities between the defendants, and, on giving judgment for the plaintiff for possession of the land, render judgment in favor of the mortgagor against the mortgagees for the surplus in his hands.

ACTION to recover land, heard before *McIver, J.,* at Fall Term, 1895, of GRANVILLE. The facts appear in the opinion of the court. From the judgment rendered the defendant, Stanton, appealed.

Mr. A. J. Field for plaintiff.

Messrs. Shaw & Shaw and N. Y. Gulley for J. G. Stanton (254) *(appellant).*

DOUGLAS, J. This action was originally brought by the plaintiff against the defendant, Blackwell, alone, to recover possession of land sold under a mortgage executed by said Blackwell to the defendant, J. G. Stanton, and purchased by the plaintiff. The defendant, Blackwell, alleged, in his answer, that the mortgage debt was usurious and had been fully paid to Stanton, and that the sale was therefore void. Stanton was made a defendant and filed his answer, denying the material allegations

of Blackwell's answer, and alleging that his debt had not been paid; that the sale under the mortgage was in all respects regular and valid; that the land sold for $280, from which he paid the remainder of his debt ($102.71), the expense of sale, and $87.90 due on a former mortgage given by Blackwell to one A. J. Harris; that he still had in his hands a surplus of $85.39 belonging to Blackwell, which he was ready and willing to pay to "Blackwell or to any one whom the court may direct." The mortgage to Harris was a first lien on the land existing when the land was sold by Stanton. It then belonged to Harris and was not conveyed to Stanton until after the sale of the land.

All the issues were found in favor of the plaintiff. His Honor, *Judge Coble,* then presiding, refused to sign the judgment as asked by Stanton, but gave judgment for the plaintiffs for the possession of the land for $40 annually for the wrongful possession of the land, and for the plaintiff's cost in the action, and made an order directing that the question of the application of the money be continued to the next term of court. At the next term the matter of application of the proceeds arising from the sale came up to be tried before *Judge McIver,* and, by agreement of counsel a jury trial was waived and his Honor (255) found the facts and rendered the following judgment: "It is adjudged that defendant, Blackwell, recover of defendant, Stanton, mortgagee in Blackwell's mortgage of 16 April, 1891 (the second mortgage), the sum of $189.67, with interest on $173.29, principal, from 27 July, 1896, until paid, together with costs of action accruing between Blackwell and Stanton since April Term, 1896." From this judgment the defendant, Stanton, appealed.

We see no error in the judgment. The plaintiff, Bobbitt, sued only for the possession of the land, with damages for its detention, and that he obtained. As the land was sold by Stanton under a second mortgage, subject to a prior mortgage, Bobbitt purchased only an equity of redemption; that is, the right to redeem the land by paying off the first mortgage. The right is in no way interfered with by the judgment, and, in fact, judgment had previously been rendered for the plaintiff in full accordance with his prayer.

Stanton was not compelled to pay off the first mortgage to protect himself, because he had already sold the land, subject to the first mortgage, for much more than enough to pay his debt. "A voluntary payment by a mortgagee of claims against the mortgaged property, which it was not necessary for his own protection he should pay, does not entitle him to be subrogated to the rights of the creditors whose liens he has discharged." Jones on Mortgages (5 Ed.), sec. 878.

In *Kornegay v. Spicer,* 76 N. C., 96, *Pearson, C. J.,* says: "A mortgagee, with a power of sale, is a *trustee* in the first place to secure the

payment of the debt secured by the mortgage, and in the second place for the mortgagor as to the excess." In *Vick v. Smith,* 83 N. C., 80, it was held that the mortgagee holds the proceeds of sale as a trustee, and, after paying his secured debt, must pay the surplus to the mortgagor, even though he may hold another unsecured debt. (256)

In this case, Stanton, holding the surplus as trustee for Blackwell, cannot be permitted, at Blackwell's expense, to exonerate the land in favor of Bobbitt, who purchased only the equity of redemption, and who is not asking any such relief. As this equity was sold subject to the first mortgage, it presumably brought less than the value of the land by the amount of the first mortgage. The purchaser, under these circumstances, would naturally bid that much less. In fact, the land, and not the mortgagor, remained primarily liable for the debt. "The note evidencing the debt is the personal obligation of the debtor; the mortgage is a direct appropriation of property to its security and payment." *Capehart v. Dettrick,* 91 N. C., 344.

Where the mortgagor himself sells his equity of redemption, he is, of course, bound by the terms of his conveyance, but where it is sold by the mortgagee under a power of sale, it is, in the absence of special covenants, equivalent to a sale under execution. At such a sale the purchaser of the equity of redemption takes subject to the mortgage and the judgment debtor is neither legally nor equitably bound to pay off such prior mortgage for the benefit of the purchaser. Jones on Mortgages, *supra,* sections 736 and 737 and cases cited therein; *Russell v. Allen,* 10 Paige, 279; 15 A. & E., 835.

If there be a surplus of the purchase price of the equity of redemption after payment of the judgment and costs, this should be paid to the *judgment debtor* and not to the mortgagee. Jones, *supra,* sec. 665.

Of course, this rule applies only to senior encumbrances, on the principle that such encumbrances are presumably included in the purchase price of the land. If there are liens, junior to that under which the equity of redemption is sold, the surplus must be applied to (257) such junior liens unless protected by some exemption.

The defendant, Stanton, in his brief, states that his mortgage contained covenants of warranty, but such fact does not appear anywhere in the record, even by allegation. He also claims that this was an action in ejectment, and that therefore these equities between co-defendants cannot be adjusted. A simple action of ejectment is unknown to our procedure. This is a civil action under The Code, and which, originally brought in the nature of an action of ejectment, is capable of determining all rights, legal as well as equitable, naturally arising from the original cause of action. It is true that the essential facts should be fully and clearly stated, and must be proved in accordance with the general rules

of evidence; but this being done, the court can grant any relief, legal or equitable, that the circumstances of the case may require. For the convenience and orderly trial of actions, some limitations were necessarily made by Statute and the ruling of the courts. Section 267 of The Code prescribes what causes of action may be joined by the plaintiff; while section 244 regulates counterclaims of the defendant against plaintiff. See Clark's Code, with cited cases. The rule as between co-defendants in equity, equally applicable to our Code system, is clearly stated by *Chancellor Waldworth* in *Elliott v. Pell,* 1 Paige, 253, as follows: "It is the settled law of this court that a decree between co-defendants, grounded upon the pleadings and proofs between the complainant and defendant, may be made, and it is the constant practice of this court to do so to prevent multiplicity of suits; but such decree between co-defendants, to be binding upon them, must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants." Cited and approved in *Hulbert v. Douglas,* 94 (258) N. C., 128.

This case comes clearly within the rule. The equity of redemption is sold under the mortgage; the purchaser brings suit for possession; the mortgagor in possession pleads payment of the mortgage debt, and consequent invalidity of sale; the mortgagee, properly made a defendant, alleges the validity of the sale and asks the court to apportion the purchase money. These matters are all connected, and arise from the sale of the land. They would clearly have been cognizable by cross bill in equity, and are equally so under our Code practice, which is essentially equitable. *Wilson v. Moore,* 72 N. C., 558; Clark's Code, pp. 1, 9, 10.

The only exception in the case is that taken by the defendant, Stanton, to the judgment rendered by *Judge McIver.* Substantial justice appears to us to have been done to the parties, and we do not think it would be just to force the defendant, Blackwell, to bring a new suit, with all its attendant cost and delay, simply to determine rights already passed upon, without objection, by a court of competent jurisdiction. It is true, we might find some authority for doing so in the celebrated English case of *In re Bivalve,* reported in Punch. That was an action for the possession of an oyster, and after years of litigation the court decided that it was a very fine oyster, and awarded to each claimant a half shell. As we think that this matter should be settled while some part of the oyster yet remains for the rightful owner, the judgment is

Affirmed.

Cited: Morrison v. Chambers, 122 N. C., 692; *Fleming v. Barden,* 127 N. C., 217; *Parish v. Graham,* 129 N. C., 231; *Hill v. Gettys,* 135 N. C., 377; *Moring v. Privatt,* 146 N. C., 566.

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G. W. DAVISON ET AL. v. WEST OXFORD LAND CO.

Practice—Appeal—Judgment In Fieri During Term When Rendered.

1. The rule that judgments date as of the first day of the term at which they are rendered has no application to appeals, as to which the rule is that they date from the last day of the term.

2. Where the trial term at which a judgment was rendered commenced before but was not adjourned until after the first day of the term of this court, the appellant need not docket his appeal until the ensuing term of this court.

MOTION to dismiss appeal of plaintiff from judgment rendered against him at July, 1896, Term of GRANVILLE, before *McIver, J.*

Mr. A. J. Field for plaintiffs (appellants).
Messrs. J. W. Graham and A. W. Graham for defendants.

CLARK, J. This is a motion to docket and dismiss the plaintiff's appeal in this case under Rule 17. It appears that the term of the court below, at which the trial was had, began before the first day of this term of this court, but that it did not adjourn till after the term here had begun. While such appeal might be docketed at this term, this is not imperative (Rule 5, *Porter v. R. R.*, 106 N. C., 478), and the motion to docket and dismiss must be denied. The rule that the term of a court is considered as one day and that all judgments date as of the first day of the term (*Farley v. Lea,* 20 N. C., 169; *Norwood v. Thorp,* 64 N. C., 682; *McNeill v. McDuffie,* 119 N. C., 336) is a very necessary one to place all judgments taken at the same term upon the same footing, without any priority one over the other. But this rule has no application to an appeal, since, as to that, all judgments, no matter on what day taken, are deemed as of the last day of the term, because they are (260) *in fieri* (*Gwinn v. Parker,* 119 N. C., 19) till the actual adjournment of the court. Hence, notice of appeal, filing appeal bond, taking exceptions to the charge and serving "case on appeal" are all to be done, not within ten days of the first day of the term (*Worthy v. Brady,* 91 N. C., 265), nor within ten days of the actual rendition of the judgment, but from the adjournment. *Turrentine v. R. R.,* 92 N. C., 642; *Simmons v. Allison,* 119 N. C., 556; *Guano Co. v. Hicks, ante,* 29. Till adjournment, the judgment, being *in fieri,* is not final, and hence when the adjournment of the court below takes place, after the beginning of the term of this court, the next term here will be the term at which the ap-

pellant is required to docket his appeal. Exceptions even to the legal fiction, that all judgments speak as of the first day of the term, will be found in *Clifton v. Wynne,* 81 N. C., 160, and *Whitaker v. Wisbey,* 74 E. C. L., 44.

Motion denied.

Cited: Houston v. Lumber Co., 136 N. C., 329.

MARY B. GREGORY v. JOHN BULLOCK.

Action on Guaranty—Guaranty—Notice of Acceptance.

1. Notice is necessary to be given a guarantor that the person giving the credit has accepted or acted upon the guaranty, and given credit on the faith of it.
2. On the trial of an action, it appeared that the defendant wrote to plaintiff saying, "When S. is ready to cut ties, if you can agree between you as to price, no doubt I can arrange the payment of the money satisfactorily to you." Thereafter plaintiff sold ties to S., but gave no notice to defendant that she had acted on the proposition contained in his letter until some months thereafter. *Held,* that the letter was ineffective as a guaranty to pay plaintiff for the ties.

(261) ACTION to recover the value of crossties, tried at July Term, 1896, of GRANVILLE, before *McIver, J.,* and a jury. There was a verdict against the defendants, and from a judgment thereon defendant, Bullock, appealed. The facts appear in the opinion of the court.

Messrs. Edwards & Royster and Graham & Graham for plaintiffs.

Messrs. Winston, Fuller & Biggs and Hicks & Hicks for defendant Bullock (appellant).

FAIRCLOTH, C. J. On 28 December, 1894, the plaintiff wrote to defendant Bullock, "I would like to sell you some pine and oak timber and all the railroad crossties on my children's (Stovall) land." On 1 January, 1895, the defendant replied, "When Mr. Smith is ready to cut ties, if you can agree between you as to price, no doubt I can arrange the payment of the money satisfactorily to you. As to old field pine, if you are willing to take the price I have been paying (50 cents per 1,000) I could put a man in it that would cut it, and it would bring you more than oak, growing so thick on an acre. If you wish the pine cut, please answer

soon." Defendant testified that on 10 January, 1895, he received a letter from plaintiff saying "she would sell pine at $1.25 per 1,000, and that she had decided not to sell the ties on the children's (Stovall) land." This letter was lost. Plaintiff, on redirect examination, said, "That about 10 January, 1895, if she did write defendant, Bullock, a letter, it was refusing his offer."

On 26 January, 1895, the plaintiff sold to R. T. Smith "all of the crossties east of the dirt road * * * on the land belonging to the children of R. O. Gregory," and Smith agreed to pay for all the ties. On 27 March, 1895, plaintiff wrote to defendant, "I sold R. T. (262) Smith crossties on my Cooper land, also those on my children's land near Stovall. There is $100 due me 1 April, and $100 due 1 May. What discount will it require to let me have the two payments 1 April?" There was no other communication between the parties. After 1 August, 1895, plaintiff demanded of defendant payment for balance on Stovall ties. This suit is for ties cut on Stovall land.

These letters present the question whether plaintiff and defendant entered into a contract making defendant liable for the Stovall crossties cut by Smith. Defendant bought some of the crossties from Smith, and at his request made two payments to plaintiff, 1 April and 1 May, and paid the balance to Smith. The most important element in an agreement is the consent of the parties. There must be a meeting of two minds in one and the same intention. Otherwise, there is no agreement and therefore no contract. There must be a distinct intention, common to both parties. If there is doubt or difference, there is no agreement. Where the terms of the agreement are ascertained, its effect is determined by the law and does not depend upon the uncertain or undisclosed notions of either party. "The construction of a contract does not depend upon what either party understood, but upon what both agreed." *Brunhild v. Freeman,* 77 N. C., 128; *Pendleton v. Jones,* 82 N. C., 249.

In order to constitute a contract there must be a proposal and an acceptance absolute and identical with the terms of the offer, neither falling within nor going beyond the terms proposed, but closing with it as it stands. If anything is left for future arrangement, the parties have not agreed. An acceptance, varying the terms, is a rejection of the offer, and unless a counter proposal is accepted and its acceptance made known to the proposer, there is no contract. *Cozart v. Herndon,* (263) 114 N. C., 252; Clark on Contracts, 36, 52.

Application: There is no pretence that the proposal of 28 December, to sell to the defendant was accepted, but the defendant's letter of 1 January was a proposition based upon an uncertain event, of which no notice of acceptance was given. On the contrary, the letter of 10 January, "that she had decided not to sell the ties on the children's (Stovall) land,"

was a lapse of all negotiations on the subject, and any subsequent change of mind and acceptance could not affect the question without a new and accepted proposal. Clark on Contracts, 53.

It was argued, however, that defendant's letter of 1 January was a guaranty binding him to pay the plaintiff, notwithstanding her letter of 10 January. The answer is that the alleged guarantee gave no notice of its acceptance within a reasonable time. In *Adams v. Jones,* 12 Peters, 213, *Justice Story* said: "Notice is necessary to be given the guarantor that the person giving credit has accepted or acted upon the guaranty and given credit on the faith of it. This is no longer an open question in this court." The alleged guaranty was not a promise to pay money, like an endorsement, but an offer to arrange for its payment upon an uncertain event. The terms of the negotiations being ascertained by the letters, the court applies the law and finds no contract in this case. *Houck v. Adams,* 98 N. C., 519. This conclusion makes it unnecessary to consider the exceptions.

Error.

Cited: S. c. 121 N. C., 145; *Pruden v. R. R., ib.,* 511; *Cowan v. Roberts,* 134 N. C., 421, 426; *Lumber Co. v. Lumber Co.,* 137 N. C., 437; *Green v. Grocery Co.,* 153 N. C., 413; *Clark v. Lumber Co.,* 158 N. C., 145.

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A. J. FIELD, RECEIVER, v. S. M. WHEELER ET AL.

Claim and Delivery—Landlord and Tenant—Cost—Parties.

1. Where, in claim and delivery proceedings under which the entire crop raised by the tenant was delivered to the landlord, the latter was adjudged entitled to one-fourth of the crop as rent, it was error to charge him with any part of the cost of gathering and marketing the crop.
2. Where the plaintiff in claim and delivery proceedings for a crop was adjudged to be entitled only to a part thereof, he should be charged with only one-half of the fees of a referee who had been appointed with his consent to appraise the value of the crop.
3. Where a plaintiff in claim and delivery proceedings for a crop was adjudged to be the owner of a part thereof, against defendants who claimed the whole, and were proceedings to convert it, costs should be allowed to such plaintiff under section 525(2) of The Code.
4. Where, pending an appeal in an action by a receiver involving the title to a property or the proceeds of its sale in which a judgment had been rendered in favor of one of the defendants for a part of the fund in plaintiff's hands, a motion was made in this court to substitute the

assignee as party plaintiff, which was resisted by the plaintiff upon the ground that the assignment did not affect the property in dispute: *Held*, that there was an issue of fact raised, not germane to the appeal, which could better be settled in the court below.

5. Under section 177 of The Code an action must be prosecuted by the real party in interest; hence, where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought for another person, such person and not the nominal assignee should be substituted as plaintiff under section 975 of The Code.

CLAIM AND DELIVERY, tried before *McIver, J.*, at July, 1896, Term of GRANVILLE. A jury trial was waived and his Honor found the facts. The action grew out of the matters embraced in the case of *Hunt v. Wheeler*, 116 N. C., 422. This plaintiff, having been appointed receiver in that action under the judgment which is set out in the report of that case, was placed in possession of the land by the sheriff (265) under a writ of assistance in that action, which was returned endorsed as follows: "Executed 2 August, 1895, by going upon the land described within which I found in the actual possession of Dub. Waller, who stated that he was working the land on shares, with S. M. Wheeler as his tenant, and removed said Dub. Waller from said land and putting Alexander J. Field, the receiver herein referred to, in the quiet, peaceable, sole and exclusive possession of said land.

"W. S. COZART, *Sheriff*.

"Per J. T. COZART, *D. S.*"

The complaint in this action, after stating the above facts, alleges:

"1. That said receiver, the plaintiff being then and there in the possession of said land, told said Dub. Waller, the defendant, that if he would come back upon the said land as the tenant of this plaintiff he might do so, and go on with the crop, and finishing, making and saving same, which he, the said Dub. Waller, agreed to do upon the assurance of plaintiff that he should be allowed such pay as was right and just; and thereupon plaintiff let him, the said Dub. Waller, into possession of said land as his tenant.

"2. That at the time plaintiff took possession of said land all of the crops for the year 1895 thereon were still standing and growing and not yet matured, except a lot of wheat and oats which had been saved, but were then still on the said land.

"3. That, as plaintiff is informed and believes, under the agreement between said S. M. Wheeler and Dub. Waller, each one was to have one-half of the crops after they were harvested or marketed.

"4. That after plaintiff had taken possession of said lands he posted same, as allowed by law, forbidding all persons from going upon the same, or in any way trespassing upon same. (266)

"5. That, as plaintiff is informed and believes, thereafter said S. M. Wheeler, the defendant, did enter upon said lands and remove therefrom a part of said crop, towit, a lot of oats, and converted same to his own use; and that said Wheeler and said Waller did thereafter sell, or cause to be sold and removed from said land, a certain lot of tobacco, of the value of $44 and divided the proceeds between them, in defiance of plaintiff's rights and to his great damage, towit, the sum of $52.

"6. That the plaintiff verily believes that the defendants would continue to dispose of said crop, if left in the possession of Dub. Waller, in utter disregard of plaintiff's right; and he thereupon brought this action and caused said crops, or what remained of them, to be seized under claim and delivery and delivered into the possession of himself."

The prayer of the complainant was that the crops seized should be adjudged to belong to plaintiff, to be applied as directed in the order appointing him receiver; that he recover of the defendants the sum of $52 and costs, and that he should be instructed what sum to allow Dub. Waller for his services.

The defendants denied that plaintiff had any right or authority to put defendant Dub. Waller out of possession of the land or to permit his coming back on the land as plaintiff's tenant. The answer admitted that defendants were to divide the crops made on the land, each to have one-half and to pay one-half of the expenses incurred for fertilizers, etc., and that Waller was to pay S. M. Wheeler all amounts due for advances out of his (Waller's) share of the crops. It was also admitted that certain lots of oats and tobacco were removed from the land, but it was (267) denied that such removal was in defiance of plaintiff's rights, defendants claiming they had full right to the crops on the land and that plaintiff had no right to interfere with their removal by defendants. Defendants prayed for damages sustained by the seizure of the crops by plaintiff.

By consent of parties, W. T. Allen was appointed arbitrator to fix value of property seized by plaintiff, under claim and delivery proceeding; and he found its value $195.75 "now," and that it was of same value "at the time of seizure."

His Honor found the facts as follows:

"The summons in *Hunt v. Wheeler* was served on 16 November, 1894, and at the January Term, 1895, judgment was rendered in favor of the plaintiff, and appointing said Field a receiver. From this judgment there was an appeal to the Supreme Court, where said judgment was affirmed and modified.

"Thereafter the following judgment was entered in the court below, in accordance with the opinion of the Supreme Court:

"This cause coming on to be heard, and it appearing to the court that

on the appeal heretofore had herein, the Supreme Court modified and affirmed the judgment heretofore granted herein by this court, this court doth now, on motion of plaintiff's counsel, enter this judgment in accordance with the opinion of the Supreme Court; and doth now order, adjudge and decree, that the plaintiff above named recover of the defendant W. T. Wheeler the sum of $1,065.80, with interest on the sum of $690, the same being principal money, from 22 July (Term), 1895, the same being the first day of this term of this court, till paid, together with the costs of this action, to be taxed by the Clerk; and the Court doth further order, adjudge and decree that the said judgment is, and shall be, a charge and lien upon the lands described in the pleadings, to be paid and discharged by and from the rents and profits of said lands described in the pleadings, the same being, etc. (Here follows description.) And the Court doth further, on motion, order, ad- (268) judge and decree that Alexander J. Field be, and he is hereby appointed a receiver of this court to at once take possession of said lands, and to rent the same annually at public auction at the courthouse door in Oxford, N. C., for monthly rent; and the said receiver is directed to collect said rent and apply it, first, to the satisfaction of the cost of said receivership; second, to the payment of the judgment herein rendered in favor of the plaintiff. And the Court further, on motion, doth order and direct the defendant S. M. Wheeler and any of the other defendants and their agents and servants, who may be in possession of said land, to yield possession of said land peaceably to the said receiver hereinbefore appointed, and they, and each of them, are hereby forbidden to yield possession of said land to any other person. And the Court doth further, on motion, order, adjudge and decree that a writ of assistance issue, and the clerk is hereby directed to issue same, addressed to the sheriff of Granville County aforesaid, commanding him to put the said receiver in the quiet and peaceable and exclusive possession of said land. And this cause is retained for further orders. "HENRY R. STARBUCK,

"Judge Presiding."

Upon the facts his Honor rendered judgment as follows:

"It is, on motion, ordered and adjudged by the Court that the plaintiff recover of the defendants the sum of $77.60, less the sum of twelve dollars paid by defendants for one-fourth of the fertilizer and manure used in making the crop mentioned in the pleadings, which, by agreement of the parties, the Court adjudges to be a fair rental value of the lands mentioned in the pleadings for the year 1895, and which amount is one-fourth the value of all crops raised on said lands in said year. And the Court doth further order, adjudge and decree that the report of W. T. Allen, arbitrator, fixing the value of the crops seized by the plaintiff

(269) from the defendants at $195.75 be, and the same is hereby approved and confirmed. And the Court doth further order, adjudge and decree that the defendants recover of the plaintiff and the surety on his claim and delivery bond, L. R. Hunt, the sum of $195.75, the value of said crops, less the sum of $65.60 (which is the net rent of the said lands), with interest thereon from 30 September, 1895, till paid. And the Court doth further order, adjudge, and decree that the costs of this action, including a fee of five dollars for the arbitrator, W. T. Allen, to be taxed by the clerk, and the costs and expenses of gathering and marketing said crops, amounting to $32, be paid by the plaintiff and the defendants, each paying one-half."

From this judgment the plaintiff appealed.

Mr. A. J. Field appellant in propria persona.
Messrs. Edwards & Royster for appellees.

CLARK, J. The Court, having found as a fact that one-fourth of the crop, less one-fourth of the costs of fertilizers used, was a fair rental value, rightly adjudged that the plaintiff only recover said rental and no more; for the will, as construed in *Hunt v. Wheeler,* 116 N. C., 422, conferred a right to collect and apply "the rents and profits of the land" upon the lien, but his Honor erred in taxing the plaintiff with any part of the expense of gathering and marketing the crops, for that devolved upon the parties paying, or responsible for rent—the defendants. It was also error to tax the plaintiff with any part of the costs of the action, except one-half the fees of the arbitrator, or referee by consent—as he really was. The Code, sec. 533, as amended by Laws, 1889, chap. 37, making the apportionment of referee's fees discretionary in the Court.

(270) As to the rest of the costs, it is true the plaintiff, having taken the whole crop under claim and delivery, was adjudged to pay back part of its value to the defendants, but the conduct of the latter, by their admissions in the answer, made the proceedings necessary. The plaintiff, having obtained judgment for part of the crop taken by him in claim and delivery, is entitled to judgment for the costs. The Code, 525 (2); *Horton v. Horne,* 99 N. C., 219; *Wooten v. Walters,* 110 N. C., 251; *Ferrabow v. Green, ib.,* 414.

J. H. Gooch moves in this court to be substituted as party plaintiff (The Code, sec. 965) upon a certificate of the clerk showing an assignment of the judgment in September, 1896. The plaintiff contends that this assignment did not affect the crop of the year 1895. This is a controversy not germane to the appeal and raises a question of fact which can be settled better in the court below than here. Besides, the counsel for Gooch admitted that Gooch bought the judgment in fact for Wheeler,

and the latter, if any one, should be made party to the action as the "party in interest." Code, 177. This, however, would present the singular spectacle of the same person being plaintiff and one of the defendants. The motion is denied. The costs of this court will be divided. Code, 527 (2).

Judgment modified.

Cited: Williams v. Hughes, 139 N. C., 20; *Vanderbilt v. Johnson,* 141 N. C., 373; *Phillips v. Little,* 147 N. C., 283; *Horner v. Water Co.*, 156 N. C., 496.

HENRY A. CRENSHAW ET AL. v. W. C. JOHNSON ET AL.

Will—Caveat—Answer—Devisavit Vel Non—Evidence—Leading Questions—Discretion of Judge—Trial—Withdrawing Testimony from Consideration of Jury.

1. The issue as to whether a paper writing is the will of a decedent being raised by the caveat filed thereto, no answer to such caveat is necessary.
2. Where, in the trial of an issue *devisavit vel non*, the examination in chief of a subscribing witness to a will was confined to the execution of the instrument, it was not proper, on cross-examination, to ask him as to statements alleged to have been made by him respecting the mental capacity of the decedent.
3. Testimony concerning statements made by a deceased witness to a will as to the mental capacity of the testator, being hearsay, is not admissible on a trial of an issue *devisavit vel non.*
4. It being within the discretion of the trial judge to permit leading questions on a trial, the exercise of such discretion will not be reviewed.
5. Upon the trial of an issue of *devisavit vel non*, after the filing of a caveat, the instrument, though it has not been probated, can be admitted as evidence.
6. Although portions of the charge of the trial judge may be misleading if detached from the other portions of the charge, yet if the whole charge is so explicit that the jury can comprehend it and not be misled by the detached portion, the error in the submission of the latter is harmless.
7. Where, in the trial of an issue as to the validity of a will, the propounder was not examined by either party, and, upon comment by the counsel of the caveator as to his failure to testify, a contention arose between counsel whether the propounder, being named as executor in the will, was competent under section 590 of The Code, it was not error to refuse to give an instruction, requested by the counsel for the caveator, after the argument, that the executor was a competent witness.
8. If improper testimony is admitted during a trial, the trial judge may withdraw it and all comments by counsel thereon from consideration by the jury even after argument is ended.

(271) ISSUE of *devisavit vel non,* tried before *Coble, J.,* and a jury, at January Term, 1896, of GRANVILLE. There was a verdict for the propounders, and from the judgment thereon the caveators appealed.

Messrs. Winston, Fuller & Biggs for caveators (appellants).
Messrs. Edwards & Royster and W. M. Person for appellees.

(272) MONTGOMERY, J. The will of the decedent John Johnson was proved in common form, and upon a caveat being filed the issue joined thereby was sent up by the clerk to the next term of the Superior Court for trial. The caveators assigned as reasons why the alleged will was not the will of the decedent: (1) That he was not at the time of its execution, of sound mind and disposing memory; (2) That he was unduly influenced in its execution by those by whom he was surrounded and especially by his wife, the sole devisee and legatee. The first exception of the caveators was to the ruling of his Honor, that it was not necessary for the propounders to file an answer to the caveat.

No answer was necessary. The issue as to whether a paper writing is the will of the decedent is made up upon the filing of the caveat. Eaton's Forms, p. 446.

The next exception was to the reading of the paper writing in evidence; the caveators contending that the witness Wimbish who was also a subscribing witness to the script, had not identified the same as the paper which was really executed by the decedent. There is nothing in the exception. The writing was shown to the witness and he said that the same was the paper which the defendant signed as his will after it had been read over to all present, and that the witness and D. S. Osborn, now deceased, the other witness to the paper, signed the same in the presence of the decedent and at his request. The witness Wimbish, on cross-examination by the caveators, was asked what he had said when the will was proved before the clerk as to the mental capacity of the decedent. His Honor properly refused to allow this question to be put. The witness had not been asked on his examination in chief a word about the mental condition of the decedent, nor on his cross-examination. The only purpose of the question must have been to contradict the witness and he had made no statement about it one way or another.

Another exception was to the refusal of the Court to allow (273) Taylor, a witness for the caveators, to testify as to what Osborn, a deceased witness to the execution of the will, had told him about the mental condition of the decedent, both before and after the execution of the paper-writing. His Honor's ruling was correct. The testimony offered was nothing but hearsay evidence.

The exceptions from 11 to 27 were to the form of questions put to wit-

nesses by the propounders to show testamentary capacity. They were leading—all of them—but the Judge, in his discretion, allowed them to be asked and we cannot review them.

At the close of the evidence the caveators asked the Court to instruct the jury as follows: "1. That there has not been evidence sufficient to admit the alleged will to probate, in that evidence of F. B. Wimbish, the subscribing witness, is not sufficient to establish the due execution of the same. 2. There is no evidence in this case that the alleged will has been admitted to probate and, this being true, the alleged will cannot be offered in evidence in this suit." The Court properly refused to give the instructions asked. As we have already said, the testimony of the witness Wimbish was sufficient to have the will put in evidence for the purpose of establishing its execution by the decedent. He identified the paper, saw the decedent sign it after it had been read over to him, and both himself and Osborn, the other subscribing witness, signed it in the presence of the decedent and at his request. The probate of the will before the clerk was a matter totally immaterial in its relation to the trial in the Superior Court. The result of the trial in the Superior Court was to be the overthrow of the alleged will or its probate afresh in that court. There is no merit in exceptions 30, 31, 32, 33, and 34.

The caveators made exception to that part of his Honor's (274) charge where he said, "was he (said Johnson) able to understand what he was about? If so, then he was of sound mind and memory within the meaning of the law; if not, he had not testamentary capacity." This exception was a part of eight lines immediately connected together, the whole reading as follows: "Did he, the said Johnson, at the time of the execution of the script or writing in question, have sufficient mental capacity to understand the nature and character of the property disposed of? To whom he was giving his property and how he was disposing of the property? Was he able to understand what he was about? If so, then he was of sound mind and memory within the meaning of the law; if not, then he had not testamentary capacity." But if the detached portion of the charge, which was the subject of the exception, had stood alone, and not in conjunction with the other part which we have quoted above, it would not be error (or if error, a harmless one), for, in other parts of the charge, his Honor expressed himself to the jury upon the sufficiency of testamentary capacity, in words that have stood the test of our decisions—as, for instance, he told them "the law is, that to be of sound and disposing mind and memory, so as to be capable of making a valid will, the deceased must at the time of executing the paper-writing have had sufficient mental capacity to understand the nature and character of the property disposed of, to whom he was willing it, and how he was disposing of his property." In another place

he said, if, at the time he had the capacity to know what he was doing, and was capable of understanding the nature and character of the property disposed of, to whom and in what way he was disposing of his property, then his mental capacity would be sufficient. The exception can avail nothing.

The Court, in the long and full charge to the jury, among other
(275) things, said: "If the jury believe the evidence as to the formal execution of the alleged will, as explained in these instructions, and that the testator knew the contents of the same, and if, after a consideration of all the evidence in the case, a want of testamentary capacity in the testator has not been shown, and if it has not been shown that undue influence was exerted upon the testator at the time of the execution of the alleged will, then the jury will answer the issue, 'Yes,' otherwise, 'No.'" The defendant excepted to that instruction on the ground that it was misleading and that it placed upon the caveators the burden of proving both the want of testamentary capacity and of undue influence, and they insisted that the jury should have been instructed that if the caveators had shown either want of testamentary capacity or undue influence, then the jury should have found for the caveators. If the charge on the whole was not so full and clear, on the point to which the exception is directed, we would have no hesitancy in ordering a new trial, for the reason set out in the exception. But, upon reading the whole charge, it is perfectly clear that on this point the jury could not have been misled. The language used by the Judge, when taken in connection with the balance of the charge, was so manifestly an inadvertence that it could have produced no harm. He told them over and over again, in substance, at length, and so clearly that they could not misunderstand him, that testamentary incapacity alone would avoid the paper-writing alleged to be the will, and that undue influence alone exerted by his wife or any other person would make the paper-writing, not his will, but that of another.

On the argument, one of the counsel for the caveators commented upon
(276) the failure of H. A. Crenshaw, the person named as executor in the will, to go upon the stand as a witness for the propounders to show that the decedent had testamentary capacity. It had been shown on the trial that Crenshaw was the brother-in-law of the decedent, and that he delivered to the attorney who drew the will, a message from decedent to prepare the will in the manner in which it was drawn. The attorney for the propounders, in his argument to the jury, replied to that of counsel for the caveators, and asserted that Crenshaw was not a competent witness under section 590 of The Code. Neither side had offered Crenshaw as a witness. Upon the conclusion of the argument the Court took a recess until next morning, when, upon its being convened, the counsel for the caveators submitted in writing two instructions, which

they called special, as follows: "1. H. A. Crenshaw was a competent witness in this case. *Halliburton v. Carson,* 100 N. C., 99." "2. Counsel had the right to comment on his not going on the stand." The Court refused to give the instructions and did not advert to the matter in the charge. There was no error in refusing these instructions. Crenshaw had not been tendered as witness, and the question of his competency as a witness, under section 590, could not have been raised in an orderly manner unless he had been so tendered, and his testimony objected to. If the courts were compelled in the trial of jury causes, after argument begun, to stop and submit instructions whenever opposing counsel in their arguments to the jury differed as to questions of law not raised in an orderly way on the trial, there would be no end to the controversy. The Judge was called upon by the instructions prayed for to decide a question of evidence that had not arisen in the due course of the trial, to decide which one of the attorneys was correct in his construction of a section of The Code. As the counsel raised this question themselves, out of the due course of the trial, they were very properly (277) allowed by the Court to settle it among themselves.

The matter which gave rise to the 39th and last exception was this: Dr. Taylor, a witness for the propounders, had testified, over the objection of the caveators, that he was very much surprised when he heard that this suit was brought, and that he never dreamed that the testator was of unsound mind. The Court in the charge told the jury that they should not consider Dr. Taylor's testimony, neither should they consider the remarks of counsel passed upon such excluded testimony. The caveators alleged that the ruling of the Judge was erroneous, in that after the evidence was admitted and after counsel for the propounders had commented upon it, it was too late to withdraw it from the jury, because such a course could not but have had the effect of impressing the jury to such a degree as to make it almost impossible to counteract the effect by a withdrawal of the evidence. This Court had decided that the Judge has such right. *Wilson v. Mfg. Co., ante,* 95, and cases there cited. Upon a review of the whole case we find no error which, in our opinion, could have influenced the finding of the jury, and the judgment is

Affirmed.

Cited: Waters v. Waters, 125 N. C., 591; *S. v. Ellsworth,* 130 N. C., 691; *Gattis v. Kilgo,* 131 N. C., 208; *Willeford v. Bailey,* 132 N. C., 406; *Moore v. Palmer, ib.,* 977; *Westbrook v. Wilson,* 135 N. C., 404, 405; *Parrott v. R. R.,* 140 N. C., 548; *In re Thorp,* 150 N. C., 492; *Daniel v. Dixon,* 161 N. C., 381; *S. v. Cobb,* 164 N. C., 422; *Howell v. Solomon,* 167 N. C., 592; *In re Rawlings,* 170 N. C., 61.

DENNIS BURRELL v. J. R. HUGHES ET AL.

Practice—Appeal—Failure to File Transcript.

1. It is the duty of an appellant to have his appeal docketed at the first term of this court beginning after the trial below, and if, without laches on his part, the case on appeal should not then be settled by the Judge, he should file the rest of the transcript and apply for a *certiorari.* Otherwise, the appeal will be dismissed.
2. If by reason of the loss of papers, or for other good cause, the transcript of no part of the record can be docketed at the first term of this court following the trial below, that fact should appear by affidavit and a *certiorari* asked for, supplemented by a motion below to supply the papers.

(278) ACTION, tried before *McIver, J.,* and a jury, at Fall Term, 1896, of ORANGE. There was judgment for the defendant and plaintiff appealed. The appellant applied in this court for a *certiorari.*

Mr. C. D. Turner for plaintiff (appellant).
Messrs. Graham & Graham for defendant.

Per Curiam: The judgment was taken in Orange Superior Court at August Term, 1896, and the appeal should have been docketed in this court at last term, rule 5 of this court, and if without laches of the appellant, the "case on appeal" was not then settled by the Judge, the appellant should have docketed the rest of the transcript and applied for a *certiorari. Guano Co. v. Hicks, ante,* 29; *Shober v. Wheeler,* 119 N. C., 471; *Causey v. Snow,* 116 N. C., 497; *S. v. Freeman,* 114 N. C., 872; *Pipkin v. Green,* 112 N. C., 355; *Porter v. R. R.,* 106 N. C., 478; *Stephens v. Koonce,* 106 N. C., 255; *Norman v. Snow,* 94 N. C., 431; *Owens v. Phelps,* 91 N. C., 253; *Pittman v. Kimberly,* 92 N. C., 562; citing *Wiley v. Lineberry,* 88 N. C., 68, and *Suiter v. Brittle,* 90 N. C., 19. If by reason of the loss of the original papers, or other good cause, the transcript of no part of the record could be docketed here at the first term beginning after the trial below, then that fact should have been shown by affidavit, and a *certiorari* asked for, supplemented by a motion below to supply the papers. *Peebles v. Braswell,* 107 N. C., 68; *Nichols v. Dunning,* 91 N. C., 4. In any event, since the appeal should (279) have been docketed here at the first term beginning after the trial below, it was the duty of the appellant at such first term to file all of the transcript that was available, and have asked for a *certiorari* to complete the transcript. His failure to do so is a lack of diligence and forfeits his appeal. *Brown v. House,* 119 N. C., 622; *Haynes v. Coward,* 116 N. C., 840; *Graham v. Edwards,* 114 N. C., 228; *Sanders v. Thomp-*

son, 114 N. C., 282; *S. v. James,* 108 N. C., 792; *Collins v. Faribault,* 92 N. C., 310, and there are still other cases. There are *some* matters at least which should be deemed settled and this is one of them.

Certiorari denied and appeal dismissed.

Cited: Morrison v. Craven, post, 329; *Critz v. Sparger,* 121 N. C., 283; *Rothchild v. McNichol, ib.,* 284; *Parker v. R. R., ib.,* 504; *McMillan v. McMillan,* 122 N. C., 410; *Norwood v. Pratt,* 124 N. C., 746, 747; *Benedict v. Jones,* 131 N. C., 475; *Worth v. Wilmington, ib.,* 533; *S. v. Telfair,* 139 N. C., 555; *Slocomb v. Construction Co.,* 142 N. C., 350; *Walsh v. Burleson,* 154 N. C., 175; *Mirror Co. v. Casualty Co.,* 157 N. C., 30; *Caudle v. Morris,* 158 N. C., 595; *Hawkins v. Tel. Co.,* 166 N. C., 214; *Transportation Co. v. Lumber Co.,* 168 N. C., 61; *Land Co. v. McKay, ib.,* 85; *S. v. Trull,* 169 N. C., 370.

CAUSEY v. SNOW.

Action on Note—Issues—Practice—Evidence—Presumption—Married Woman—Assent of Husband to Wife's Contract.

1. Where an action in the nature of a creditor's bill proceeded to final decree and a note which had been executed to a commissioner appointed in the cause was, by the decree, turned over to one of the parties to the suit, the remedy of the owner was by action thereon and not by motion in the cause.
2. In an action on a note, an issue involving the enquiry whether defendants were indebted to plaintiff and, if so, in what amount, was sufficient to enable defendants to have the question of plaintiff's ownership of the note passed on by the jury.
3. Where, in an action on a note, the defendant admits its execution and the plaintiff produces it on trial, the presumption raised by the law that the plaintiff is the rightful owner is not rebutted by the defendant's denial of such ownership in the answer.
4. The contract of a married woman, made against her interest, and for which she receives no valuable consideration, is invalid without her husband's consent.

ACTION, on a note, tried before *McIver, J.,* and a jury, at July, (280) 1896, Special Term of GUILFORD.

The decree referred to in the opinion and by the terms of which the note sued on was given was rendered in a cause entitled *N. L. Causey, for herself and all other creditors, etc., v. The Willow Brook Mfg. Co.,* and was as follows:

"This being an action to enjoin the sale of property under executions upon docketed judgments against the Willow Brook Mfg. Co., and praying a sale of all the property of said company by decree of court and the ascertainment of the liens on the property and the applications of the proceeds of sale by the court according to the priority of liens and the rights of all the parties, and the case being duly constituted in court by service of summons and publication, the same is now set down for hearing, and now by consent of parties and the admitted and undenied facts in the pleadings, the parties submit and bring the case on for judgment upon the following undisputed facts, towit:

"1. The High Point Mfg. Co. was the owner of a factory and fixtures on a lot in High Point of one acre and one hundred poles, and in the course of its business it executed a mortgage to secure $15,000 of bonds issued by the corporation, each bond being for the sum of one thousand dollars, all of which said bonds became the property of the Wachovia Bank, of Winston.

"2. That said High Point Mfg. Co., on 8 November, 1882, sold and conveyed all of its property to the Willow Brook Mfg. Co., and at the same time the said Willow Brook Co. acquired by purchase of and from O. S. Causey five lots of land adjacent to the said property of the High Point Mfg. Co., and for said five lots agreed to pay eight thousand and five hundred dollars ($8,500) whereby the said Willow Brook Co. acquired said property, subject to the mortgage to secure the $15,000 aforesaid, and charged with the said purchase money of the five lots purchased of O. S. Causey.

"3. That the Willow Brook Co. had on the premises affixed to (281) the freehold an engine and boiler purchased of W. A. Harris at $3,400 reduced by payment thereon down to $2,600, with a written reservation of title until full payment, which was before the law was passed requiring such reservation to be registered.

"4. That the Mutual Machine Works, of Philadelphia, sold and delivered thirty looms to the Willow Brook Co., which came to hand and were put into position and fastened down to the floor, and some two months thereafter the said Willow Brook Co. executed a written reservation of title to said Mutual Machine Works, and same was not registered as required by the statute in force at the time of the execution thereof until within sixty days next before the institution of this suit—cost price $2,300.

"5. During the course of its business the Willow Brook Co. became indebted to the Wachovia National Bank in the sum of $8,500; for that debt the company confessed a judgment on 27 September, 1884, in favor of said bank, which judgment was void for defects in the affidavit on which it was founded.

"6. That the Willow Brook Co. also became largely indebted to the First National Bank, of Winston, and on 20 March, 1884, confessed judgment in favor of that bank for $18,096.50 and cost, which said judgment, as well as the one last aforesaid, were docketed in the Superior Court clerk's office of Guilford..

"7. That besides these debts reduced to judgments, the other creditors made defendants, subsequently to said two in favor of the bank also obtained judgments, and had them docketed in the Superior Court of Guilford before the registration of the reservation of title by the Mutual Machine Works was ever registered, towit: Four judgments in favor of Brown Bros., one for $73.76 and costs, one for $83.54 and costs, one for $194.24 and costs, and one for $70.59 and costs. Two in favor of Henry Gould, one for $240.25 and costs, and one for $240.25 and costs, those in favor of Brown Bros. being docketed 17 February, 1885, and the two in favor of Henry Gould docketed on 2 March, 1885, and besides these there are judgments as follows: One in favor of Guesheimer & Co., for $693.94 and costs, docketed 31 August, 1885; one in favor of J. L. Lindsay for $159.65 and costs, for A. Hoen & Co., for $66.34 (282) and costs, one in favor of John Snedecker for $34 and costs, the last three docketed 18 March, 1885.

"8. That besides these debts reduced to judgments as aforesaid, the said Willow Brook Co. was indebted to the plaintiff in $8,500, the purchase money of the five lots sold to the company by O. S. Causey, and the further sum of $15,000 by virtue of the notes of the company in payment of moneys due her as her separate estate.

"9. That the Willow Brook Co., in the course of its business, effected insurance on the factory, fixtures, etc., and the same was consumed by fire on 4 July, 1884, and the moneys realized from the policies went as appropriated in the policies, to the judgment in favor of the First National Bank, of Winston, leaving a balance then of $3,750, and the coupon bonds held by the Wachovia Bank were paid off, except $3,000, the sum of $8,600 was paid plaintiff on the note given for the five lots conveyed to the company by O. S. Causey, and the residue paid to plaintiff in part of her debt of $15,000 aforesaid.

"10. That the Wachovia Bank, on the judgments aforesaid, confessed to it, caused execution to be issued and sold all the right, title and interest of the Willow Brook Mfg. Co. in the lands purchased of the High Point Mfg. Co. and the five lots adjacent purchased of O. S. Causey, and all the machinery and fixtures, including the looms bought of the Mutual Machine Works, and the engine and boiler bought of W. A. Harris, the sale being a sale of the equity of redemption in all the realty, except the five adjacent lots, and subject to prior liens thereon to secure the coupon

bonds aforesaid and to the said confessed judgment in favor of the First National Bank, of Winston.

"That at the sale the plaintiff purchased all of the said property, and paid her money for it, and took a sheriff's deed therefor, the sale being under the said Wachovia Bank execution, in good faith, believing that the sale was all regular and fair and the title valid and good, and so believing she went on and paid $3,000 to the Wachovia Bank in order to relieve the property of a balance due on the mortgage given to secure the

(283) $15,000 of coupon bonds, paid the First National Bank, of Winston, $3,750 not paid by insurance policy, and paid and took assignment of balance due W. A. Harris for engine and boiler, the title to which was reserved, and she has since bought and had transferred the claims of the Mutual Machine Works of $2,300 to herself and owns the same now.

"That in the course of this suit, by consent of parties, the whole property, including looms bought of the Mutual Machine Works, was sold by R. R. King and John A. Barringer, as receivers, and the sales confirmed, and from their report filed, after deducting the expenses of sale and all costs, there appears to be a net sum of $_____ in hand and subject to application by this Court.

"Upon the foregoing facts it is adjudged by the Court that the plaintiff has the right of subrogation to the lien of the Wachovia Bank as bondholder for $3,000 paid by her to relieve the property of the mortgage thereon and its interest since paid by plaintiff, also to lien of the judgment of the First National Bank, of Winston, for $3,750 paid by plaintiff to relieve her purchase from the lien of the judgment and interest on that sum, and also hath the right to have $2,600 secured by a reserved title to engine and boiler purchased of W. A. Harris and assigned to her, making in the aggregate $9,350 principal money, and the Court adjudges that said three sums have priority over all other creditors.

"11. That the looms bought of the Mutual Machine Works became and were a fixture, being a part of the freehold, and as such came under the lien of the mortgage given to secure the coupon bonds under the lien of the judgment in favor of the First National Bank; and the net sum in hands of the receivers from all sources, including said looms, not being sufficient to pay said liens, without regard to the reservation of title on the engine and boiler, it is adjudged by the Court that there is no need to go further and pass any judgment as between the other creditors by subsequent judgments, and those without judgments, and thereupon it is adjudged by the Court that the receivers, R. R. King and John A. Barringer pay the costs, to be taxed, of this cause, and the residue they shall pay over to plaintiff and take her receipt therefor."

On the trial the defendants, other than O. S. Causey, tendered (284) an issue as to the ownership of the note sued on. His Honor declined to submit such an issue and submitted one as to whether defendants were indebted to plaintiff, and if so, in what amount. There was a verdict followed by judgment for the plaintiff and the defendants appealed.

Messrs. L. M. Scott and J. A. Barringer for plaintiff.
Messrs. Dillard & King and J. T. Morehead for defendants (appellants).

MONTGOMERY, J. There was a motion made in the court below to dismiss the action on the ground that the note sued on showed on its face that it was executed to commissioners named in a certain action in the nature of a creditor's bill, in the same court in which the present action is pending, in which the plaintiff here was of the plaintiffs there, and the Willow Brook Mfg. Co. and others were defendants, and that therefore proceedings to recover on the note should have been commenced by a motion in that cause. His Honor committed no error in overruling the motion. The decree in the creditor's bill was a final one. The receivers had performed all the duties required of them and they were ordered in the decree to pay over to the plaintiff the funds in their hands after first paying out of the same the entire costs of the proceedings. The defendants' second exception was to the refusal of his Honor to submit an issue as to the ownership of the note sued on. The Court submitted an issue as to whether the defendants were indebted to the plaintiff, and if so, in what amount? And we are of the opinion that that issue was sufficient for the purpose of enabling the defendants to have the question of the plaintiff's ownership of the note passed upon by the jury. It would have been an easy matter for his Honor to have instructed (285) the jury that, if they found from the evidence that the plaintiff was not the owner of the note, then they should find for their verdict that nothing was due to her; and the jury would have had no trouble in understanding the matter committed to them.

After the testimony was all in, the Court charged the jury that if they believed the testimony they should find the issue submitted in favor of the plaintiff. The defendant in his answer admitted that he had executed the note for money lent to him and that he had not paid any part of it. He, however, denied that the plaintiff was the owner of the note, but he introduced no sufficient testimony tending to make good the averment.

The plaintiff having produced the note on the trial, and the defendant having admitted its execution, the law raised the presumption that the

plaintiff was the rightful owner. And this presumption was not rebutted by the defendant's denial in his answer. *Pate v. Brown,* 85 N. C., 166; *Jackson v. Love,* 82 N. C., 405.

The defendant also set up in his answer the defense that although he executed the note to the commissioners for money lent to him by them by order of the Court during the pendency of the creditors' bill, he yet had an understanding with the plaintiff at that time that he would not be compelled to pay the note in the event that her claim should be adjudged of prior dignity over the other creditors; and that she did recover in the said creditors' bill all she claimed. The defendant avers that the consideration upon which plaintiff's promise was based was that he should not become one of the parties to the creditors' bill, as a stockholder, for the purpose of contesting her right of priority over the other creditors. Upon an inspection of the final decree in the creditors' bill it is plainly to be seen that the promise of the plaintiff, if made by her, was
(286) against her interest; that she had never received anything of value from the defendants, and that her claims against the defendants in the creditors' bill were in law paramount to those of any stockholder. The plaintiff was a married woman at the time of the alleged agreement with the defendant, and could not make such a contract without the assent of her husband, and that she did not have. There was no error.

Affirmed.

Cited: Holmes v. Davis, 122 N. C., 270; *Vann v. Edwards,* 128 N. C., 426; *In Re Hybart's Estate,* 129 N. C., 131; *Woods v. Finley,* 153 N. C., 499.

R. L. HOLLOWELL v. THE SOUTHERN BUILDING AND LOAN ASSOCIATION.

Action to Recover for Usurious Interest Paid—Usury—Building and Loan Association Loans.

1. Any charges made by a Building and Loan Association against a borrowing member, in excess of the legal rate of interest, whether such charges are called "fines," "dues" or "interest," are usurious.
2. A borrower who has paid usurious interest may, under section 3836 of The Code, recover of the lender twice the amount of usurious interest so paid, notwithstanding he is *in pari delicto* in the transaction.

HOLLOWELL *v.* B. & L. ASSOCIATION.

ACTION, to recover twice the amount of usurious interest paid by plaintiff to defendant Building and Loan Association. There was judgment for the plaintiff and defendant appealed.

Mr. J. A. Barringer for plaintiff.
Messrs. J. T. Morehead and Shaw & Scales for defendant (appellant).

FURCHES, J. It is alleged in the complaint that the plaintiff (287) borrowed of the defendant $1,000, which sum had been paid off and satisfied by plaintiff before the commencement of this action. That defendant charged plaintiff $5 as interest and $12 as dues, to be paid on the last Saturday in each month. That plaintiff continued to pay this interest and these dues, as required by the contract of loans, until 1 July, 1894, when he had paid the defendant $450.60. This left, as defendant contended, the sum of $730.97, which the plaintiff paid to the defendant —making the sum of $181.57 he had paid to defendant for the loan of $1,000 for 14 months and 21 days. Plaintiff then claims that he is entitled to recover of the defendant $363.14—this being double the amount of interest paid by him to defendant association. To this complaint the defendant demurs. The Court overruled the demurrer, gave judgment for plaintiff, and defendant appealed.

This court has decided that whatever is collected over and above 6 per cent, whether called interest or "dues" is, in fact, interest and usurious. *Meroney v. B. & L. A.*, 116 N. C., 882; *Rowland v. B. & L. A.*, 115 N. C., 825; *Miller v. Ins. Co.*, 118 N. C., 612; *Roberts v. Ins. Co.*, 118 N. C., 429. That a member of the association may be a borrower from the association, and any charges made against him in excess of the lawful rate of interest, whether called fines, charges, dues or interest are, in fact, interest and usurious. *Strauss v. B. and L. A.*, 117 N. C., 308; and 118 N. C., 556. Whenever more than the lawful rate of interest is charged it is usurious, and the party paying it may recover back from the party to whom it is paid, double the amount of interest so paid by him. Code, sec. 3638. If we follow the logic of these authorities the judgment must be affirmed.

The defendant cites *Latham v. B. & L.*, 77 N. C., 145, to sus- (288) tain the demurrer. That action was brought to recover $92.04 wrongfully paid to the defendant through a mistake of fact. The Court found that this money was not paid under a mistake of fact and that the plaintiff could not recover, which this court sustained. So, it will be seen, that this case is clearly distinguishable from *Latham's case, supra.* It is true that, in the discussion of the case of Latham, there is an *obiter* that seems to be very much on the line of the defense in this case. But this *dictum* is not in harmony with the authorities

cited above, if it should be construed to sustain the demurrer, and if allowed the construction contended for by defendant, it vitiates and renders void section 3836 of The Code, as that *dictum* is put upon the ground that the courts will not lend their aid to parties *in pari delicto,* while the statute (Code, sec. 3836) expressly provides that a party who has so paid usurious interest (and is *in pari delicto*) may recover double the amount he has paid. There is

No error.

Cited: Cheek v. B. and L. Asso., 126 N. C., 245; *Turner v. Boger, ib.* 302; *MacRacken v. Bank,* 164 N. C., 27.

GARRETT & SONS v. S. J. PEGRAM & CO.

Action for Damages—Stipulation Pending Action and Before Trial Concerning Matters in Controversy—Admissibility—Instructions.

1. Where, pending an action to recover for damage done to a lot of tobacco which plaintiff had bought and paid for under a guarantee of soundness by defendants, an agreement was entered into, adjusting the amount of damage per pound which plaintiff should recover, if entitled to recover at all, said agreement to be without prejudice to either party: *Held,* that such agreement was not an offer of compromise in the meaning of section 573 of The Code, and was admissible on the trial of the action to determine the amount of plaintiff's recovery.
2. After a full and fair review of the evidence and charge in all the issues, in the trial of such action, it was not error to add that, if plaintiffs were entitled to recover anything, the amount would be that agreed upon by the stipulation.

(289) ACTION, for damages to a lot of tobacco, tried before *McIver, J.,* and a jury, at June, 1896, Special Term of GUILFORD. There was a verdict for plaintiff and from the judgment thereon defendants appealed.

Messrs. Dillard & King for plaintiffs.
Mr. J. T. Morehead for defendants (appellants).

FURCHES, J. Upon this case coming on for argument, the plaintiff (appellee) moved to dismiss the appeal under rule 28, alleging that appellant had failed to comply with said rule in printing the record.

Wiley v. Mining Co., 117 N. C., 489. To avoid the consequences of this motion and the dismissal of the appeal, the defendant abandoned any exception that would require a perusal of any part of the transcript not contained in the printed record.

This reduces the matters for our consideration to two questions—the alleged contradiction in the Judge's charge upon the question of damages and the introduction of Exhibit A. And the defendant's counsel argued only these two questions. Reversing the order in which these questions are presented we will consider the introduction of Exhibit A as evidence.

This is objected to by the defendant, it is true. But the burden of showing that it was improperly allowed as evidence is on the defendant, and this he has failed to show. The only ground suggested why it was not proper evidence is, that it was the nature of a compro- (290) mise, and should have been excluded under section 573 of The Code. But to our minds it does not appear to have been a compromise, or in the nature of a compromise; but an adjustment of the amount of damages per pound, if the plaintiff should recover. But it was not to affect the status of the parties, as to plaintiff's right to recover or defendant's right to defend and defeat plaintiff's recovery.

To our minds, it was used on this trial for the very purpose it was intended for by the parties.

The only other question is the alleged contradictions contained in the charge of the Court. These contradictions we fail to see. The Court seems to have charged fully and fairly upon every question presented by the controversy; and then, in substance, instructed the jury that the amount of damage the plaintiffs were entitled to recover, if they were entitled to recover anything, had been agreed upon by the parties in Exhibit A, this being the difference between 29 cents per pound, the price for which defendants sold the tobacco to plaintiffs, and 17 cents per pound, the amount they have agreed it was worth in its damaged condition, to which they should add expense of shipping, storage, etc., as agreed in Exhibit A. And this was the only use they were allowed to make of Exhibit A in making up their findings upon the issues submitted to them.

It seems to us there can be no just grounds of exception to this charge; and no error appearing to us, the judgment must be

Affirmed.

DOUGLAS, J., being related to one of the parties, took no part in the decision of this case.

(291)

A. M. RUMLEY v. WILLIAM PURYEAR ET AL.

Action to Recover Land—Judgment.

Where, in the trial of an action of ejectment, the plaintiff established title in himself by a succession of deeds through a sale under power in a mortgage given by the ancestors of defendants, it was error to adjudge that plaintiff was entitled only to an order of sale of the land.

ACTION, to recover land, tried before *McIver, J.*, and a jury, at July Special Term, 1896, of GUILFORD. The plaintiff introduced a mortgage deed executed by John Puryear and wife (signed "Pryer"), nonpayment of the debt, sale under the mortgage by the mortgagor, deed to purchaser and deed from purchaser to plaintiff. Defendants claimed as heirs of John Puryear. His Honor held that the plaintiff was not entitled to a judgment for possession, but only to an order of sale, whereupon plaintiff submitted to nonsuit and appealed.

Mr. J. A. Barringer for plaintiff (appellant).
No counsel contra.

FURCHES, J. This appeal was not argued for the appellees, and this may be unfortunate for them, as we are unable to see any ground upon which the judgment of the Court can be sustained. It is stated in the case that plaintiff and defendants both claim under the same party—the common source. And plaintiff has introduced deeds, without objection, showing a regular claim of title from John Puryear (or John Pryer) to himself. And defendants, as we understand the case, claim their title as the heirs at law of the said John. Upon plaintiff's showing these facts, and also showing that defendants were in possession,
(292) we see no reason why he was not entitled to a judgment for possession of the land.

But at this stage of the trial the Court stated to the plaintiff "that he could not allow him to have a decree for possession of the land, and that all he could have was an order for sale." In this there was error. This ruling could not have been put upon the apparent difference in the name "Puryear" and "Pryer." If it had been for this reason (and there is nothing in the record to suggest that it was), that the mortgagor was not the same person as that of the ancestor of defendants, there should have been no judgment for plaintiff, for this reason would have applied as well to "a decree for a sale of the land" as to a judgment for possession.

There is error and the judgment of nonsuit is set aside and a new trial awarded.

New trial.

WALTER LEWIS v. W. F. CLEGG.

Action for False Arrest—Damages.

1. A plaintiff in an action for injuries resulting from his false imprisonment must show that he has been injured, and can recover only for actual damages, including injury to feelings and mental suffering, and is not entitled to punitive damages unless the arrest was accompanied with malice, gross negligence, insult or other aggravating circumstances.

2. In an action for damages for injuries caused by the defendant's having plaintiff unlawfully arrested and imprisoned, on the ground that he was about to dispose of his property fraudulently, plaintiff alleged that after his arrest certain contracts of employment he had made were rescinded by the other parties, and that a marriage engagement was cancelled. On the trial it appeared that defendant knew that plaintiff had no property except $31.50 due from his employer for labor, and that the plaintiff had not disposed of any property, and further, that defendant's purpose in having plaintiff arrested was to enforce the payment of a debt of $13.60 due to him from plaintiff, which was accomplished by obtaining an order from plaintiff on his employer: *Held*, that plaintiff was entitled to nominal damages only, in the absence of evidence that the marriage was postponed by reason of the arrest, or that plaintiff underwent any suffering, or that he lost employment or credit, or suffered any injury to his reputation in the community.

ACTION, for damages, for unlawfully causing the arrest of (293) plaintiff and the abuse of legal process, tried before *McIver, J.*, and a jury, at July Special Term, 1896, of GUILFORD.

The complaint alleged, as a first cause of action, that "on 9 April, 1895, the defendant William F. Clegg, imprisoned the plaintiff and deprived him of his liberty for the space of twenty-four hours, unlawfully and with force, and without probable cause, on a pretended charge that the plaintiff 'had disposed of his property with intent to defraud his creditors, and was about to depart from the State,' to his great damage, twenty-five hundred dollars."

As a second cause of action the defendant alleges:

"1. That on 9 April, 1895, the defendant applied to J. A. Pritchett, a justice of the peace for the county of Guilford, for the process of arrest and bail against the defendant in an action to recover the sum of $13.60 of him, and in order to obtain such order of arrest and bail made affidavit that the defendant was indebted to him in said amount and that he had disposed of his property, with intent to defraud his creditors, and was about to depart from the State.

"2. That upon and by virtue of the said affidavit the defendant procured to be issued an order of arrest against this plaintiff, under

(294) which the plaintiff was arrested and imprisoned for the space of twenty-four hours and compelled to pay, by reason of such detention, the sum of $13.60 and the further sum of $2 costs in the action.

"3. That the above facts set forth in the said affidavit and alleged in the first article of this cause of action were absolutely false and there was no probable cause for making said arrest, or for arresting and imprisoning this plaintiff.

"4. That the defendant, well knowing that the plaintiff in this action was insolvent, and did not have $500 worth of personal property and had no real estate whatever, which was a fact at the time, and that by the simple process of the law, towit, a summons, judgment and execution, he could not make the defendant pay the said sum of $13.60, resorted to this unusual and extraordinary process of arrest and bail for the purpose of making said plaintiff pay the debt aforesaid, well knowing that he was not entitled to such ancillary and unusual process, and that thereby he was relying upon and resorting to such process unlawfully and wrongfully and was thereby abusing the process of the law, while this plaintiff was a resident of this State and was entitled to his exemptions against said debt.

"5. That at the time of the plaintiff's unlawful arrest as aforesaid, he was under contract of marriage with a young lady of about his own age and of a fair name, and that the plaintiff at the time of his arrest was of a good name, reputation and credit and had a fair prospect in life, and had made a contract to sell tobacco for responsible parties, by which he had reason to believe he would make a considerable sum of money; by reason, however, of such false arrest he was deprived of the benefits of such contracts and they were rescinded, and he was notified that they would not be fulfilled on the part of the persons making them, and he suffered damages in his reputation, character and credit, and men-

(295) tally and physically, and the said contract of marriage was broken off by the said young lady and her parents, and he was forbidden to visit their house, to his damage twenty-five hundred dollars.

"Therefore, he demands judgment for the sum of $15.60 extorted from him by the defendant as aforesaid, and the further sum of twenty-five hundred dollars as damages."

The answer of defendant alleged that the proceeding under which plaintiff was arrested was instituted by him in good faith, based on probable cause, he having been informed that plaintiff had sold some property and was on the point of leaving the State, and was, in fact, arrested at 12 o'clock at night at the depot where he was about to take passage on a freight train for Norfolk; that plaintiff justly owed him the debt, and that plaintiff was only detained for about two hours and was not imprisoned, and that plaintiff had not been damaged.

On the trial it did not appear that plaintiff had suffered any damage by reason of the arrest; the cancellation of the contract of employment was not caused by the fact that he had been arrested and that he had not been refused credit because of such arrest; nor had the marriage been postponed by reason of the arrest.

There was a verdict in favor of the plaintiff for $200 and from the judgment thereon the defendant appealed.

Mr. J. A. Barringer for plaintiff.
Messrs. James E. Boyd and F. H. Busbee for defendant (appellant).

MONTGOMERY, J. The defendant knew that the plaintiff had no property except an amount of $31.50 due to him by the railroad company for a month's service already rendered. The defendant, in his testimony, said: "I knew the plaintiff had little or no property, ex- (296) cept his clothes and the amount due him by the railroad." With a knowledge of this fact, the defendant sued out arrest and bail proceedings, in which it was alleged that the plaintiff was indebted to him in the sum of $13.60, and that he had disposed of his property with intent to defraud his creditors, and was about to depart from the State. After the arrest had been made, the plaintiff gave the defendant an order on the railroad company for the debt. No return of the proceedings has ever been made by the justice by whom the process was issued. There was testimony going to show that the defendant had abused the process of the law in having issued these proceedings; that his purpose was not to collect his debt by means of legal remedies invoked in good faith, but to compel the debtor to pay to escape the humiliations and pains of imprisonment. There was no pretense that the plaintiff had disposed of any of his property. Indeed, he had nothing to dispose of except the $31.50, and that sum the defendant knew he had not disposed of. Creditors must learn that they cannot resort to the process of the law to enable them to extort from a debtor that which could not be appropriated to their debts by the law. But the debtor, when he becomes a plaintiff against the creditor in an action to recover damages on account of injuries which he has sustained by reason of his unlawful arrest and the abuse of process of the court by creditor, must show that he has been injured by such proceedings. If the arrest was accompanied with malice, gross negligence, insult or other aggravating circumstances, punitive damages will be awarded. If not, the plaintiff can recover only for actual damages, including injury to feelings and mental suffering. In the case before us there was, from the testimony, an entire lack of those elements which would subject the defendant to damages as smart money—punitive damages. Upon a close scrutiny of the testi- (297)

mony—of the plaintiff's particularly—we are unable to discover that the plaintiff has suffered any damage whatsoever. There was no testimony that the marriage was delayed or postponed in any way by reason of the arrest; none that the plaintiff underwent mental or physical suffering; none that he lost employment or credit, or suffered any injury to his character and standing in the community. It is true that he showed that Mr. Patterson had annulled a business contract with him, but he did not say that that act of Mr. Patterson was on account of the plaintiff's arrest by the defendant or that it had any connection with it; and Mr. Patterson testified that he had not heard of the plaintiff's arrest when the agency was revoked by him. He also testified that Mr. Vanstory, the keeper of a livery stable, had refused to credit him, but he did not say that the refusal of credit was on account of the plaintiff's arrest. We are, therefore, of the opinion that his Honor was in error when he refused to instruct the jury as asked in the defendant's first prayer for instructions, which was in these words: "The plaintiff cannot, upon his allegation, recover exemplary or punitive damages, and there is no evidence of actual damage to plaintiff by reason of the arrest." It is unnecessary to discuss the other exceptions. The plaintiff would be entitled to nominal damages and such actual damages as he may show he has sustained.

New trial.

Cited: Lovick v. R. R., 129 N. C., 435; *Tucker v. Winder*, 130 N. C., 148; *Kelly v. Traction Co.*, 132 N. C., 375.

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STATE EX REL BOARD OF COMMISSIONERS v. J. D. SUTTON ET ALS.

Action on Sheriff's Bond—Official Bonds—Condition—Sureties.

1. Although section 2073 of The Code prescribes that one of the bonds required to be given by the sheriff of a county must be conditioned for the settlement of the "county, poor, school and special taxes," yet where the bond given by a sheriff was conditioned for the settlement of the "county taxes due to said county," the omission of the words "poor, school and special" did not contract or abridge the liability of the sureties for the sheriff's default as to school taxes, since, under section 1891 of The Code, the bond may be put in suit for the benefit of the person injured, notwithstanding any variance in the penalty or condition of the instrument from the provisions prescribed by law.
2. The "county" bond of a sheriff is liable for any school taxes, whether belonging to the State or county school fund.
3. The Board of County Commissioners are the proper relators in an action against a defaulting sheriff to compel the settlement of school taxes.

ACTION, heard on complaint and demurrer, before *Coble, J.*, at November Term, 1896, of LENOIR.

This action was brought to recover of the defendant J. D. Sutton, sheriff, and the other defendants, as sureties on his bonds, the sum of $3,098.76, a portion of the school fund, levied by the State under the general law for school purposes, to be expended for common school purposes in said county, and collected by the defendant Sutton, as Sheriff of Lenoir County, during his term of office, commencing on the first Monday in December, 1892, and ending on 21 January, 1895, at the time his successor was legally appointed.

It was admitted that the defendant Sutton executed, during his said term of office, three bonds, viz.: The bond upon which this action is brought, and for the collection and payment of the public taxes, (299) and what is known as the process bond.

The taxes in suit were levied by the State for school purposes. All taxes levied by the county for school purposes and for other purposes and all law taxes levied by the State other than the school tax in suit had been duly paid by the defendant sheriff to the persons entitled in law to receive the same.

The bonds on which suit was brought were conditioned for the settlement of "the county taxes due to said county."

The defendant sureties demurred to the complaint, "because it does not set forth facts sufficient to constitute a cause of action against them in this:

"*First.* For that the said action is brought and instituted to recover an alleged balance due on the School Fund, and it is not alleged in the complaint that these defendants ever executed any bond or bonds to cover the said school fund.

"*Second.* For that the conditions of said bonds set out in the complaint cover and protect only the 'county taxes due to said county,' and the default set out and alleged in the complaint, towit, the nonpayment of an alleged balance due on the school fund is not covered and protected in the conditions of said bonds or either of said bonds."

The demurrer was overruled and defendants appealed.

Messrs. A. J. Loftin and George Rountree for plaintiffs.
Messrs. N. J. Rouse and R. O. Burton for defendants (appellants).

CLARK, J. The Code, sec. 2073, prescribed that the sheriff shall execute three several bonds, payable to the State. (1) "One conditioned for the collection, payment and settlement of the county, poor, school and special taxes." (2) "For the collection, payment and settlement of the public taxes." (3) "For the due execution and return of (300)

process, payment of fees and money collected and the faithful execution of his office as sheriff." This latter is commonly known as the "process" bond.

The first of the foregoing bonds covers the taxes levied for school purposes, whether school taxes are State or county taxes, and its conditions should have included the collection, payment and settlement of "county, poor, school, and special" taxes. The draftsman in drawing the "county" bond, instead of enumerating these four funds, which should be embraced in its conditions, inserted only this condition: "If the said James D. Sutton shall well and truly pay over to those entitled by law to receive the same the county taxes due to said county." Many losses having accrued to the public by inadvertence and omissions as to the conditions of such bonds, the Legislature of 1842 enacted the provision, which, with some amendment, is now embraced in The Code, sec. 1891, which provides that the bond, "notwithstanding any * * * variance in the penalty or condition of the instrument from the provisions prescribed by law, shall be valid and may be put in suit in the name of the State for the benefit of the person injured * * * as if the penalty and condition of the instrument had conformed to the provisions of law." The defendants when they signed said "county" bond were fixed by law with notice that the statute required that bond to cover "county, school, poor, and special" taxes, and the omission of the words "school, poor, and special" did not contract or abridge their responsibility, which is the same as if those words had been properly inserted. There is no doubt which of the three bonds required of a sheriff the defendants signed. It was the bond for "county" taxes. It is also clear that such bond, if properly written, covered "school, poor, and special" taxes, and the statute supplies those words which were omitted from the condition in the bond. This (301) has been repeatedly decided. *Kivett v. Young,* 106 N. C., 567; *Joyner v. Roberts,* 112 N. C., 111; *Daniel v. Grizzard,* 117 N. C., 105; *Warren v. Boyd,* at this term; *Shuster v. Perkins,* 46 N. C., 325. Possibly in taking the bond, only the word "county" was inserted, under an impression that, *ex vi termini,* that covered school taxes, as had been held under a former statute in *Lindsay v. Dozier,* 44 N. C., 275.

It is immaterial whether the school fund is, strictly speaking, State taxes or county taxes, or partly both. They are included in the "county" bond and the sheriff must account for them in settling his liability on that bond. *Tillery v. Candler,* 118 N. C., 888. The case of *Governor v. Crumpler,* 12 N. C., 63, relied on by defendants, simply holds that the sureties on the "process" bond are not liable for default as to county taxes, which is true now, as it was then. *Eaton v. Kelly,* 72 N. C., 110, and cases there cited, were before the act amending The Code, sec. 1883, and are not in point.

The Code, sec. 2563, made the County Commissioners the proper relators in an action on the sheriff's bond to compel a settlement of the school taxes. Laws 1889, chap. 199, substituted the County Board of Education as relators (*Board of Education v. Wall,* 117 N. C., 382), but Acts of 1895, chap. 439, abolished the County Board of Education and again made the County Commissioners the proper relators. *Tillery v. Candler,* 118 N. C., 888.

No error.

Cited: Comrs. v. Fry, 127 N. C., 262.

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(302)

JOHN L. NELSON AND S. H. LOFTIN v. ATLANTA HOME INSURANCE COMPANY.

Action on Fire Insurance Policy—Insurance—Additional Insurance—Title—Disagreement Between Insurers and Insured—Trial—Instructions to Jury.

1. The possession of land under a deed apparently good and sufficient, properly acknowledged and recorded and unimpeached, is sufficient evidence of title; and where such facts appeared on the trial of an issue as to whether plaintiff was the owner of certain property it was not error to instruct the jury that, if they believed the evidence, they should answer in the affirmative.

2. Where, on the trial of an issue whether plaintiff in an action on a fire insurance policy (which contained a provision making it void if the insured should procure other insurance without the assent of the insurer) had accepted other insurance placed on the property, as he alleged, without his knowledge or consent, an instruction that defendant contended that plaintiff had "received and accepted" such additional policy, and that, if such receipt and acceptance was established, the issue should be found against the plaintiff, preceded by a reading of the trial judge's minutes of the testimony, was sufficiently full and explicit in the absence of a request for further instructions.

3. Ratification is the subsequent affirmance or adoption of the act of another, or of the voidable contract of the party himself, but it must be made before any liability accrues under the contract; hence, one to whom a policy of insurance was issued without his knowledge or consent and who did not intend to accept it when it was issued, cannot accept it after a loss, and the filing of proofs of loss thereunder is not an acceptance such as will violate a provision in an existing policy against additional insurance.

4. A contention between the parties to a policy as to whether additional insurance had been taken in violation of a condition in the policy in suit, is not a "disagreement as to the amount of the loss," although, if both policies had been valid the loss would have been divided; hence, where such contention was the only disagreement claimed, a lack of fullness in an instruction as to the *amount* of the loss was not error.

ACTION, on a policy of insurance, tried at November Term, 1896, of LENOIR, before *Coble, J.*, and a jury.

(303) The following were the issues submitted to the jury and the responses thereto:

1. Was the plaintiff Nelson the owner of the said buildings destroyed?

Answer: Yes.

2. Were the buildings described in the said policy of insurance destroyed by fire on 28 February, 1895?

Answer: Yes.

3. Did the plaintiffs have, at the time of the issuing of the policy of insurance, or did they afterwards have, any other contract of insurance, whether valid or not, on the property covered by the policy of insurance declared on?

Answer: No.

4. If so, did the defendant company agree thereto in writing on the policy declared on?

Answer: ------.

5. Has the plaintiff furnished proof of loss to the defendant as required by the policy of insurance declared on?

Answer: Yes.

6. Has there been any arbitration to ascertain the amount of loss prior to the institution of this suit?

Answer: No.

7. Did the defendant notify the plaintiffs, or either of them, that it would not pay the amount of the policy and decline to pay the amount of the policy prior to the expiration of sixty days after the fire?

Answer: Yes.

8. Has there been any disagreement between the plaintiffs and the defendant as to the amount of loss prior to the commencement of this action?

Answer: No.

9. What damage, if any, are the plaintiffs entitled to recover of the defendant?

Answer: Two thousand dollars, with six per cent interest from 27 June, 1895, until paid.

There was judgment according to the verdict and the defend-

(304) ant appealed.

Mr. George Rountree for plaintiff.
Messrs. Allen & Dortch for defendant (appellant).

DOUGLAS, J. This was a civil action on a policy of fire insurance issued by the defendant to the plaintiff Nelson, as owner, and payable to the plaintiff Loftin, as mortgagee, in which was the following condition: "This entire policy, unless otherwise provided by agreement, indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The defendant alleges that this condition was broken by the issuance to the plaintiff Nelson of a policy of insurance covering the same property by the Western Assurance Co., of Toronto, Canada. The plaintiff Nelson maintains that this latter policy was issued without his knowledge or procurement, and was never accepted by him. Nine issues were submitted to the jury, without objection, all of which were found for the plaintiffs.

There are three exceptions, all to the charge. The first was to the charge on the first issue, where his Honor told the jury that if they believed the evidence they would answer this issue "Yes." We see no error therein. The plaintiffs introduced two deeds, covering the land in question, to Nelson, who, in his testimony, identified the land. There was no other evidence on this issue, and it was direct, full and uncontradicted, the jury could come to no other possible conclusion if they believed it. Its credibility was left to them, and the charge of his Honor amounted practically to telling them what would be the legal effect of the facts if found. *Hannon v. Grizzard,* 89 N. C., 115; *Gaither v.* (305) *Ferebee,* 60 N. C., 310; *Chemical Co. v. Johnson,* 101 N. C., 223; *Purifoy v. R. R.,* 108 N. C., 100. The possession of land under a deed apparently good and sufficient, properly acknowledged and recorded and unimpeached, is sufficient evidence of title.

The second exception was "to the charge upon the third issue, for that his Honor did not present the contentions of the defendant, and did not explain the law arising upon a consideration of the evidence bearing upon this issue."

The Judge, after reading to the jury his notes of the evidence at the beginning of his charge, instructed them as follows on this issue: "The third issue submitted to the jury is, Did the plaintiffs have, at the time of the issuing of the policy of insurance, or did they afterwards have, any other contract of insurance, whether valid or not, on the property covered by the policy of insurance? The burden of this issue is upon the defendant to show, by the greater weight of the evidence, that the plaintiffs did have another contract of insurance, whether valid or not, on the prop-

erty covered by the policy of insurance. The defendant contends that the plaintiffs did have another contract of insurance on the property covered by the policy of insurance. It contends that the plaintiffs had received and accepted from the Western Assurance Co. a policy for three thousand dollars on the property covered by the policy of insurance sued on. The plaintiffs contend that they had no other policy on this property. This is for the jury to determine from the evidence in the case. If Nelson received and accepted a policy of insurance from the Western Assurance Co., a policy covering the property covered by the policy sued on, then the jury will answer the third issue 'Yes.' If the defendant has failed to show the affirmative of the third issue, by greater
(306) weight of evidence, then the jury will answer the third issue 'No.'"

We think this is sufficiently explicit, taken in connection with the testimony. The simple question at issue was not whether the policy of the Western Assurance Co. was valid, but whether it was accepted by the plaintiff Nelson. There can be no possible question of ratification, which is the subsequent affirmance or adoption of the act of another, or of the voidable contract of the party himself. There is no pretense that Nelson *authorized* Midgette to issue this policy, and the only evidence of its acceptance by Nelson was the fact that he did not return it immediately upon receipt, and that after the fire he sent to the Western Assurance Co. a proof of loss containing the remarkable statement that "this policy was issued by your company, through its agent, voluntarily and without the knowledge or procurement of this affiant." It is needless to say that he got nothing from this company, and yet this is relied on as a *ratification.* A ratification of what? Surely not of the policy, for it will scarcely be contended that the assured can, after the property insured has been destroyed, accept a policy issued without his knowledge or procurement, and which, at the time of issue, he never intended to accept. In the absence of any prayer for fuller instructions, we think the charge sufficient. *Morgan v. Smith,* 77 N. C., 37; *King v. Blackwell,* 96 N. C., 322; *Morgan v. Lewis,* 95 N. C., 296; *Boone v. Murphy,* 108 N. C., 187; *Willey v. R. R.,* 96 N. C., 408.

The third and last exception was "to the charge upon the eighth issue, for that his Honor did not present the contentions of the defendant, and did not explain the issue or the law arising thereon." The charge on that issue was as follows: "The eighth issue is, has there been any disagreement between the plaintiffs and the defendant as to the
(307) amount of loss prior to the commencement of this action? The plaintiffs contend that there has been no disagreement between them and defendant as to the amount of loss prior to the commencement of this action, and the burden of showing that there was no such disa-

greement is on the plaintiffs and they must show this by a preponderance of evidence, and if they have done so, then the jury will answer the issue 'No.' If there was a disagreement between the plaintiffs and defendant prior to the commencement of this action, the jury will answer this issue 'Yes.'" We might have some difficulty about this portion of the charge were there any merit in the defendant's contention relating thereto, which is so purely technical as almost to furnish its own answer. It is as follows: "The defendant contended before the Court and jury, upon the eighth issue, that the undisputed evidence of a disagreement as to the amount of loss, that there had always been a disagreement as to the issuing and validity of the Western Assurance policy, and if it was valid both policies aggregated more than the entire loss, and both containing the three-fourths value clause, the loss that would fall on the defendant must in any event be less than $2,000."

The real contention of the defendant was, not *what amount* it should pay the plaintiffs, but whether it should pay them anything at all, as it set up the policy in the Western Assurance Co., not in diminution of the recovery but as a bar to the action. There was no disagreement as to the value of the property destroyed, three-fourths of which is largely in excess of the defendant's policy.

As we see no substantial error in the charge, the judgment is

Affirmed.

Cited: Alspaugh v. Ins. Co., 121 N. C., 293; *Patterson v. Mills, ib.,* 269; *Hardee v. Weathington,* 130 N. C., 92; *Mfg. Co. v. Bank, ib.,* 608; *Bullock v. Canal Co.,* 132 N. C., 181; *Roberts v. Dale,* 171 N. C., 468.

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(308)

F. T. ATKINS v. J. M. CRUMPLER ET AL.

Mortgage—Power of Sale—Compliance With Power—Trial.

(For Syllabus, see report of same case in 118th N. C. Reports, 532).

PETITION by plaintiff for a rehearing of case between same parties, 118 N. C., 532.

Messrs. Allen & Dortch and H. E. Faison for petitioner.
Mr. J. D. Kerr contra.

FURCHES, J. This is a petition to rehear, and to have the opinion of the Court at Spring Term, 1896 (118 N. C., 532), reviewed.

The first assignment of error in the petition is that the Court stated that the plaintiff, according to his contention, bought the land mentioned in the pleadings at a sale made by T. J. Lee, under the powers of sale contained in a mortgage to T. M. Lee, after the death of the said T. M. Lee, which petitioner says, "Upon the contrary, it appears is not true." In reply to this assignment of error we quote the first paragraph of the plaintiff's replication to the defendant's answer:

"The plaintiff, replying to the matters of fact set out in the answer, alleges: 1. That in 1870 these defendants made a mortgage deed of their interest in the land described in the complaint to one T. M. Lee, who died, and his executor, A. M. Lee, sold the same to satisfy the balance due on said debt, so secured as aforesaid, and plaintiff became the purchaser and took deed."

This paragraph of the plaintiff's replication would seem to be a sufficient answer to the first assignment of error in the petition. But
(309) there is one error in the opinion of the Court, as published. It speaks of this mortgage as only passing seven-tenths of the estate of Irwin Owen, if it had been properly foreclosed; whereas, it should have been *four*-tenths as it was written in the opinion of the Court, but by inadvertence was published seven-tenths.

The second assignment of error in the petition to rehear is based on an alleged erroneous statement of a fact appearing in the record; that the Court, in the opinion heretofore rendered (*Atkins v. Crumpler,* 118 N. C., 532), states that the deed from A. F. Johnson to W. L. Faison did not appear in the transcript of record. We find that this allegation of the petition is not true in fact, as the published opinion of the court will show. The court does say that the alleged deed from Faison to the plaintiff does not appear in the transcript of record, and this statement of the court is true. But, according to the principles governing this case, it is not material as to whether the deed of assignment from Johnson to Faison was in the transcript or not. It is given the same consideration in the former opinion of this court that we are compelled to give it now—that it did not authorize Faison, the assignee of Johnson, to foreclose the mortgage of defendants to the Clinton Loan Association; and if the plaintiff was the purchaser at such sale, it only had the effect of making him the equitable mortgagee instead of Johnson. *Dameron v. Eskridge,* 104 N. C., 621.

The plaintiff admits that after he bought at the Lee mortgage sale he sold to four of the defendants and took their note for $640 at 12½ per cent. interest, and gave them a bond to make them a good and indefeasible title to the whole tract, with full covenants, upon the payment of the $640 note. The defendants deny his power to do this, and it is our opinion, from the statement of the facts in the case before us, that he could not.

But this sale of plaintiffs to defendants and bond for title cre- (310) ated the relation of mortgagor and mortgagee. *Ellis v. Hussey,* 66 N. C., 501; *Allen v. Taylor,* 96 N. C., 37.

But this relation, once existing between the parties, continued to exist until this note was paid and the deed made, or until, by mutual consent and agreement, it was abandoned and the papers surrendered or cancelled. *Faw v. Whittington,* 72 N. C., 321; *Hall v. Lewis,* 118 N. C., 509. And it not being shown that this relation has ever terminated, the defendants, who were parties to this first contract, would have the right to insist on its completion.

The third assignment of error is as follows: "The court says that, at the time of the transaction above referred to, the plaintiff was a member of the Clinton Loan Association." This assignment is not a correct statement of what the court said, as the opinion will show. A. M. Lee testified that he was a member of the Clinton Loan Association "and did not know when Atkins became a member of the Association." And the only reference to this matter, in the opinion of the court, is the following: "The Clinton Loan Association was a partnership and not a corporation, and plaintiff was a member of the partnership."

The fourth assignment is that the court stated in the opinion that the $640 note was the original indebtedness for the land. And then the petition proceeds to deny the truth of this statement. In answer to this assignment, we will quote the second paragraph of plaintiff's replication, as follows: "That he admits making a bond for title to certain of the defendants, and taking their note for $640 in 1882." This, it would seem, is a sufficient answer to the fourth assignment of error.

The fifth assignment of error is, that the opinion of the court states that the payments endorsed on the note, made to Johnson, cashier, were received by the plaintiff. The counsel for plaintiff admitted that this appeared to be so, but in fact it was not; that this error occurred from the fact that the plaintiff endorsed the note and the credits (311) were entered above his name. If this is so, as the plaintiff alleges, he will be able to show the truth of the matter on another trial.

The counsel for plaintiff admitted on the argument that if there had been any evidence showing a connection between the $640 note and the "acknowledgment" of indebtedness sued on and bearing date February 1, 1889, the note for $640 would have been competent evidence, and the opinion of the court would be correct. To our mind, this connection abundantly appears in this "acknowledgment." It was not in the usual form of transactions between parties, where the sale of property and the security taken are contemporaneous. It was the "acknowledgment" of an indebtedness. It does not say "the plaintiff has sold the land and this is the price or consideration." And the only reference it has to the

land is the following: "And we do further agree to surrender and give up the possession of the Irwin Owens land, on account of which this indebtedness *is* due, on the first day of January, 1890, unless the sum of $640 *is paid* before that day, towit, 1 January, 1890." Why should the plaintiff require payment of $640, the exact sum of the original note, given to him on the 31st day of January, 1882 (which bore 12½ per cent. interest), if there was no connection between the transactions?

The plaintiff stands in such relation to the defendants as to make it necessary that he should explain these transactions, and show that they are free from fraud and usury. *Dameron v. Eskridge,* 104 N. C., 621; *Hall v. Lewis, supra.* The petition to rehear is

Dismissed.

Cited: Monroe v. Fuchtler, 121 N. C., 104.

(312)

L. HUSSEY ET AL. V. FRIDAY HILL AND WIFE.

Action to Foreclose Mortgage—Mortgages—Assignment of Note and Mortgage—Power of Sale—Estoppel.

1. The assignment of a note with mortgage securing it, does not carry with it the power of sale contained in the mortgage.
2. A sale of mortgaged lands by an assignee of a note and mortgage, under a power of sale in the mortgage, and a subsequent sale of the land by the purchaser at the sale under the power, amount merely to an equitable assignment of the note and mortgage.
3. An equitable assignment of a note and mortgage security to the *mortgagor* discharges the mortgage.
4. Where the holder of a note secured by a first mortgage on land purchased a second mortgage thereon and then sold the first note and mortgage, he is not estopped to enforce the second mortgage, both mortgages being recorded and nothing being said to the assignee calculated to deceive him.

PETITION to rehear the case between the same parties, 119 N. C., 318. The petition was as follows:

"The defendants, Friday Hill and wife, Lizzie Hill, respectfully petition the court to grant them a rehearing of the above-entitled action, which was heard during the Fall Term, 1896, of said court, upon the grounds and errors following, towit:

"1. That your Honors refused to grant a new trial for an error apparent in the record, towit: The said action was tried in the Superior Court of Duplin before a jury, and issues tendered by the defendants, which were refused, and exception by the defendants, and issues were submitted to the jury and found by them; notwithstanding this, the case on appeal does not state there was any jury trial, and in this, and other matters, contradicts the record, all of which matters seem to have been overlooked by your Honors, wherein there is error.

"2. In holding that none of the questions argued are presented by the record; for that the facts are found by the trial court, and assignments of error sufficiently definite are presented for the court to pass upon; and holding otherwise, there is error in the opinion. *Dav-* (313) *enport v. Leary,* 95 N. C., 203.

"3. The facts found, in substance, are: L. Hussey, the plaintiff, holding a first mortgage, and at the same time a second mortgage by an equitable assignment, now sought to be foreclosed in this action, sells to a stranger, W. L. Hill, for value, the said first mortgage by an equitable assignment. Said Hill advertises, under the power contained in the mortgage, and sells publicly; and a *bona fide* purchaser, for value, buys at said sale; a deed recited the power under which [sale] was had, conveying a fee, which said purchaser takes the open and notorious possession of the land, rents it out, receives the rents and profits for one year, then himself sells to Friday Hill, for value, making deed in fee, with full covenants of warranty. The propositions arising upon these facts are: First, is L. Hussey estopped to set up his second mortgage by reason of his equitable assignment to W. L. Hill, and Hill's subsequent sale, etc., and deed to a *bona fide* purchaser, under whom Friday Hill claims? Second, does Friday Hill hold the fee simple title by reason of the fact that he stands in the shoes of J. S. Wilson, an innocent purchaser for value? Third, if Hussey is not estopped by reason of his assignment and subsequent sales, etc., thereunder, etc., has Friday Hill, by reason of the fact that he stands in Wilson's shoes, acquired the title and interest which are conveyed to Wilson and his grantor under Hussey's equitable assignment? In holding that these questions do not arise in this controversy, and ought not to be decided in this action, there is error, and the highest authorities in the land have been overlooked.

"4. In holding that the preceding questions can only arise be- (314) tween the purchaser under the foreclosure proceedings in this action and the defendants, there is error, because the defendants would be estopped by the judgment—certainly, if the plaintiff Hussey, or either of them, should purchase; because all the defenses of defendants have been set up in this action, and it seems to us Friday Hill,

defendant, would be estopped by the judgment to set up title outstanding against their purchaser under said judgment.

"5. That the judgment rendered in the Superior Court is properly secured.

"6. That John A. Gavin, commissioner appointed by the decree herein, has advertised the lands described in the complaint for sale at the court house door in Kenansville on 17 February, 1897."

Wherefore your petitioners pray—

"1. That a rehearing be granted them for the errors specified and assigned.

"2. For an order restraining said commissioner from selling the said lands until the rehearing of the cause in the Supreme Court.

"3. For such other and further relief as to the court may seem just and equitable."

Messrs. H. L. Stevens and Jones & Boykin for petitioners.
Messrs. Allen & Dortch and Simmons & Ward, contra.

FURCHES, J. In 1883 the defendant Hill executed his note and mortgage to the plaintiff Hussey, and in 1884 he executed a note and second mortgage on the same land to the plaintiff Stanford. After this, and while the plaintiff Hussey was the holder and owner of the first note and mortgage, the plaintiff Stanford sold and assigned his note (315) and mortgage to the plaintiff Hussey. That after the plaintiff Hussey had become the assignee of the Stanford note and mortgage, he sold and assigned the note and mortgage given to him in 1883, to one W. L. Hill. That said Hill, the assignee of the plaintiff Hussey, under the power and sale contained in the mortgage which he supposed authorized him to do so, sold the mortgaged land to the highest bidder, having first advertised the same for the length of time prescribed in the mortgage, when one J. S. Wilson became the purchaser—paid the purchase money and took a deed from said Hill. That after Wilson's occupying the land for about one year, he sold the same to the defendant Friday Hill, the mortgagor, and made him a deed in fee with warranty.

This presents the case on appeal, and when it was before us at the last term of this court we were of the opinion that the question of defendant's title, derived from Wilson, was not presented, and the case went off on a question of pleadings, in which this question was not considered.

But since the opinion in this case was filed, the opinion of the court in *Wagon Co. v. Byrd,* 119 N. C., 460, has been filed, and although the opinion in *Wagon Co. v. Byrd* does not in express terms overrule the opinion filed in this case at the last term, it reverses the principle upon which

this case was decided, and, in effect, does overrule the opinion in this case. And for this reason the rehearing was granted the defendant, and we come now to consider the case on its merits.

The first ground assigned in the petition is not tenable and is not true in fact. The 2nd, 3rd and 4th assignments appear to be substantially the same, and state the grounds upon which the rehearing was granted. But it is not necessary to consider these assignments specifically, as the merits of the case were not passed upon in the former opinion, and we treat the case *de novo.* (316)

The note to the plaintiff Hussey was the evidence of the debt from defendant to him, and the mortgage was security for its payment. It was the same as to the note and mortgage from defendant Hill to the plaintiff Stanford.

A mortgagee is the legal owner of the property which he holds in trust for the payment of the debt, and then for the mortgagor. *Parker v. Beasley,* 116 N. C., 1. And the power of sale contained in the mortgage authorized Hussey to foreclose by sale and to convey the legal and equitable title to the purchaser.

But when he sold the note to W. L. Hill and assigned the note and mortgage to him, the latter only became the equitable owner—the naked legal estate still remaining in the plaintiff Hussey.

This assignment to W. L. Hill did not carry with it the power of sale, and he only having the equitable estate in the land could not convey the legal estate. 2 Jones Mortgages, section 1992; *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Strauss v. B. & L. Asso.,* 117 N. C., 308; *Atkins v. Crumpler,* 118 N. C., 532.

This being so, the sale of W. L. Hill to Wilson and the sale of Wilson to the defendant Friday Hill were only equitable assignments of the note and mortgage from the defendant Friday Hill to the plaintiff Hussey.

This equitable assignment would have authorized W. L. Hill or J. S. Wilson to have compelled a foreclosure and sale through an order of court and a commissioner.

But this is not the case with the defendant Friday Hill. He has no equity. When he purchased the note, or the equitable interest in the note—his own note—it was not an assignment to him, but a satisfaction. He could not ask a court of equity to sell *his land* to pay *his debt.* Upon Friday Hill becoming the owner, the equitable owner of (317) the note, it was in law discharged, and this left the land subject to the second mortgage.

It was contended that, as Hussey became the assignee of the second mortgage before he sold the first note and mortgage to W. L. Hill, he was estopped to enforce the Stanford (second) mortgage. But we have

re-examined this question and can see no elements of estoppel in it. In the first place, both mortgages were on record, and it is not alleged that Hussey said anything to Hill calculated to deceive him. If Hussey had sold Hill the second mortgage, without saying anything to him about the first mortgage, there might have been some ground for complaint. But how there can be, when he sold the first mortgage which was a prior lien to the Stanford mortgage, we cannot see. The Stanford mortgage did not stand in the way of the Hussey mortgage, and the assignee got all he could have gotten, whether Hussey or Stanford was the owner of the second mortgage.

The question as to whether the warranty of the defendant Friday Hill in the Stanford mortgage estopped him from asserting title to the land under the Wilson deed, was learnedly discussed by the defendant's counsel. But it will be seen, from what we have said, that this question has no bearing on the decision of the case.

The usual practice is to dismiss the petition to rehear where the judgment in the former opinion is not reversed. But as the former opinion was not put upon the merits of the case, we will not discuss the petition in this case, but affirm the judgment of the court below.

Affirmed.

Cited: Tyler v. Capeheart, 125 N. C., 70; *Norman v. Hallsey,* 132 N. C., 8; *Morton v. Lumber Co.,* 144 N. C., 33; *Morton v. Lumber Co.,* 152 N. C., 56; S. c., 154 N. C., 340; *Weil v. Davis,* 168 N. C., 302.

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(318)

CAROLINE SOUTHERLAND v. DAVID MERRITT.

Action to Recover Land—Mortgagor and Mortgagee—Mortgagee Purchasing at His Own Sale—Betterments.

Where a mortgagee purchased at his own sale and took possession and made betterments, and in an action to recover possession by the mortgagor the latter was adjudged entitled thereto upon payment of the mortgage debt, the mortgagee is not entitled to allowance for such betterments, since he is charged with notice of defect in his title.

ACTION, for the recovery of land, tried before *Coble, J.,* at December Term, 1896, of DUPLIN, on petition of defendant for allowance for betterments. His Honor denied the motion, setting out in his judgment the judgment rendered at December Term, 1895, of said court by *Timberlake, J.,* from which the facts involved can be gathered. The latter judgment was as follows:

"This cause coming on to be heard before his Honor *E. W. Timberlake, J.*, and a jury, and the jury having found that the balance due on the mortgage debt is fifty and 56-100 dollars and that the annual rental value of mortgaged land is ten dollars per year, and it being admitted by the answer of the defendant that he took possession of the mortgaged land in January, 1892, and has held said land for four years, and that the total amount of said rent is forty dollars, and the jury having found that the defendant bought at his own sale in a pretended foreclosure in 1892, it is, on motion of J. D. Kerr, attorney for plaintiff, considered and adjudged that the sum of forty dollars of annual rental value found by the jury be applied to the payment and satisfaction of the mortgage debt, and the Register of Deeds of Duplin County enter on the record in his office of the registry of the mortgage made by James Southerland and wife, Caroline V. Southerland, to Lewis Herring, a credit of forty dollars on said mortgage, and that the defendant recover of the plaintiff ten 56-100 dollars, the balance due of the (319) said mortgage debt; and, after paying off the debt as found due on said mortgage indebtedness, it is further considered and adjudged that the deeds made by David W. Merritt to T. G. Powell, and the deed made by T. G. Powell to David W. Merritt, for the land described in the complaint, are hereby adjudged null and void, and the register of deeds shall enter on said record the words, 'Canceled by order of the Superior Court of Duplin County at the December Term, 1895,' on both of said deeds now on record in his office. It is further considered and adjudged that the plaintiff is the owner of and entitled to the possession of the lands described in the complaint, and that the clerk of this court will issue his writ ejecting the defendant from the possession of said lands and putting the plaintiff in possession of said lands as soon as the plaintiff shall pay said balance of ten 56-100 dollars due on the mortgage debt as aforesaid."

Mr. J. D. Kerr for plaintiff.
Mr. H. R. Kornegay for defendant (appellant).

Per Curiam: The defendant was mortgagee and bought at his own sale. He is fixed with legal notice of the defect in his title and is not entitled to betterments. *Hall v. Lewis,* 118 N. C., 509.

Affirmed.

Cited: Alston v. Connell, 145 N. C., 6.

(320)

P. REMINGTON AND WIFE v. G. L. KIRBY.

Action for Damages—Unlawful Entry—Trespass—Exemplary or Punitive Damages—Wantonness.

Punitive damages will be allowed in an action for unlawful entry or trespass on land only where the trespass is committed through malice, or is accompanied by threats, oppression or rudeness to owner or occupant.

ACTION for damages for unlawful entry by defendant on land which he had leased to the plaintiff, tried before *Starbuck, J.*, and a jury, at January Term, 1896, of NEW HANOVER. The issues submitted to the jury, and the references thereto, were as follows:

"I. Did the plaintiff abandon the land described in the lease? A. No.

II. Did the plaintiff, on his part and before the entry of the defendant, comply with the terms of the lease? A. Yes.

III. What amount, if any, is plaintiff entitled to recover as actual damages? A. $608.90.

IV. What amount, if any, shall plaintiff recover by way of punitive damages? A. $1,000."

The grounds of the action and the facts involved can be gathered from the charge of his Honor, the pertinent part of which, was as follows:

"The plaintiff Remington brings this action against the defendant Kirby to recover damages for Kirby's unlawful entry upon the lands leased by Kirby to him. As appears by the contract, on 29 September, 1892, the plaintiff Remington rented and leased from the defendant a certain truck farm, located in the county of Wayne, containing fifty acres, for a term of one year, with the privilege of extending the term to three years from 20 October, 1892.

"That the said Remington was to pay Kirby an annual rental
(321) of four dollars per acre at stated times, as set out in lease. Kirby was also to furnish Remington with two mules, for which Remington agreed to pay the sum of forty dollars per year, keeping them in good condition and returning them at the expiration of the lease in good order; and Remington, on his part, agreed that he would cultivate said land thoroughly and properly, keep all of the ditches on the land rented to him cleaned out and off, and one-half of the boundary ditch, or perform one-half of the labor necessary to attend to the same, and to keep the fences in repair. Said Remington was to have for use on said land such manure as was then on the premises and return an amount of equal value on the termination of his occupancy, and return same premises to Kirby in as good condition as they were when he received them, ordinary wear and tear excepted; and upon any failure on the part of

Remington to comply with this contract on his part, the defendant Kirby, was to have the immediate and full possession thereof.

"Now, it is alleged, on the part of Remington, that during the month of October he entered into possession of said premises, and at the time of entering upon the same he could not have the full control and possession of the land by reason of the fact that the defendant Kirby then had his crops, or a part of them, still on the land, and that as soon as he could get possession of the land he began preparations for his crop, which he expected to make, but that on account of the very cold January and the wetness of the season, he was able to do very little work on the farms during the months of January and February; that he had hired a superintendent by the name of Wiley, and a colored man to aid in the farming operations, and had provided them with all that was necessary for their use, and also made preparations for the feeding of the mules; that about 6 or 7 February, in the year 1893, he (322) found it necessary to bring his wife to Wilmington for the purpose of receiving medical attention, and that before leaving the farm he had put things in order in the house in which he lived on the farm and fastened the windows and doors of the house, and made arrangements with a man by the name of Ginn to provide his hands with what provisions were necessary for their support, and also for the feeding of the mules; that at the time he left home he expected to return in the course of ten days or two weeks; that he wrote from Wilmington to his foreman Wiley from time to time, giving him directions as to the crop, and that he always intended to return until he received the notification from the defendant Kirby, that he had entered and taken possession of the farm; that he had not abandoned the farm and had no intention of abandoning it, and that he always intended to return to the farm as soon as his wife's health permitted, had it not been for the defendant's entry upon the farm and taking possession. The plaintiff claims that by reason of this unlawful entry upon his possession he is entitled to actual damages to such amount as he actually lost, and that this includes the cost of his moving of himself and family from Raleigh to the farm; of what provisions he had made for the making of his crop; of what injury and damage was done to his furniture, and what things were lost, and also actual damages or loss by reason of what the term was worth over and above what he had agreed to pay. He also claims punitive damages, by reason of the fact that the entry made upon his possession was unlawful, wanton and reckless.

"It is contended by the defendant that the plaintiff Remington, after renting the farm, abandoned it and gave up the possession, and thereby he had the right to take possession of the same. It is also claimed on the part of the defendant that the plaintiff Remington did not (323)

comply with the terms of the lease, in which he agreed to cultivate the land properly and thoroughly, and to keep all the ditches on the land rented cleaned out and off.

"It is further claimed by the defendant, that the farm was rented for the purpose of a truck farm, and that the preparation for making a truck farm, fertilizing and the proper operations of the land, manuring and putting out same, ought, according to the course of good husbandry, to be done during the fall and early winter months; and that the plaintiff, instead of giving his attention to the making of such preparation for the cultivation of the truck crop, soon after taking possession of the said farm, spent his time in going about the country buying eggs and produce for shipment, and that he gave little or no attention to the preparation for making said crop.

"It is further claimed by the defendant, that in order to make a good truck crop on the said land, it is necessary that the ditches on the same shall have been cleaned out and off, and the land drained and fertilizer composted, prior to the time the plaintiff left the farm; and it is further claimed by the defendant, that on or about 6 or 7 February, the plaintiff left the farm, went to the City of Wilmington, where he remained continuously, not visiting the farm in the interval, until the 13th of March; that the foreman left by the plaintiff upon the said land was unable to procure supplies for himself and the hands employed by the plaintiff to work with him, and feed for the mules, and notified the defendant that the plaintiff failed and neglected to provide the same; that the said foreman threatened to leave the place.

"It is further contended by the defendant, that, in order to procure the said foreman to remain, he, the defendant, for some time fur-
(324) nished supplies for the laborers and mules, and that the plaintiff, failing to return and failing to provide supplies necessary for the proper cultivation of the land, he, defendant, took possession of the same; that the entry made by him upon the said land was not forcible, wanton or reckless, but was made peaceably and with the assistance of the foreman left by the plaintiff in charge of the same, and was made after he had consulted counsel and made a full disclosure of all the facts in the case, and had been advised that he had a right to so enter, and after he believed, and had reason to believe, that the plaintiff had abandoned the farm."

Judgment was rendered according to the verdict and defendant appealed.

Mr. J. D. Bellamy for plaintiff.
Messrs. Aycock & Daniels for defendant (appellant).

FAIRCLOTH, C. J. The principal contention of defendant (appellant) before this court was, that there was not sufficient evidence to entitle plaintiff to punitive or exemplary damages, and he requested his Honor to so instruct the jury, which was refused. The defendant, admitting the lease and entry in March, insisted that the latter was lawful by reason of the forfeiture clause in the contract, and, if the entry was unlawful, it was made in good faith and under an honest belief of his right to do so. The jury found these questions against defendant.

The defendant's eleventh prayer for instruction was: "That there is no sufficient evidence to entitle the plaintiff to punitive damages." The defendant's liability for such damages does not depend upon whether he was a wrong doer or not, but upon the manner and motive of such wrong doing. "Exemplary damages are not recoverable in any action of tort, but only in those where a bad motive is shown, (325) and not for every trespass on land of which a defendant is guilty, but only where it is committed through malice, or accompanied by threats, oppression or rudeness to the owner or occupant. Punitive damages have not been allowed where the testimony tended to show good faith and only a mistake as to authority." *Waters v. Lumber Co.,* 115 N. C., 648; *Hansley v. R. R.,* 115 N. C., 602, and the several authorities cited. It will be noticed that, in all the well considered cases allowing punitive damages, wantonness in some one of its many forms was the controlling element, and illustrations will be found in *Wylie v. Smitherman,* 30 N. C., 236, and *Duncan v. Stalcup,* 18 N. C., 440. We deem it unnecessary to recite the evidence. We have examined it carefully and fail to find any sufficient evidence to show conduct on the part of defendant to subject him to exemplary damages within the rule above declared, and we think the eleventh prayer should have been given.

New trial.

Cited: Burwell v. Brodie, 134 N. C., 543; *Ammons v. R. R.,* 138 N. C., 559; *Jackson v. Tel. Co.,* 139 N. C., 356; *Warren v. Lumber Co.* 154 N. C., 38; *Saunders v. Gilbert,* 156 N. C., 478.

R. M. NIMOCKS v. H. J. McINTYRE AND WIFE.

Action to Foreclose Mortgage—Mortgage—Trial—Issues—Probate—Privy Examination of Married Woman.

1. In the trial of an action such issues as are raised by the pleadings should be submitted to the jury; hence, where a reply to an answer set up an additional cause of action not inconsistent with that set up in the complaint, it was error to refuse to submit issues arising upon facts stated in the reply.
2. While the probate of a deed by a married woman, with her privy examination, is not conclusive as a judicial proceeding, yet such proceeding can be declared invalid, and the deed impeached only by strong, clear and convincing evidence.

(326) ACTION, for the foreclosure of a mortgage, tried before *Starbuck, J.*, and a jury, at November Term, 1896, of CUMBERLAND. The facts sufficiently appear in the opinion of the court. There was a verdict followed by judgment for the defendant and plaintiff appealed.

Mr. H. McD. Robinson for plaintiff (appellant).
Messrs. J. C. & S. H. MacRae and MacRae & Day for defendants.

MONTGOMERY, J. This action was commenced for the foreclosure of a mortgage upon real estate, executed by the defendants to secure a debt mentioned in the mortgage. The debt was in the form of a promissory note executed by the husband, and the mortgage was upon the wife's land. The defendants, in their answer, admitted the execution of the mortgage, but averred that it was executed by the *feme* covert under duress of the original creditor, Worrell, who had assigned the note to the plaintiff, and the undue influence of her husband. An amended answer also set up the further defense that the probate of the justice of the peace, who took her privy examination, was invalid, because her husband was present the whole time. The plaintiff, in his reply, denied the averments of the answer, and set up the further cause of action that the debt, in part at least, mentioned in the mortgage, was due and owing to the plaintiff by reason of a trust imposed upon the land and upon the *feme* defendant in the deed which conveyed the land to her. This additional cause of action set up in the reply was not inconsistent with that stated in the complaint, and, as the plaintiff did not demur to it, it must be permitted to stand.

On the trial the plaintiff asked that certain issues, arising upon the facts stated in the reply, be submitted to the jury, and they were (327) refused by the court. There was error in this refusal. The re-

ply was a part of the pleadings, as we have seen, and such issues as were raised by the pleadings ought to be submitted. The plaintiff requested the court to charge the jury "that the taking the private examination of a married woman is a judicial act and ought to stand, unless the evidence offered to set aside the same is full and convincing." There was error in the refusal of the court to grant this instruction. The acknowledgment of the execution of a deed by a married woman, with her privy examination, is not now conclusive as a judicial proceeding as it was formerly. Yet we are of the opinion that before such a proceeding can be declared invalid and the deed is impeached, the evidence ought to be clear, strong and convincing.

New trial.

S. D. MORRISON AND WIFE ET ALS. v. R. P. CRAVEN.

Practice — Appeal — Waiver of Diligence—Color of Title—Possession Under Color of Title—Tacking Possession of Several Parties—Judicial Proceedings—Estoppel.

1. Where counsel waive the diligence required by rule 5 of this Court as to docketing appeal, it will not be exacted by the Court.
2. The possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the necessary seven years' possession under color of title.
3. Where the record of a proceeding to sell land, as the property of a decedent, to make assets for the payment of his debts, recited that "due notice had been given to all parties concerned," it is sufficient to estop an infant heir of a decedent from claiming the land as his heir when such heir had a general guardian.

DOUGLAS, J., dissenting.

ACTION, for the recovery of land, commenced in April, 1892, (328) and tried before *Norwood, J.*, and a jury, at July Term, 1895, of CABARRUS. The plaintiffs claimed a one-half interest in the land described in the pleadings, it being admitted that defendant owned the other half. The plaintiffs claimed as the children and heirs at law of J. O. Pharr and in order to show color of title introduced a deed from A. B. and J. J. Pharr to J. O. Pharr, father of the *feme* plaintiffs, which was dated in 1852. The testimony showed that J. O. Pharr was not in possession of the land until 1855, but that A. B. Pharr, his grantor, was in possession in 1852 and so continued until 1855. There was no evidence of a deed or color of title in A. B. Pharr. The defendant introduced the record of a proceeding for the sale of the land as the

property of J. M. Pharr (a deceased brother of J. O. Pharr) for assets at January Term, 1863, from which it appeared that the land was sold and sale confirmed to Rachael Pharr, who went into possession, and under her, by *mesne* conveyances, the defendant claims the land. The said record shows the following entry: "In the matter of H. A. Area and W. W. Pharr, administrators of John M. Pharr, it appearing to the satisfaction of the court, upon hearing the petition and exhibits in this case, *that due notice has been given all the parties concerned,* it is therefore ordered and decreed by the court, that the land mentioned in the proceedings be sold by the administrators on a credit of nine months," etc., etc. The record also shows that the sale was duly confirmed at a subsequent term.

It appeared by the testimony that J. O. Pharr, the father of plaintiffs, was dead at the time of the said proceedings for the sale of the land as the property of J. M. Pharr, and that the plaintiffs were two of the heirs at law of the said J. M. Pharr.

It also appeared from the testimony that the *feme* plaintiffs (329) married before arriving at full age.

The defendant, in order to show that the land was not claimed by the heirs at law of J. O. Pharr, introduced the record of proceedings for the partition of his lands in which no mention was made of the land in controversy in this action.

The defendant contended that the plaintiffs were estopped by the judgment in the proceedings for sale of the land as the property of J. O. Pharr. His Honor held otherwise, and the jury, under his instructions, rendered a verdict that the *feme* plaintiff Morrison was entitled to one-fourth of the land, and judgment was rendered accordingly and defendant appealed.

Messrs. Jones & Boykin for plaintiffs.

Messrs. W. G. Means and Burwell, Walker & Cansler for defendant (appellant).

CLARK, J. This action, having been tried in the court below at June Term, 1895, should have been docketed here at the Fall Term of that year, or a *certiorari* applied for upon filing such part of the transcript as was available to the appellant. *Burrell v. Hughes, ante.,* 277. But, by agreement of counsel, the case is now docketed, and where counsel waive the required diligence the court will not exact it.

The plaintiff rests her right to recover upon seven years' possession in her father under color of title. Code, sec. 141. The deed to him, which was color of title, was executed in 1852, but the grantor therein remained in possession for three years thereafter, upon plaintiff's own showing, and her father's possession thereunder began, at the earliest,

some time in 1855. There was no color of title shown in the (330) grantor, and hence his possession could not be added to that of his grantee. Therefore, the full seven years' possession necessary to ripen the title had not elapsed when the running of the statute was suspended in May, 1861, and soon thereafter, if not before, those under whom defendant claims, went into adverse possession. Besides, the plaintiffs are estopped by the proceedings in 1863 to sell the realty as the property of John M. Pharr, deceased, to make assets, for the court adjudged that "due notice had been given to all parties concerned," and the land in controversy was sold under the judgment in this case (*Harrison v. Hargrove,* at this term), and the *feme* plaintiffs were among his heirs at law, and further, at that time, had a general guardian. *Hare v. Holloman,* 94 N. C., 14; Code, sec. 387. The court records have been destroyed and there was nothing to rebut the presumption *omnia rite acta est* and that the plaintiff was duly made a party by her guardian, according to the judgment of the court that "all parties concerned" had been notified. It is significant evidence, though not an estoppel, that in the partition proceedings of the land of J. O. Pharr this realty was not mentioned. It is unnecessary to consider the other exceptions.

Error.

DOUGLAS, J., dissenting from the opinion: I concur in the judgment of the court for the reason first stated in the opinion, that seven years' possession was not shown prior to the suspension of the statute in May, 1861, but I cannot concur in the opinion that the *feme* plaintiff is estopped by the proceeding in 1863 to sell the realty in question as the property of John M. Pharr, deceased. The *feme* plaintiff (Cross) was then an infant with a general guardian, but there is no direct finding that either she or her guardian was ever made or became a party to that proceeding. There is no proof whatever of that fact, and (331) their names nowhere appear in any of the remaining records. The fact can be gathered only inferentially from the vague finding of the Probate Court that "due notice had been given to all the parties concerned." This is itself as much conclusion of law as a finding of fact, the identity of the parties depending entirely upon the opinion of the court as to who were "concerned." That an infant of tender years, with or without a guardian, should be estopped from asserting whatever rights she may have by such a record, I cannot admit. It appears to us that the *femes* plaintiffs were nieces and heirs at law of the said John M. Pharr, but this fact is nowhere found in the special proceedings, and, indeed, the very existence of the plaintiffs may then have been unknown to the court.

Cited: Cross v. Craven, post, 333; *Norwood v. Pratt,* 124 N. C., 747.

D. B. CROSS AND WIFE ET ALS. v. R. P. CRAVEN.

Action to Recover Land—Infant With Guardian—Coverture—Statute of Limitations.

1. A guardian having no title to the land of his ward, it is not his duty to sue for the recovery of realty; hence,
2. The fact that an infant, after the accrual of her right of action for land, had a guardian for seven years before her marriage, which was before her majority, and that neither she nor her guardian brought action within that time, does not bar an action by her for the recovery of the land.

ACTION, for the recovery of land, commenced in April, 1892, and tried before *Norwood, J.*, and a jury, at June, 1895, Term, of CABARRUS. The facts are the same as in *Morrison v. Craven, ante,* 327, except that it appeared on the trial that the *feme* plaintiff Cross had a guardian (332) from her early infancy in 1862 until after her marriage, which was during her minority. His Honor charged that "if the jury should find that the plaintiff Louisa Cross had a legal guardian from her early infancy, in 1862, until after her marriage with D. B. Cross and was a minor at the time of her marriage, then she is barred by the statute of limitations and cannot recover: so, if she had a legal guardian for seven years before her marriage." The jury so found, and judgment was rendered against the plaintiffs Cross and wife, who appealed.

Messrs. Jones & Boykin for plaintiffs (appellants).
Messrs. W. G. Means and Burwell, Walker & Cansler for defendant.

CLARK, J. It was error to charge that, though Mrs. Cross was an infant when her cause of action accrued and was married before arriving at age, she was barred by the statute of limitations from maintaining an action for the real estate because she had a legal guardian for seven years before her marriage. Section 148 of The Code provides that "If a person entitled to commence an action for the recovery of real property, &c., is within the age of twenty-one years or a married woman, &c., then such person may, notwithstanding the statute of limitations, commence his action within three years next after full age or discoverture," &c. Here, the disability of coverture supervened upon that of infancy, and the statute of limitations is suspended in language too explicit to be capable of any other construction. *Clayton v. Rose,* 87 N. C., 106. The defendant relies upon *Culp v. Lee,* 109 N. C., 675, 678, but that has no application to actions for the recovery of realty, when the legal title is in the person under disability. In (333) *Culp v. Lee* it was contended that an executor, who had filed his

final account many years before, was not protected by the statute, because the distributees were infants, but the court held that the distributees having had a general guardian, the executor, having been exposed to an action by him for the full period prescribed by the statute, was protected by the lapse of time. It was pointed out that in such case the guardian would be responsible on his bond from any loss resulting from his laches in failing to sue (Code, sec. 1593), but the guardian bond is not responsible in any way for the realty beyond the rents and profits. Code, sec. 1574. By special provision, he is made liable for land forfeited for taxes (Code, sec. 1595), but there is no similar provision of liability for failure to bring an action for realty under The Code, 1588. Where real estate is held by a trustee, the legal title being in him, if he is barred the *cestui que trust* is also. *King v. Rhew,* 108 N. C., 696; *Clayton v. Cagle,* 97 N. C., 300. But a guardian does not hold the legal title to the real estate and is not a trustee thereof, though charged with duties concerning it, as payment of taxes, leasing, preventing waste, &c.

The error, however, is a harmless one in this instance, as Mrs. Cross' father, not having held the land adversely under color of title—the only title set up—for seven years prior to the suspension of the statute in May, 1861, she cannot recover, and besides, she is estopped by having been a party to the proceedings to sell the realty as the property of John M. Pharr (*Morrison v. Craven, ante,* 327, which rests upon the same facts).

We only pass upon this assignment of error because of its importance and the zeal with which it has been pressed.

Affirmed.

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(334)

THOMASVILLE SHOOTING CLUB v. P. C. THOMAS.

Contempt—Failure to Obey Order of Court.

Where a defendant in an action failed to perform the order of the Court, and, upon notice to show cause why he should not be attached for contempt, answered, admitting his non-compliance, and stated that he was unable to perform it, but the trial judge found, as a fact, that the defendant had been since the judgment, and then was, able to perform the order, and that he was in contempt: *Held,* that it was proper to commit him to jail until he should comply with the judgment.

ACTION, pending in DAVIDSON. From a judgment committing the defendant to jail for contempt of court, he appealed.

Mr. E. E. Roper for plaintiff.
Messrs. Walser & Walser for defendant (appellant).

FAIRCLOTH, C. J. At Spring Term, 1896, it was ordered and adjudged that the defendant remove a certain brick building from Winston avenue on or about 1 September, 1896. Failing to obey said order, an affidavit was filed on 8 September, 1896, and notice given to defendant to show cause why he should not be attached for contempt.

The return admitted non-compliance, and the respondent averred by affidavit that he was unable to obey the order. His Honor heard proofs by affidavit from both parties and found (1) That defendant had neglected and refused to remove said building as he was ordered to do. (2) That said defendant has been since said judgment, and still is, able to comply with the same, and is in contempt of court. It was thereupon ordered that the defendant be imprisoned in the county jail until he complies with the judgment rendered at Spring Term, 1896.

We can see no reason why the judgment, committing the de-
(335) fendant to prison, should not be affirmed. That part of the order directing the sheriff to remove the building at plaintiff's cost is not appealed from, and we express no opinion about it. *Millhiser v. Balsley,* 106 N. C., 433; *Baker v. Cordon,* 86 N. C., 116.

Affirmed.

S. H. BOYD, GUARDIAN, v. E. M. REDD, ADMINISTRATOR OF A. J. BOYD, AND THE BANK OF REIDSVILLE.

Statute, Construction of—Banks and Banking—Lien on Stock of Debtor Stockholder—Failure of Bank to Organize Within Two Years from Date of Charter—Corporation—Quo Warranto.

1. A statute which gives to a bank a lien on the stock of a stockholder indebted to it is in derogation of common right and must be strictly construed to the purposes of its enactment.

2. The lien given to a bank by its charter upon the stock of a stockholder indebted to it extends only to indebtedness incurred directly by such stockholder to the bank and not to his indebtedness to a third person acquired by the bank.

3. Such lien is not extended to notes of a stockholder to a third person, taken by the bank as collateral from such person, merely by the fact that the stockholder was at the time president of the bank.

4. The fact that a bank failed to organize within two years after it was chartered (sec. 688 of The Code) cannot affect the validity of whatever

lien the bank may, by its charter, have on the shares of stock of a stockholder indebted to it. Such defect in the organization of the bank can be taken advantage of only by a direct proceeding by the State for that purpose.

ACTION, tried before *Hoke, J.*, and a jury, at November, 1896, Term of ROCKINGHAM. The nature of the action and the facts appear in the opinion of the court. His Honor, at the trial, held that the Bank of Reidsville, under and by virtue of its charter, had a lien upon the stock of A. J. Boyd—both upon the forty shares deposited (336) with S. H. Boyd, guardian, and upon the thirty-seven shares now in the hands of the bank, not only for the direct debts due by A. J. Boyd to the bank, but also for the notes of A. J. Boyd to the Hermitage Cotton Mills, deposited by the said cotton mills as collateral for its debt to the bank. Under the instructions of his Honor, the jury found the issues in favor of the defendant Bank of Reidsville, and from the judgment thereon the plaintiff appealed.

Mr. J. T. Pannill for plaintiff (appellant).
Messrs. J. T. Morehead and Johnston & Johnston for defendant.

CLARK, J. "It is clear that at common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company. The policy of the common law has always been to discountenance secret liens, inasmuch as they hinder trade, and restrict the safe and speedy transfer of property." Cook on Stocks, section 520; 2 Thompson Corp., section 2317; 2 Waterman Corp., 227; *Heartt v. Bank,* 17 N. C., 111. The statute in such cases being in derogation of common right, must be strictly construed to the purposes of its enactment. That purpose is thus clearly stated in *Bank v. Smalley,* 2 Cowen, 770: "This clause in bank charters is intended merely for the protection of the bank, *i. e.*, to give them a lien on the stockholder for what he owes the bank." It is conceded that for any indebtedness a stockholder incurs to a bank directly, whether as principal or surety, his stock in bank is collateral security by virtue of the terms of such charters. The stockholder knows that fact when he makes the bank his creditor. By such (337) voluntary act he gives the lien and waives his constitutional right to a personal property exemption. As to the direct indebtedness of A. J. Boyd to the bank, it holds thirty-seven shares of his stock, which is admittedly sufficient to pay that indebtedness. A. J. Boyd, however, executed the note to the plaintiff as guardian, on 4 August, 1893, which is the subject of this action, and to secure the same, deposited with him forty other shares of stock of the bank as collateral. In April, 1893, A. J. Boyd had executed his two notes, aggregating $7,300, to the Her-

mitage Cotton Mills, which notes, together with many others, were deposited in June, 1893 (being indorsed in blank), by said cotton mills with the bank (of which said A. J. Boyd was president) as collateral to secure an indebtedness of the cotton mills to the bank.

The question is, whether as to this indirect indebtedness of A. J. Boyd to the bank, by reason of its taking his paper to another party, it acquires a lien upon the forty shares of stock and thereby renders worthless his deposit of the stock with the plaintiff as collateral. When the stockholder, as we have said, makes the bank his creditor, knowing the statute, he voluntarily assents to the stock being impounded and waives his personal property exemption. But he cannot be thus taken as giving a lien on his stock and waiving his constitutional exemption when he executes a bond, or contracts a debt, to other parties, and the fact that such other party transfers the indebtedness of the stockholder, either by sale or as collateral to the bank, cannot have the effect of giving to the indebtedness a security it did not have when it was created, nor can it waive *in invitum* the personal property exemption which the debtor did not do, and had no intention of doing, when the con-
(338) tract or indebtedness was made. Besides, the funds of the bank are a trust fund for all the stockholders, and if it is admissible to use that common fund for buying up negotiable paper or other indebtedness of a stockholder to third parties, and immediately securing it against his intention by the shares of such stockholder and depriving him of his personal property exemption, it would become easier for the managers of any corporation to "freeze out" any stockholder they may wish.

Our conclusion is that, upon a reasonable construction, the statutory lien on stock is intended only to secure the direct indebtedness which the stockholder creates with the corporation, either as principal or surety, and not any involuntary indebtedness to it caused by the purchase of his liabilities incurred to third parties. *White's Bank v. Toledo,* 12 Ohio St., 601; *Bank v. Smalley, supra;* Cook on Stocks, section 529; 2 Beach Corp., section 645; *Cross v. Bank,* 1 R. I., 39.

This being the construction of the effect of the statutory lien conferred by such provisions in a charter, it has no significance and is purely incidental, that, when the notes of the stockholder Boyd to a third party were deposited with the bank as collaterals, Boyd himself was president of the bank. The lien is statutory, and not conferred by an estoppel; and Boyd as president, when the bank took by assignment his indebtedness to a third party, must have understood it as being taken like any other stockholder's paper thus bought in, and that there was no statutory lien attached to it.

We concur with his Honor that there was no impairment of whatever lien was conferred by the charter by the delay of the bank to organize till after the statutory period of two years had elapsed. Code, sec. 688. A defect of that kind cannot be taken advantage of in this collateral way. The sovereign is the proper party to set it up, and (339) by a direct proceeding. *Navigation Co. v. Neal,* 10 N. C., 520; *Academy v. Lindsey,* 28 N. C., 476; *Asheville Division v. Aston,* 92 N. C., 578.

But for the misdirection to the jury there must be a New trial.

Cited: Bank v. Scott, 123 N. C., 547.

W. F. HENDERSON v. D. W. WILLIAMS ET ALS.

Practice—Costs—Nonsuit—Witness Not Sworn.

Where a defendant's witnesses are present when the case is called for trial but are not sworn or tendered because plaintiff takes a nonsuit, the costs of such witnesses are properly taxable against the plaintiff.

This was a motion made by the plaintiff before Clerk of the Superior Court of Wilkes, to re-tax bills of cost theretofore made out and taxed against the plaintiff, and from the judgment of the Clerk the plaintiff appealed to *Greene, J.,* at chambers. The summons issued in the original cause 9 July, 1895, returnable to Fall Term, 1895. The complaint, alleging injury to plaintiff's land, was filed 15 July, 1895. The answer denying the allegations of plaintiff's complaint was filed at Fall Term, 1895. At Spring Term, 1896, of WILKES, the plaintiff asked for a continuance for the want of the testimony of Henry Brown, which continuance *Norwood, J.,* granted upon the plaintiff paying the cost of the term.

At Fall Term, 1896, of WILKES, the case was called, and the plaintiff in open court took a nonsuit.

On Monday, 18 January, 1897, the plaintiff, through his attorney, L. S. Benbow, came before the Clerk and made a motion to re-tax the cost in the case upon the grounds that no witness should (340) be allowed to prove his attendance, except those who were sworn, examined or tendered against the party cast. No witness was sworn.

After hearing and considering the motion, the clerk adjudged that, as the case was disposed of at term time he had no jurisdiction to order cost re-taxed.

From this ruling the plaintiff appealed to *Green, J.*, at chambers, who held that the clerk erred in holding he had no jurisdiction to order the cost re-taxed. And the cause was remanded to the clerk, who was commanded to re-tax all the cost, from commencement of the action entire, and in so doing to allow no witnesses subpœnaed by the defendants to be taxed against the plaintiff, except those who were sworn, examined or tendered.

From this judgment the defendant appealed.

Messrs. Glenn & Manly and W. W. Barber for defendants (appellants).

No counsel contra.

FAIRCLOTH, C. J. The summons was returnable to Fall Term, 1895. At Fall Term, 1896, the plaintiff took a nonsuit, and judgment was entered against him for costs. The defendants had witnesses in attendance and their tickets were taxed against the plaintiff, who, at next term, moved to re-tax the costs and to exclude the defendant's witnesses' cost on the ground that they were not sworn, examined or tendered against the plaintiff. His Honor allowed the motion and directed the clerk accordingly.

This was error. The case was brought for trial at Fall Term, 1896, and the defendant properly had his witnesses present. He had no (341) opportunity to swear, examine or tender his witnesses by reason of the nonsuit. It is where a trial is had and the witnesses are not sworn or tendered that their costs cannot be taxed against the party cast. *Loftis v. Baxter,* 66 N. C., 340. When such costs are allowed, see Code, secs. 528 and 532.

Error.

Cited: Sitton v. Lumber Co., 135 N. C., 541; *Brown v. R. R.,* 140 N. C., 154; *Herring v. R. R.,* 144 N. C., 210; *Chadwick v. Ins. Co.,* 158 N. C., 382.

RICHARD HAIRSTON v. R. B. GLENN, ADMINISTRATOR OF WILLIAM HAIRSTON.

Husband and Wife—Wife's Earnings—Gift from Husband.

1. While a husband is entitled to the earnings of his wife, he may consent to their becoming and remaining her separate property, the validity of the gift being subject, of course, to the same rules which govern voluntary conveyances; hence,

2. Where a husband and wife deposited their earnings in a bank, the former telling the cashier that they were their joint earnings and that he desired a certificate in their joint names, and it was so given, and no rights of creditors intervened: *Held*, that the transaction was a valid gift of one-half of the money to the wife.

ACTION, heard before *Hoke, J.*, at January, 1897, Special Term, of FORSYTH, on a case agreed as follows:

Facts agreed: "Ruth Hairston is the wife of William Hairston, who is now dead, and R. B. Glenn is his administrator. Richard Hairston and Ruth Hairston are the sole legatees of William Hairston's estate. There are no creditors. W. Hairston worked for wages in a factory, and, with his consent and knowledge, Ruth did the same. As they collected their wages they would deposit them in the First National Bank, taking certificates for the same. They always went to the bank together, and William told the cashier in presence of Ruth, (342) that the money belonged to both of them, was their earnings, and that he wanted the certificate made out in the name of William and Ruth Hairston, and that, in case of the death of either of them, he wanted the survivor to have all the money. At his request and by his direction, the certificate was made out in their joint names, and returned by the cashier to William. Seven hundred and fifty dollars is now in the hands of the administrator. Plaintiff contends that this amount should be distributed by the administrator, and the administrator and Ruth contend that this half of the $1,500 certificate belongs absolutely to the defendant Ruth. The Court, upon these facts, is asked to direct the proper distribution of the fund."

His Honor rendered judgment as follows: "It is adjudged that the intestates William Hairston and Ruth Hairston are tenants in common, and are entitled to one-half of the money, and that on the death of William his part belonged to his administrator, and should be collected by R. B. Glenn, administrator; that the other half is the property of Ruth, and should be delivered to her; and, it appearing that the bank holds the fund, the bank is hereby authorized to pay the same to Ruth Hairston, now Ruth Griffith, or to her attorneys, Glenn & Manly. It is further ordered that plaintiff take nothing by the suit, and is not entitled to the relief asked, and that defendant go without day," etc.

Mr. J. S. Grogan for plaintiff (appellant).
Mr. Clement Manly for defendant.

FAIRCLOTH, C. J. William Hairston, intestate of defendant Glenn, and his wife, Ruth, worked together in a factory and accumulated $1,500 in money. They went together and deposited the same in the bank, taking a certificate in their joint names, William stating (343)

to the cashier, in her presence, that these were their earnings; that he wanted the certificate in both their names, and that "in case of the death of either of them he wanted the survivor to have all the money." The question of survivorship is not before us, as Ruth claims only one-half of the money, and to that we think she is entitled.

It is admitted that prior to 1868 the husband was entitled to the earnings and services of his wife. The Constitution of 1868 and the Marriage Act (1871-2), Code, chap. 42, makes the wife's property her separate estate, etc., but it has been held that the wife's earnings are still the property of her husband, because he is still under obligation to maintain and support her and children, and because the Constitution does not change his common law rights in that respect. *Baker v. Jordan,* 73 N. C., 145; *Syme v. Riddle,* 88 N. C., 463. In the latter case it was stated *arguendo:* "Doubtless a husband may consent that the fruit of his wife's toils shall be her own, and constitute her separate estate; but in such case her title will vest upon his consent and not upon the law; and the validity of the gift, as against his creditors, will depend upon the same rules which govern other conveyances from him to her." That question is now raised in the present case, and we hold it to be the law. The same principle was held in *Kee v. Vasser,* 37 N. C., 553; *Springfield Inst. v. Copeland,* 39 Am. St., 489; *Peterson v. Mulford,* 36 N. J., 481.

The agreed facts in this case fail to show that the husband intended to exercise his marital rights over his wife's money, but they show that he intended that his wife should own her share, free from any claim of his, *i. e.,* he gave to her her part of their earnings, and there is nothing in the legislation of the State nor in the *policy* of the law to forbid his doing so.

Affirmed.

Cited: Cunningham v. Cunningham, 121 N. C., 417; *Flanner v. Butler,* 131 N. C., 154; *S. v. Robinson,* 143 N. C., 622.

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(344)

BALTIMORE BUILDING AND LOAN ASSOCIATION v. W. L. BETHEL.

Action to Recover Land—Deed—Description.

Where, to the description of a lot, by metes and bounds, in a deed, were added the words: "This lot is known as Lot No. 13, . . . and upon this lot the Hotel Bethel stands," and it appeared that the hotel building extended over the line and covered a part of Lot No. 12: *Held,* that no part of Lot No. 12 passed by the deed, the hotel being mentioned only as a further means of locating Lot No. 13.

LOAN ASSOCIATION *v.* BETHEL.

ACTION, to recover land, tried before *Hoke, J.*, and a jury, at January, 1897, Special Term, of FORSYTH. Upon an intimation from his Honor that plaintiff could not recover such part of Lot No. 12 as was covered by the "Hotel Bethel," the plaintiff took a nonsuit and appealed.

Messrs. J. S. Grogan and Watson & Buxton for plaintiff (appellant).
Messrs. A. H. Eller and Glenn & Manly for defendant.

FURCHES, J. This is an action of ejectment. The defendant, for the purpose of securing money borrowed from the plaintiff, executed a deed of trust to one Grogan, by which he conveyed to said trustee Lot. No. 13 in the City of Winston. The description contained in the deed is as follows: "Beginning at the corner of Lot No. 12 and running southwardly the west side of Chestnut street 44 feet 3 inches to Seventh street, thence westward with said Seventh street 100 feet to an alley, thence northward with said alley 39 feet 11 inches to the line of Lot No. 12, thence eastward with the line of Lot No. 12, 100 feet to the beginning. This lot is known as Lot No. 13 on the Show ground plot, recorded in the Register's office, in Book 42, page 274, and upon this lot the Hotel Bethel is erected." Grogan, trustee, sold, and plaintiff (345) bought and brings this action.

In fact, the Hotel Bethel is erected on Lot. No. 13, but extends over the line between lots No. 12 and 13, eight feet on Lot No. 12, and this action is to recover this eight feet of Lot. No. 12.

Plaintiff contends that the language used in the closing sentence of the description—"and upon this lot the Hotel Bethel is erected"—controls the description; and thereby this eight feet was conveyed by the deed of trust to Grogan and by him to the plaintiff—it being admitted that the Grogan deed to plaintiff contains identically the same description as that in the deed of trust.

But we do not agree with the plaintiff. If the mortgage had been a conveyance of the "Hotel Bethel," situate on Lot 13, we would say it conveyed the ground upon which it stood, so far at least as the mortgagor was concerned, and he would be estopped to deny that it did. But that is not the case here. The grant is of Lot No. 13 specifically described by metes and bounds, calling for the line of Lot No. 12, and the hotel is only mentioned as a further means of locating the property.

We are unable to distinguish this case from that of *Midgett v. Twiford, ante,* 4, and it must be governed by what is said in that case.

Affirmed.

(346)

ADA DUFFY v. CHARLES DUFFY.

Divorce A Vinculo Matrimonii—Alimony.

Upon the granting of an absolute divorce, all rights arising out of the marriage cease and determine (Code, sec. 1295), and hence the Court has no power in such case to allow permanent alimony.

ACTION for divorce, tried before *Hoke, J.*, and a jury, at January Special Term, 1897, of FORSYTH.

Upon a finding by the jury that defendant had, prior to 13 March, 1895, abandoned and lived separate and apart from plaintiff for two consecutive years, an absolute divorce was granted the plaintiff, who, thereupon, moved for an allowance for her future support. His Honor denied the motion on the ground that the Court had no power to make such allowance and plaintiff appealed.

Mr. A. E. Holton for plaintiff (appellant).
Mr. J. S. Grogan for defendant.

FAIRCLOTH, C. J. The plaintiff sued for and obtained a judgment "that the bonds of matrimony between plaintiff and defendant be dissolved as to this plaintiff." The plaintiff then moved for an order and judgment for an allowance by the month or in gross for her future support. His Honor held, as a matter of law, that he had no power to make an order for future support of the plaintiff. This is the only question before us in this appeal, and there was no error in his Honor's conclusion.

At common law, where a divorce *a vinculo matrimonii* was granted, no allowance for the future support of the wife was given, and we have no statute in this State allowing it. An allowance for her benefit *pendente lite* or in case of separation from bed and board is author-
(347) ized and regulated by The Code, chap. 29. Section 1295 of that chapter says when an absolute divorce is decreed, "all rights arising out of the marriage shall cease and determine, and either party may marry again."

Affirmed.

WEST-END HOTEL AND LAND COMPANY v. T. B. CRAWFORD.

Principal and Agent—Sale of Land by Agent—Authority to Rescind Sale.

1. It is the duty of one dealing with an agent of limited powers "to look out for the power" and its extent in contracting for the principal.
2. The authority of an agent to sell land does not, *per se*, confer authority to cancel the trade without the principal's knowledge or consent and the burden of proving the agent's authority to rescind is on the one relying upon it.

ACTION, for the purchase price of land, tried before *Brown, J.*, and a jury, at December, 1895, Special Term, of FORSYTH. There was a verdict, followed by judgment, for the plaintiff, and defendant appealed.

Messrs. Watson & Buxton for plaintiff.
Messrs. Glenn & Manly for defendant (appellant).

FAIRCLOTH, C. J. Plaintiff sold Lot 200 at auction to defendant, who was to pay a part cash and give notes for balance. No cash was ever paid, but notes were given for the whole amount. No bond for title was given, as no cash was paid. Plaintiff now tenders deed and demands judgment. These facts are admitted, and the defense set up is that subsequently the plaintiff's agent agreed to rescind and cancel the contract of sale. This is denied by plaintiff, and the evidence was (348) conflicting. But assuming defendant's evidence to be true, it does not appear, nor was any evidence offered to that effect, that the agent had authority to rescind the contract. The authority of an agent to sell land does not *per se* confer authority to cancel the trade without the principal's knowledge or notice, and the burden of showing the agent's authority to rescind rested on the defendant in this case, which was done. It is the duty of one dealing with an agent of limited power "to look out for the power" and its extent in contracting for the principal. *Earp v. Richardson,* 81 N. C., 5; *Biggs v. Ins. Co.,* 88 N. C., 141. The statute of frauds is not pleaded, and we have no question on that matter.

The defendant offered to prove, by his own oath, what Woods had told him about the lot. This was hearsay, and therefore incompetent.

Affirmed.

DIXIE CIGAR COMPANY v. SOUTHERN EXPRESS COMPANY.

Common Carriers—Limiting Liability—Unreasonable Restrictions.

1. Stipulations in a bill of lading restricting the common law liability of a common carrier are invalid unless reasonable, because the parties are not dealing on an equal footing.
2. Where an express bill of lading contained a stipulation that the company should not be liable for loss or damage, unless demand therefor should be made within thirty days from the date of the bill of lading, and the company instructed its agents not to return undelivered packages until the expiration of thirty days from their arrival at their destination: *Held*, that the stipulation was unreasonable and void.

(349) ACTION, tried before *Hoke, J.*, and a jury, at January, 1897, Special Term, of FORSYTH, upon appeal. The plaintiff complained for the value of a package worth $27.50 which it delivered to defendant in April, 1893, to be shipped to Ratan, Mexico, and which was not delivered as agreed.

The receipt given by the express company contained the following stipulation: "In no event shall the Southern Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office within thirty days after this date, in a statement to which this receipt shall be attached."

Upon the back of the envelope used by the defendant company in transmitting package was an instruction to its agents as follows: "If not delivered in thirty days return to shipper, unless otherwise specifically instructed."

His Honor held that the stipulation in the receipt, as to giving thirty days' notice in writing, &c., was unreasonable, and that the failure of plaintiff to comply therewith would not prevent recovery.

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

Messrs. Jones & Patterson for plaintiff.
Messrs. Watson & Buxton for defendant (appellant).

CLARK, J. Stipulations in a bill of lading restricting the common law liability of a common carrier are invalid, unless reasonable; because the parties are not dealing on an equal footing. *R. R. v. Lockwood,* 17 Wall., 357. We think his Honor properly held that a stipulation that the defendant would not be liable unless there is a demand in writing made within thirty days from the date of the bill of lading was unreasonable and void. The instructions to its agents upon the back of

the defendant's envelopes and packages recognize this, for those (350) instructions require the agent at the receiving point, when the consignee cannot be found, to notify him through the mail, and if the package is not delivered in thirty days to return it to the shipper. This contemplates the loss of going and returning, plus thirty days' detention at the receiving point. To require, therefore, every shipper to visit the express office and demand, in writing, pay for his package before the time has expired in which it should be returned, under penalty of losing pay for same if lost by negligence or other default of the express company, is an unreasonable requirement. The consignor, having entrusted the package to the common carrier for a consideration, is entitled to rely upon the carrier's doing its duty without worrying its agents or himself with constant inquiries whether it has done so or not. If the package is returned for failure to find the consignee, or is lost or stolen, the carrier should notify the consignor. We are inclined to think, in analogy to the ruling as to telegraph companies (*Sherrill v. Tel. Co.*, 109 N. C., 527), that a stipulation would be reasonable that the consignor or consignee should make his demand, within sixty days after he has notice of his loss or damage, that he intends to hold the carrier responsible for negligence or other default, so that the carrier may perpetuate the evidence of its shifting agents, and this does not abridge the statutory time in which the action can be brought.

The stipulation here being void, and the action having been brought within three years, the plaintiff was entitled to recover.

No error.

Cited: Watch Case Co. v. Express Co., post, 352; *Mfg. Co. v. R. R.,* 128 N. C., 283; *Deans v. R. R.,* 152 N. C., 172, 173; *Forney v. R. R.,* 167 N. C., 642; *Culbreth v. R. R.,* 169 N. C., 725.

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UNITED STATES WATCH CASE COMPANY v. SOUTHERN EXPRESS COMPANY.

Common Carriers — Unreasonable Restriction of Liability — Waiver of Stipulation Limiting Liability.

1. A stipulation by an express company contained in its bill of lading that it shall not be liable for loss or damage, unless demand of payment therefor is made within thirty days from the date of the bill of lading, is an unreasonable restriction of its liability.

2. Such stipulation, even if not unreasonable, was waived by stating, in answer to the shipper's demand for the return of the package, that the company was searching for it and, when found, by accepting the shipper's instructions to sell it.

ACTION, tried at January, 1897, Special Term of FORSYTH before *Hoke, J.*, and a jury.

The plaintiff complained for the non-payment of the sum of seven dollars, the value of a package delivered by it to the defendant to be sent C. O. D. to Westville, S. C., from Winston, N. C.

It appeared from the testimony that the package was delivered to defendant for shipment on 28 October, 1892; that the time between Winston, N. C., and Westville, S. C., was two or three days; that hearing nothing of the package, plaintiff ordered its return, whereupon, after tracing it, the defendant located it at Westville and asked for instructions, and on 29 November, 1892, plaintiff sent instructions to sell package for $6 or to return it; that not having any report from defendant, plaintiff made two or three claims or demands for the package, to which no attention was paid until in July, 1893, defendant notified plaintiff that the package had been stolen. Plaintiff then made written demand for the package on 25 July, 1893, which has never been complied with.

Defendant relied upon the statute of limitations and on a stipulation contained in its bill of lading that the company should not be
(352) liable for any loss or damage unless the claim therefor should be presented in writing within thirty days after date of bill of lading. His Honor held that the stipulation relied on by defendant was unreasonable, and if not, it was waived by conduct of defendant, and the cause of action having accrued in July, 1893, the action was not barred.

There was verdict followed by judgment for the plaintiff and defendant appealed.

Messrs Jones & Patterson for plaintiff.
Messrs. Watson & Buxton for defendant (appellant).

CLARK, J. The stipulation that the defendant should not be liable for loss or damage, unless demand was made in writing within thirty days from the date of bill of lading, was held an unreasonable restriction of the common law liability of a common carrier and void in *Cigar Co. v. Express Co., ante,* 348. But, aside from that, the defendant waived this stipulation and is estopped by answering plaintiff's demand for return of the package that it was searching for it, and then, when it was found, accepting plaintiff's instruction to sell the same. It was not until July, 1893, that the defendant notified the plaintiff that the package was

stolen. The demand in writing was made within thirty days, and action was brought within three years (The Code, 155, 1) after that date.

No error.

Cited: Mfg. Co. v. R. R., 128 N. C., 283; *Deans v. R. R.,* 152 N. C., 172; *Forney v. R. R.,* 167 N. C., 642.

(353)

F. E. SHOBER ET ALS. v. W. H. WHEELER ET ALS.

Judgment—Effect.

In an action to set aside certain deeds as fraudulent and to foreclose a mortgage, a commissioner was directed to sell all of the defendant's real estate mentioned in the complaint, except that part allotted to defendant as a homestead (which excepted part was included in the mortgage foreclosed); the commissioner sold one of the tracts, but his report was not confirmed. Subsequently, the Court ordered the commissioner to sell the rest of the part allotted as a homestead, in case the other property did not sell for enough to discharge the liens: *Held,* that the effect of the first judgment was not a final adjudication, vesting title to the homestead in the defendant, so as to render inoperative and void the subsequent order.

ACTION, heard before *Hoke, J.,* at August Term, 1896, of FORSYTH, upon the report of a commissioner, who had been directed to sell the lands described in the complaint.

The defendant appealed from the order confirming the sale of the lands embraced in the mortgages, a part of which had been allotted to him as a homestead, and which, in the original order of sale, the Commissioner had been directed not to sell, but by a subsequent order he was directed to sell in case a resort to it should be necessary to discharge the liens.

Messrs. Watson & Buxton for plaintiffs.

Messrs. Jones & Patterson, J. S. Grogan, A. H. Eller and A. E. Holton for defendants (appellants).

MONTGOMERY, J. In the judgment of December Term, 1893, *Judge Winston* appointed W. B. Stafford receiver "of all the land and real estate described in the complaint in this action." That part of the real estate of defendant (appellant), which was allotted to him as a homestead, after the execution of the mortgage set out in the com-

(354) plaint, was included in the tract called in the complaint the "Home Place." Stafford was also made a Commissioner and was instructed to sell the land mentioned in the complaint except the part which had been allotted to the defendant as his homestead, and also to report to the court the particulars of the judgment and mortgage indebtedness of the defendant. The Commissioner exposed one of the tracts of land to public sale and reported the same to the court, but the report was not confirmed. Afterwards *Judge Bryan,* by another order in the cause, instructed the Commissioner to make sale of the property and report to the next term of the court. In this order he directed the Commissioner to sell also the homestead if, after having sold the other real estate, the amount of the sales from that source should appear insufficient to pay the mortgage liens. An exception was noted to the order of *Judge Bryan* and the same is brought up on appeal.

In the argument here the contention of the defendant was that the judgment of *Judge Winston* was one of consent, final in its character and in some way or other passed the title and right of possession of the homestead to the defendant, and that *Judge Bryan's* decree, ordering the homestead to be sold under the contingency therein named, was void.

We fail to see that the judgment of *Judge Winston,* at December Term, 1893, was by consent in the sense that the homestead of the defendant was to be exempted from the mortgage debt of the defendant. There is no such adjudication in the order. *Judge Winston* and the counsel no doubt thought that the real estate conveyed in the mortgages, other than that part which had been allotted to the defendant as a homestead, would be sufficient to pay the mortgage debts and therefore the sale of the homestead would not be necessary. But, when later on it appeared that it would be necessary to sell all of the real estate,

(355) including the homestead, to pay the mortgage debts, *Judge Bryan* made the decree ordering the sale of the homestead under the contingency named. The exception to that order and judgment cannot be sustained. The exception to the judgment of *Judge Hoke,* made at the August Term, 1896, was abandoned here.

No error.

WACHOVIA LOAN AND TRUST COMPANY, RECEIVER OF J. W. ALSPAUGH, v. W. S. FORBES ET AL.

Action to Set Aside Fraudulent Conveyance—Fraudulent Intent—Trial —Burden of Proof—Evidence—Dealings Between Mortgagor and Mortgagee.

1. Where, in the trial of an action to set aside a sale as fraudulent, it appeared that the relation of the parties to the sale was not such as to raise a presumption of fraud, the burden of proving fraudulent intent was properly put upon the plaintiff.
2. Where, in the trial of an action to set aside a sale as fraudulent, the trial judge, in reciting the several grounds on which the jury might find a sale void, as in fraud of grantor's creditors, inadvertently used the conjunction "and," but in a subsequent part of the charge stated the grounds properly, connecting them with the disjunctive "or": *Held*, that the error was cured.
3. Where the burden of proving the *bona fides* of a transaction is upon the defendant, he may, without introducing any evidence, rely on evidence introduced by the plaintiff from which, if sufficient, the jury may find the transaction to have been in good faith.
4. Inadequacy of price will not, in itself, vitiate a transaction; and, where a pledgee of stocks of the face value of $21,000 bought them from the pledgor for $7,000, and the jury found that the transaction was *bona fide*, but that the stocks were worth $8,500, the sale will not be declared a legal fraud and void.

ACTION, brought by the plaintiff corporation, as receiver of (356) the estate of J. W. Alspaugh, to set aside the sale of certain stocks by the said Alspaugh to the defendant, who held them, at the time of the sale, as collateral for a debt due to him, and tried before *Brown, J.*, and a jury, at December Term, 1895, of FORSYTH. The facts sufficiently appear in the opinion of the court. The issues were found in favor of the defendants, and from a judgment dismissing the action the plaintiff appealed.

Messrs. Jones & Patterson and A. E. Holton for plaintiff (appellant).
Messrs. Watson & Buxton, Glenn & Manly and H. R. Scott for defendants.

FURCHES, J. This case discloses these facts: That the defendant Alspaugh being in debt to the defendant Forbes had, in 1893, executed to Forbes a mortgage deed on real estate for $10,000, which mortgage had not been registered on 9 February, 1894; that prior to 9 February, 1894, the defendant Alspaugh had borrowed of defendant Forbes other

sums of money, not embraced in the $10,000 mortgage, to the amount of $7,000; that as a security for this last-mentioned sum the defendant Alspaugh had pawned with the defendant Forbes certificates of stock which he owned in the Empire Plaid Mills, in the A. H. Motley Tobacco Co. and the Cumberland Mills Co., three corporated companies under the above names, amounting in the aggregate to over $21,000 par value; that on 9 February, 1894, the defendant Alspaugh sold these stocks to the defendant Forbes for the sum of $7,000, or in other words, in payment of the debt for which they were pledged. Alspaugh was badly insolvent at this time, of which fact the defendant Forbes had
(357) notice, and on the next day (10 February), Alspaugh made a general assignment to D. Schenck, as trustee. The plaintiff, as receiver, appointed at the instance of judgment creditors, institutes this action to vacate this sale of stock by defendant Alspaugh to defendant Forbes, upon the ground of fraud.

The defendant Forbes answers and denies the allegation of fraud. But he admits in his amended answer that on 9 February, 1894, and for a long time before that, he had in his possession the stocks mentioned, which he held as security for $7,000 loaned to the defendant Alspaugh. And on that day it was agreed between him and Alspaugh that he should become the absolute owner of them, and he "thinks" he surrendered to Alspaugh the notes he held as evidence of this $7,000 indebtedness.

On the trial the defendants offered no evidence. But plaintiff offered in evidence a deposition of defendant Forbes, taken in another action, as declarations and admissions of said Forbes. This deposition furnished evidence tending to show knowledge of Alspaugh's insolvency on 9 February, 1894, and that Forbes took the stocks in satisfaction of the debt for which they were pledged, and that he did not know the value of said stocks, and made no inquiry of Alspaugh, nor any one else, as to their value. But it is also tended to show the *bona fides* of the transaction, and that he had paid $7,000 for them, which he alleges was a fair and reasonable price for these stocks.

The court submitted, without objection, the following issues to the jury:

"1. Was the sale and transfer of the stocks, described in the complaint, made on 9 February, 1894, by J. W. Alspaugh to W. S. Forbes fraudulent and void as to the creditors of Alspaugh? Answer: No."

"2. At the date of the said sale, towit, 9 February, 1894, and prior thereto, did defendant Forbes hold the said stock in his possession as collateral security for a debt then due to Forbes by Alspaugh, as al-
(358) leged in defendant's answer? Answer: Yes."

"3. If so, what sum was actually due and owing on said debt by Alspaugh to Forbes, 9 February, 1894? Answer: $7,070."

"4. What was the actual value of said stock at the time of said sale? Answer: $8,500."

In the charge of the Court the burden of proof upon the first issue (as to the fraudulent intent) was put upon the plaintiff. But upon the second issue (as to the transfer of the pledged stock by Alspaugh to Forbes) the Court put the burden as to the *bona fides* and full and fair consideration on the defendants. The plaintiff complains of this division of the subject by the Judge, and insists that the burden of both issues should have been put upon the defendants. We do not think so. The two issues were as distinct as if they had been in separate actions and were governed by different rules and distinct principles. There being no relation between the defendants that created a presumption of fraud as to the first issue, the burden was upon the plaintiff.

But as to the second issue, when it was shown and admitted that the defendant Alspaugh sustained the relation of pawner and Forbes that of pawnee as to the *stocks,* a relation similar to that of mortgagee with power of sale, the burden changed to the defendant. Story on Bailment (9 Ed.), section 322; *Rose v. Coble,* 61 N. C., 517. And it seems to be well settled in this State that where a mortgagee, with power of sale, purchases the reversion in the property mortgaged and the transaction is attacked, the burden rests upon the mortgagee to show that the sale was fair and that he had paid a fair and reasonable price (359) for the reversion. *Lee v. Pearce,* 76 N. C., 87; *Brown v. Mitchell,* 102 N. C., 347; *McLeod v. Bullard,* 84 N. C., 515, and 86 N. C., 210. And this being a pledge of *stocks* in which a sale without notice would pass the absolute title to the purchaser (Story on Bailment, *supra*), the bailee or pawnee must be subjected to the same burden of proof as the mortgagee, who purchases the reversion. The Judge who tried the case observed this rule and charged the jury upon this issue as follows: "In view of this admission (that he held these stocks as a pledge before 9 February, 1894), upon the part of the defendant, if you find the sale was made without fraudulent purpose and intent on the part of Alspaugh, the burden of proof shifts, and it becomes the duty of the defendants to show that such sale was fair and that it was made upon full and fair consideration, and, if the defendant fails to show that, then the law declares the absolute sale of the stocks void." This seems to us to be the law, and that it was fairly presented to the jury.

The learned counsel excepted to the charge of the Court where it is said more than once in the early part of the charge (upon the first issue) that if the jury should find that this transaction "was for the purpose of hindering, delaying and defrauding Alspaugh's creditors *and*

for the ease and comfort of defendant Alspaugh," it would be void. It was contended that, these being connected by the conjunction *"and,"* it made it necessary that the jury should find both the intent to defraud creditors and to give ease and comfort to Alspaugh, before they could find the transaction fraudulent. Whereas the finding of either would have been sufficient to invalidate the transaction. And it is true, as contended, that either would have been sufficient to avoid the transaction. But the Court further on in the charge says that if "Alspaugh was actu-
(360) ated by a purpose to hinder *or* defraud his creditors *or* by a purpose to give ease and comfort to himself," the transaction would be fraudulent and void. This distinct enunciation of the law in the latter part of the charge must, as we think, have corrected any erroneous impression that may have been conveyed by the former statement.

Judges, in the hurry that often attends trials in courts below, are liable to misuse a word sometimes; as for instance, the conjunctive *and,* where the disjunctive *or* should have been used. But the object of such trials is to get to the merits of the case, and where it appears that such slips have been cured, or that no harm could have come from them, we are unwilling to award a new trial.

The plaintiff further contended that as the burden was thrown upon the defendants, in the consideration of the second issue, and as the defendants introduced no evidence, it was the duty of the court to charge the jury that they should find that issue for the plaintiff, that is, that they should find the transaction to have been fraudulent. And this, at first thought, seemed to us to be so. But the plaintiff introduced the deposition of the defendant Forbes, which defendants had the right to use, as they did any other evidence introduced by the plaintiff. And this evidence, if believed, and that was a matter for the jury, tended to establish the *bona fides* and a fair if not full consideration paid by Forbes for the stocks.

There still remains one other question to be considered, and that is the value of said stocks which was found by the jury to be $8,500, this being $1,430 more than Forbes paid for the stocks. In considering this question several matters have to be considered.

It being found that there was no intentional fraud or *mala fides* in-
(361) volved in this transaction, the parties, Alspaugh and Forbes, stand as though they were dealing on equal footing—at arms' length. The question is then presented as to whether a chancellor would feel called upon to set aside a sale of stocks of the par value of $21,000 that had no marketable value and sold for $7,000 because it was afterwards found by a jury that they were in fact worth $8,500, upon the ground that the difference in the price paid and the actual value was so great that this alone constituted fraud—that such a transaction was

calculated to shock the moral sense, upon hearing it, and cause one to exclaim "Fraud!" *Potter v. Everett,* 42 N. C., 152. Indeed, it is doubtful whether a court of equity will set aside a conveyance upon the ground of inadequacy of price alone. *Osborne v. Wilkes,* 108 N. C., 651. This discrepancy is considerable ($1,430), and in a transaction where less was involved, or where the property sold had a fixed and known value, it would likely produce a different impression upon the mind. But stocks of this kind are of the most uncertain value of all properties. No matter how valuable the plant and outfit of the milling and manufacturing companies may be, their stocks are worth nothing until the liabilities are paid. So, after considering this matter fully, we cannot think that, if this transaction had been between parties on equal terms, any chancellor or court of equity would feel called upon to declare it a legal fraud and void. The judgment is

Affirmed.

Cited: Monroe v. Fuchtler, 121 N. C., 104, 105; *Davis v. Keen,* 142 N. C., 504; *Calvert v. Alvey,* 152 N. C., 613.

(362)

A. B. GORRELL ET ALS. v. J. W. ALSPAUGH AND L. I. HINE.

Deed Absolute on Face—Security for Loan—Mortgage—Trusts—Extinguishment.

1. A, an administrator, having license to sell land of his intestate, sold and conveyed it in January, 1881, to H, by deed absolute on its face, and co-incidentally borrowed $1,200 from H for his own use, and charged himself with the purchase price. In February, 1890, he borrowed another sum from H, who then gave him a bond for title, agreeing to reconvey the land to A upon the repayment of the aggregate of the two loans. In January, 1894, H having loaned other sums to A, they had a settlement whereby H surrendered all of A's notes, and A agreed to surrender the bond for title, which he subsequently did. A was not indebted to others in 1881. The deed to H was not recorded until 1893, before which time A became largely indebted: *Held,* that the deed so made to H was not, as to the administrator's creditors, a mortgage (since upon repayment of the loan the land would have reverted to A), but a resulting trust in favor of A, subject to the repayment of the loans, arose from the conveyance.
2. The giving of the title bond by H to A, in 1890, was only a written declaration of the original trust, and did not change its nature.
3. Such trust could not have been sold under execution against A, nor could it have been subjected to the payment of existing debts, except by an action in the nature of a bill in equity, and in that event the land would have been liable for the existing equity of H.

4. While an equitable interest in land may not be transferred by parol, it may be abandoned or released to the holder of the legal title by matter *in pais*, provided such intention is clearly shown; hence, the settlement made in 1894 between H and A, being in good faith, extinguished A's equitable rights and vested in H a fee simple title.

ACTION, tried before *Hoke, J.*, and a jury, at January, 1897, Special Term, of FORSYTH. The facts appear in the opinion. In deference to the opinion of his Honor, the plaintiffs submitted to nonsuit and appealed.

Messrs. Jones & Patterson and A. E. Holton for plaintiffs (appellants).

Messrs. Watson & Buxton for defendants.

(363) DOUGLAS, J. This is a suit by the creditors of Alspaugh to subject to the payment of Alspaugh's debts certain land conveyed to Hine by Alspaugh, as administrator of G. W. Norwood, by deed in fee dated 16 January, 1881, and recorded in 1893. The plaintiffs allege that while this deed was in form an absolute deed, it was, in fact, merely a security for money advanced by Hine to Alspaugh; and that Hine was never in truth the purchaser of the property, having never paid one dollar of the consideration recited in the deed, but that the same was paid by Alspaugh; that the deed was made upon the secret trust that Hine should *reconvey* to Alspaugh upon the payment of the loan; and that, therefore, the said deed was incapable of registration and void as to creditors. None of the debts herein sued on were incurred before 1891; and none were reduced to judgment before May, 1894. Upon the execution of the deed of 1891, Hine loaned Alspaugh $1,200 and also $2,000 on 8 February, 1890, when he executed to Alspaugh a bond for title to convey to Alspaugh, upon the payment of the said loans then aggregating $3,200, the land conveyed to Hine by said deed. At divers times on and prior to 8 January, 1894, Hine paid to or for Alspaugh sums of money which, with the $3,200, aggregated over $6,000, and on said day Hine and Alspaugh came to a full settlement, whereby Hine surrendered to Alspaugh all said evidences of debt, in consideration of which Alspaugh relinquished all interest in the land and agreed to surrender to Hine his bond for title. This bond was actually surrendered in January, 1896, being regarded in the *interim* by both parties as fully satisfied and cancelled. Upon the trial the plaintiffs ad-
(364) mitted in open court that there was no actual intent to defraud on the part of defendants, but claimed that the deed of 1881, under which Hine claimed, was fraudulent and void in law, and, under

the registry acts of the State, as against the claims and judgments of the plaintiffs. "The court having intimated an opinion that the rights of the *mortgagor* J. W. Alspaugh, under his bond, &c., having been all surrendered for valuable consideration and in good faith before plaintiffs' liens attached, and that the deed to defendant being on the registry and expressing the true contract of parties at the time before liens were obtained, the said deed was valid against the claims of plaintiffs. The plaintiffs, in deference to such intimation, submitted to a nonsuit and appealed."

We think there was no error in the intimation of his Honor, although we cannot agree with him in treating the deed of 16 January, 1881, as a mortgage. It was not intended as a mortgage, and had none of its essential features. Littleton, section 332, says: "If a feoffment be made upon such condition that if the feoffer pay to the feoffee, at a certain day, &c., forty pounds of money, then the *feoffer* may *re-enter;* in this case the feoffee is called *tenant in mortgage.*" "A mortgage at common law was a conveyance of land, sometimes in fee and sometimes of a lesser state, with a stipulation called a clause of *defeasance,* by which it was provided that in case a certain sum of money were paid by the feoffer to the feoffee, on a day named, the conveyance should be void, and either the estate should by virtue of the defeasance, *revest* in the *feoffer,* or *he* should be entitled to call upon the feoffee for a *reconveyance* of the same." Bispham's Eq., section 150. Practically the same definition is given in Pingrey Mortgages, section 6. In all definitions of a mortgage the estate reverts to the *grantor or feoffer.* Fetter Eq., section 141; Abbott Law Dict., 130; 4 Kent Com., 136. (365)

In this State, mortgages are practically the same as at common law, with the exception of the equity of redemption and the equitable incidents pertaining thereto.

In this case the deed was made by said Alspaugh as administrator of the estate of G. W. Norwood to said Hine, reciting that, by virtue of an order of the Superior Court of Forsyth County and after due notice, he sold the land at public auction to said Hine, he being the highest bidder, at the price of $235. It is alleged in the complaint that one Tise bid off the land, but this fact is neither positively admitted nor proved, and in any event is immaterial, as he sets up no claim whatever. Alspaugh, as administrator, and Alspaugh, as an individual, are entirely distinct personalities in law. If, as administrator, he sold to himself, or to a stranger to hold in trust for himself, his deed was *voidable,* but not *void,* and he could be held to account only by the heirs at law or creditors of Norwood. This deed was not intended as a mortgage and cannot be construed as such, for in the event of its defeasance the land would revert to the heirs of Norwood. The legal title never

was in Alspaugh, but remained in the heirs of Norwood until it vested in Hine by operation of the deed made by Alspaugh merely as the hand of the court. It cannot be said that the legal title to land sold under execution ever vests in the sheriff, but in proper cases his deed is valid because he sells as the agent of the law under the mandate of the court. If he sells to another for the benefit of himself, his deed therefor, however tainted, can in no sense be construed into a mortgage, because in case of defeasance the land could never revert to him.

The deed of 16 January, 1881, made by Alspaugh, as administrator, was *intended* to convey to Hine a fee simple estate in the land,
(366) and did convey such an estate, subject to impeachment only by the heirs or creditors of Norwood. But it is admitted that Alspaugh alone paid for the land by charging himself as administrator with its purchase price, and that the $1,200 paid by Hine to Alspaugh coincidently with the execution of the deed was a mere loan. This being true, its effect was to raise in favor of Alspaugh a *resulting* trust in the land subject to the repayment to Hine of the money loaned. 1 Perry on Trusts, p.___; Lewin on Trusts, 143; 2 Story Eq. Jur., 1201; Bispham Eq. Jur., section 79; *Pegues v. Pegues,* 40 N. C., Eq., 418; *Hargrave v. King, ibid.,* 430; *Cunningham v. Bell,* 83 N. C., 328; *Thurber v. La Roque,* 101 N. C., 301; *Summers v. Moore,* 113 N. C., 394. Trusts are of various kinds, but may be divided generally into *express* and *implied,* the latter being raised by operation of law, either to carry out the presumed intention of the parties or to protect against fraud. Implied trusts are either *resulting* or *constructive.* Resulting trusts are of four kinds, as usually defined, only one of which need now be considered. In this State all implied trusts are generally denominated *parol* trusts, referring to their origin and nature of proof rather than their incidents and results. Some eminent authorities, as Lewin and Perry, make a separate division of *implied* trusts as distinguished both from resulting and constructive trusts; but this distinction does not seem to be recognized in this State, nor, indeed, in the statute of frauds (29 Charles II chap. 3, sec. 8) which refers to a trust "arising or resulting by implication or construction of law." See also Bispham Eq., p. 118; I Pomeroy Eq., p. 136, sec. 155; Story Eq. Jur., sec. 980; Bouvier Law Dict.; Wharton Law Lex.; Stimson Law Glossary.

The rule as to the kind of resulting trusts, herein considered, almost universally adopted by text writers and approved by the courts, is that of *Lord Chief Baron Eyre,* in *Dyer v. Dyer,* 2 Cox, 93, which is
(367) as follows: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether taken in the names of the purchaser and others jointly or in the names of others without the purchaser, whether in one or several, whether jointly or

successive, *results* to the man who advances the purchase money." This rule, of course, is not intended to apply to property purchased in the name of a wife, child or near relative, which is usually brought under the rule of advancements.

Resulting trusts, arising by operation or construction of law, do not come within the statute of frauds, and may be proved by parol. Lewin, *supra,* p. 667; Fetter *supra,* sec. 128; Bispham, *supra,* sec. 80; 10 Am. & Eng. Enc., 25 and 26; *Foy v. Foy,* 3 N. C., 296; *Shelton v. Shelton,* 58 N. C., 292; *Riggs v. Swan,* 59 N. C., 118; *Whitfield v. Gates, ibid.,* 136; *Shields v. Whitaker,* 82 N. C., 516. In fact, in this State they are generally known as "parol trusts." 6 N. C. Digest, 466; 7 *ibid.,* 431, and cases cited. As such trusts are incapable of registration they cannot be affected by the registry laws.

At the time this trust arose Alspaugh does not appear to have owed any one but Hine. Even if there had then been outstanding debts of Alspaugh, Hine, holding the legal title, together with an equitable lien upon the resulting trust, occupied a strongly defensive position.

This equity could not have been sold under execution, as it was not a pure and unmixed trust. *Everett v. Raby,* 104 N. C., 479; *Love v. Smathers,* 82 N. C., 369. In *Hinsdale v. Thornton,* 75 N. C., 381, *Pearson, C. J.,* says: "Where one has an estate in equity, viz., a *trust estate,* which enables him to call for the legal estate without further condition, save the proof of the facts which establish his estate, this trust estate is made the subject of sale under *fi. fa.* But where one has (368) only a *right in equity* to convert the holder of the legal estate into a trustee and call for a conveyance, the idea that this is a trust estate, subject to sale under *fi. fa.,* is new to us." The only remedy of existing creditors would have been an action in the nature of a bill in equity. *Jimmerson v. Duncan,* 48 N. C., 537; *Gowing v. Rich,* 23 N. C., 553; *Gentry v. Harper,* 55 N. C., 177; *Morris v. Rippy,* 49 N. C., 533; *Love v. Smathers, supra.* Even then it would have been liable for the existing equity of Hine. The bond for title given by Hine to Alspaugh on 8 February, 1890, did not change the nature of the trust, but was simply a written declaration thereof.

While an equitable interest in land may not be *transferred* by parol, it may be *abandoned* or *released* to the holder of the legal title by matter *in pais,* provided such intention of the parties is clearly shown. Brown on Statute of Frauds, p. --; 1 Greenleaf Ev., 302; 2 Story Eq., Jur., 770; *Cumming v. Arnold,* 3 Met., 494; *Faw v. Whittington,* 72 N. C., 321; *Miller v. Pierce,* 104 N. C., 389; *Falls v. Carpenter,* 21 N. C., 237; *Banks v. Banks,* 77 N. C., 186; *Herren v. Rich,* 95 N. C., 500; *Holden v. Purefoy,* 108 N. C., 163; *Taylor v. Taylor,* 112 N. C., 27; *Fortune v. Watkins,* 94 N. C., 304. In *McDougald v. Graham,* 75

N. C., on p. 316, *Pearson, C. J.*, says: "We conclude that by force of sale and the cancellation of the notes and title bond, the defendant became the absolute owner of the land." In *Taylor v. Taylor,* 112 N. C., on p. 30, *Avery, J.*, says: "Where the vendee enters under a bond for title and has executed notes for the purchase money, which are held by the vendor, the surrender of bond and the notes by the holders to the maker and obligor, respectively, has been repeatedly declared such a renunciation as would annul the contract of purchase."

(369) It is not disputed that in the settlement of 8 January, 1894, it was the clear intention and agreement of the parties that Alspaugh should abandon and release to Hine all interest in the land, and that in pursuance thereof Alspaugh subsequently surrendered Hine's bond for title, and Hine immediately surrendered Alspaugh's notes equal in amount to the full value of the land, and entered in possession of the premises.

This settlement, being in entire good faith, extinguished all of Alspaugh's equitable rights in said property and, by annexing the beneficial ownership to the legal title, vested in Hine a fee simple estate, certainly as against any of the plaintiffs. As we have seen, unless the deed of Alspaugh, as administrator, conveyed a fee simple, then the title remained in the heirs of Norwood. If, to its character as a fee simple deed, we superadd the qualities of a mortgage, we are forced to the following remarkable conclusions:

1. That the same instrument can be the deed of one party and the mortgage of another; 2. That a mortgage can be made by one having neither the legal nor the equitable title; 3. That a presumed defeasance can *revest* land where it was never *vested,* and can cause it to *revert* to one who never owned it. We do not feel called upon to adopt so novel and strained a construction simply to create a constructive fraud in law where it is *admitted* that no *actual* fraud exists in fact.

FURCHES, J., dissenting: On 16 October, 1879, the defendant Alspaugh, as administrator of Norwood, sold the real estate in controversy at the price of $235, at which sale the plaintiffs allege that one Tise bid off the property for the defendant Alspaugh. This property was a vacant lot in the city of Winston at the time of the sale. And it is

(370) alleged, and not denied, that Alspaugh took charge of the property, claiming it as his own, and soon after the sale erected thereon a brick store house, and that he continued to use, rent and control the property as his own until 8 January, 1894; that on 16 January, 1881, the defendant Hine loaned the defendant Alspaugh $1,200—using the exact language of the defendant Hine in his testimony, "I loaned that money; I did not pay him anything." And he further says,

"Alspaugh gave note for $1,200, all I advanced to him that day." He also says he never paid the $235 purchase money and supposes Alspaugh did, and that he supposes the matter was understood by the defendant Alspaugh and Tise. Hine further says in his testimony: "The first debt was contracted 16 January, 1881, for $1,200 for money borrowed, for which he (Alspaugh) gave me his note. He made me a deed to the postoffice lot, and I agreed verbally to convey it back to him when he paid this debt. The next debt was contracted 18 February, 1890, for $2,000 for borrowed money." And at this date he gave Alspaugh a bond to reconvey the property to him upon his paying the two notes, amounting to $3,200. That Alspaugh afterward borrowed other money of him, and he had no security for any of it except the deed dated 16 January, 1881. Hine further testifies that on 8 January, 1884, he and Alspaugh had a settlement, when it was ascertained that Alspaugh owed him for borrowed money and for debts he paid for Alspaugh on that day, where he was bound as surety, the sum of $6,000; that it was then agreed that he should hold the deed of 1881 and become the absolute owner of the property, and that at that time he surrendered to Alspaugh the notes he held against him, and Alspaugh agreed to surrender to him the bond for title, but this was not actually delivered to the witness until a short time before the trial, that he charged interest on the debts he held against Alspaugh, until the time of this settlement in (371) January, 1894, and Alspaugh received the rents for the property to that time, and that he has been controlling, improving and receiving the rents since that date; that this deed of 16 January, 1881, was registered in August, 1893.

This, to my mind, so clearly makes this deed from Alspaugh to Hine a mortgage, without a clause of defeasance, that it would seem almost unnecessary to cite authorities to show that it is. But as it is not admitted that it is a mortgage, indeed, as it is contended that it is not a mortgage, I will cite some of the authorities which, I think, sustain my position that it is a mortgage.

Where it is shown that the conveyance is a security for debt, and that was the real object of the conveyance, it is a mortgage. Bispham, sec. 154.

If the conveyance is to secure a debt, it is a mortgage, whether it is absolute in form or has a clause of defeasance. 3 Pomeroy Eq. Jur., sec. 1192, note 1.

An absolute deed is a mortgage if it is a security for debt. 3 Pomeroy, *supra,* sec. 1196.

The true test as to whether it is a mortgage is, whether it was given as a security for debt. "Once a mortgage, always a mortgage." Pomeroy, *supra,* sec. 1193. At the time of making a mortgage, the mortgagor

cannot waive his right to redeem. Bispham, sec. 153. "Once a mortgage, always a mortgage." And if once a mortgage, the parties cannot, by any stipulation between them, "no matter how explicit," change it from a mortgage to an absolute conveyance. Pomeroy, sec. 1194.

An absolute deed made as *security* for money is, in effect, a mortgage, and cannot be *registered,* and is *void* as to creditors. *Gulley v. Macy,* 84 N. C., 434; *Gregory v. Perkins,* 15 N. C., 50.

(372) An absolute deed intended as a security for debt, or an indemnity for a liability, cannot afterwards be changed into an absolute conveyance. And as it is a mortgage, without a clause of defeasance, or a security for debt, it cannot be registered and is void as to creditors. *Halcombe v. Ray,* 23 N. C., 340.

And the mortgagor and mortgagee, or grantor and grantee (if you choose to call them so), cannot afterwards, by any agreement between them, change this deed into an absolute conveyance. They may agree that the grantee shall surrender his debts in full payment and satisfaction of the fee simple interest, and this will not change the estate into an absolute estate. And though the deed be redelivered, still the transaction will be fraudulent and void as to the creditors of the grantor at the time or before this agreement took place, by which the grantee agreed to surrender his debts and hold the deed as an absolute conveyance. *Halcombe v. Ray, supra.* Indeed, every phase of the case now under consideration is discussed and decided by this strong, clear, ringing opinion of *Chief Justice Ruffin.* And before passing upon the case now before the court we should read and consider well the opinion in *Halcombe v. Ray.*

The intelligent Judge who tried this case below called this conveyance, from the defendant Alspaugh to the defendant Hine, a "mortgage" and treated it as such, although he held that the plaintiffs were not entitled to recover. When it gets here and is considered under the light of authorities, which the court below probably did not have at hand, it is found that it cannot be sustained if it is called a *mortgage.* And, therefore, it is sought to sustain this transaction between Alspaugh and Hine by calling it a *trust.* But whether you call it a mortgage or a trust, the facts and the transaction are the same. It is still a *security*

(373) *for debt,* as said in *Gulley v. Macey, supra,* and as is said in every authority I have consulted during this investigation. And the diligence of counsel have furnished us none to the contrary. But suppose you call it a trust, it is a trust for the security of a debt. And how this can benefit the defendants I confess my inability to see. Trusts for the security of debts stand precisely on the same footing as mortgages—both are void as to creditors until they are registered. Code, sec. 1254. And an absolute deed, with a secret or verbal trust for the

benefit of the grantor, can no more be registered than a mortgage without a clause of defeasance. *Womble v. Battle,* 38 N. C., 182; *Blevins v. Barker,* 75 N. C., 436. But this is too plain to require argument or authority. The mortgage without the defeasance cannot be registered, because it does not show the whole transaction; in other words, it does not tell the truth. The absolute deed, with a secret or verbal trust, is incapable of being registered for the same reason; it does not tell the truth. And the deed from Alspaugh to Hine did not tell the truth. Besides, its not having a clause of defeasance, it is said it was made in consideration of $235, paid by Hine, which is not true. The defendants are endeavoring to escape the force and conclusiveness of the authorities cited, by calling this deed, from Alspaugh to Hine, *a parol trust,* and to work out a defense under the doctrine enunciated in *Shelton v. Shelton,* 58 N. C., 292; *Riggs v. Swan,* 59 N. C., 118, and that line of authorities.

"The doctrine stated in these cases is not disputed, but it has no application here. The doctrine of these cases is that where A buys land and has the deed made to B, with a parol trust in favor of C, this is good; for the reason that such conveyances are within the statute of frauds and no *creditors are interested.* And so is this deed, from Alspaugh to Hine, good as between the parties, but not good as (374) against the creditors of Alspaugh. Nor can it be made good by registration, for the reason that it cannot be registered. And as *Lord Coke* would say, "herein lies the diversity" between this case and *Shelton v. Shelton, supra,* and that line of cases, and brings it within the doctrine enunciated in *Halcombe v. Ray, Gregory v. Perkins, Gulley v. Macey,* and that line of authorities.

The defendants also attempt to distinguish this case from *Halcombe v. Ray, Gregory v. Perkins,* and *Gulley v. Macey,* upon the ground that Alspaugh did not have the legal title, which they say was in the heirs of Norwood. But if he did not have the legal title, he had bought it through Tise and had paid for it in 1880, as his report shows. And this gave him an equitable estate in the lot, and no one is interested in the legal title but Norwood's heirs, and they are not complaining. Indeed, it must be supposed that they have ratified the sale made, and the purchase money paid seventeen or eighteen years ago, and no complaint made by them until now. This deed put the legal title in Hine, even as against Norwood's heirs. *Highsmith v. Whitehurst, ante,* 123. But if Alspaugh only had the equitable title, he had the right to mortgage this. *Bank v. Clapp,* 76 N. C., 482; *White v. Jones,* 88 N. C., 166.

But there is another reason why the defendants cannot avail themselves of this plea, even if it could do them any good, and I do not think it could. And that is this: They are estopped to do so. The

defendant Alspaugh cannot do so. He cannot defeat the claims of creditors, upon the ground that he is not the legal owner of the property. In fact he makes no such defense. He does not even file an answer. Hine cannot do so, as he holds under Alspaugh, and agreed to reconvey to him upon Alspaugh's paying him the money he had loaned
(375) him. It would be singularly strange if both Alspaugh and Hine, or either of them, should be in a better condition than they would be if Alspaugh had owned the absolute, undisputed, legal and equitable estate in this lot. I cannot give my assent to such a proposition.

The plaintiffs put in evidence the report of Alspaugh, showing that Tise was the purchaser of the lot at the price of $235, and Alspaugh's settlement of the Norwood estate showing that Alspaugh had charged himself with this sale and had settled for the same. And the undisputed evidence was that all the debts of the plaintiffs were made before 8 January, 1894, the alleged date of settlement, these debts having been made in 1891, 1892 and 1893. This being so, they were brought within the rule laid down in *Halcombe v. Ray,* and the plaintiffs were entitled to have the deed from Alspaugh to Hine, dated 16 January, 1881, declared void as to their debts. Upon the allegations in the complaint and the admissions in the answer, the evidence of the defendant Hine, and the undisputed evidence as to the date of the plaintiffs' debts, it was the duty of the Judge to charge the jury that, if they believed the evidence, they should find the first, third and fourth issues in the affirmative.

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

Cited: S. c., 122 N. C., 560; *Hemmings v. Doss,* 125 N. C., 402; *Ray v. Long,* 132 N. C., 896; *Avery v. Stewart,* 136 N. C., 435; *Mayo v. Staton,* 137 N. C., 681; *May v. Getty,* 140 N. C., 316; *Redding v. Vogt, ib.,* 568; *Lewis v. Gay,* 151 N. C., 170; *Lummus v. Davidson,* 160 N. C., 480; *Brogden v. Gilson,* 165 N. C., 21; *Rouse v. Rouse,* 167 N. C., 210.

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S. W. RAINEY v. R. B. HINES.

Action to Recover Land—Estoppel in Pais—Representations.

1. In order that a representation or statement as to an intended abandonment of an existing right or claim to property, made to influence another, shall become an estoppel, it must appear that the person has acted under such representation to his injury.

2. Plaintiff and one T agreed to exchange lands. T, without having obtained a deed, sold the land to one B, who gave notes and a mortgage on the land as security. T being indebted to defendant, H, transferred the B notes to H, who brought suit against B for foreclosure, obtained judgment, and had a commissioner appointed to sell, but before the sale, went to the plaintiff R, who was not a party to the foreclosure suit, and inquired whether he had any claim against the land, and upon his assurance that he had no claim, and upon his advice to "go ahead and sell the land," defendant directed the commissioner to sell, and bought the land, though he knew that both T and B were insolvent, and that T had never had a deed from R. Plaintiff thereupon brought this action to recover possession of the land, and for a sale thereof to reimburse himself for expenditures he had been compelled to make in clearing the title to the land which he had taken in exchange from T.: *Held*, that no injury resulted to H from the representation of R, and the latter is not estopped thereby.

ACTION, for the recovery of land, tried before *Hoke, J.*, and a jury, at January, 1897, Special Term, of FORSYTH. Under the instructions of his Honor, the jury rendered a verdict for the defendant and plaintiff appealed.

Messrs. Watson & Buxton for plaintiff (appellant).
Messrs. Jones & Patterson for appellee.

MONTGOMERY, J. The plaintiff, in 1890, being the owner of the tract of land in Forsyth County, which is the subject of this action, entered into an agreement in writing with the defendant Thomas, to exchange the land for a tract belonging to Thomas in Henry County, Va., the plaintiff to pay about $2,000 to boot in the exchange, and (377) each party to clear his respective tract of all incumbrances. The plaintiff, after he had paid the amount in difference and had received a deed from Thomas to his tract of land, discovered that there were incumbrances on the Thomas tract conveyed to him for a large amount, and he was compelled to pay them off to make secure the title and hold the land; and he refused to make a deed to Thomas to his original tract of land until Thomas should reimburse him for the sums he had paid out. The plaintiff prayed for possession of the land and that it might be sold under the order of court in order that he might be reimbursed the sum he had been compelled to pay out.

The defendant Hines, in his answer, sets up title to the land and avers that the defendant Boles, who is in the actual possession, is his tenant. Hines avers further, that Thomas, after he took possession under the exchange agreement between Thomas and Rainey, sold the same to Boles and took his note for the purchase money secured by a mortgage on the land; and that, for a debt which Thomas owed to him (Hines), Thomas assigned to him, as a collateral security, two of these

notes. Hines further answers, that in an action to foreclose the mortgage of Boles to Thomas (Rainey not being a party) a sale of the land was ordered, a commissioner appointed, the property sold and a deed made to Hines, the purchaser, by the commissioner. The jury, in response to one of the issues, found that the plaintiff Rainey had paid out a large sum to creditors of Thomas on account of valid incumbrances that were on the land in Virginia at the time of the exchange, for which Thomas and the land were liable.

On the trial the defendant Hines introduced his deed from the commissioner to the land, and testified himself, as a witness, to mat-
(378) ters *in pais* which he contended worked an estoppel on the plaintiff as to any recovery in this action. He testified that after he had procured, in the action for foreclosure, the order of sale above referred to and had the commissioner appointed to make the sale, knowing that Rainey was not a party to the action, he went to Virginia to see him concerning his claims on the land (the subject of this action) growing out of the exchange with Thomas; that, in a conversation with the plaintiff, he asked the plaintiff if Thomas owed him anything on the Germantown farm (the land in controversy), and he answered "No; we have had our settlement and neither owes the other anything. Go along and sell the property under your judgment. You can go ahead, Mr. Hines, and I will not bother you." The plaintiff Rainey denied having made this statement or any one like it to Hines or any one else.

On this question of estoppel the jury found for the defendant, the issue being in these words: "Is plaintiff estopped by his statement to defendant Hines from asserting his claim for incumbrance against said defendant Hines and against the land?" The exception of the plaintiff is to the instruction of the court on the issue of estoppel. The instruction is in the following language: "On the seventh issue the defendant insists that if plaintiff has an incumbrance on the land, he cannot maintain it, because by his statement he is estopped from asserting it in court; that he has, by his language and statement, put himself in such a position that he cannot now assert his claims; that before defendant bought, he interviewed plaintiff, who told him that he had no claim; that he had settled with Thomas; to go on and buy the land. Plaintiff denies that he made such statement, and says that he distinctly asserted that he had such claims and would maintain them against the land. Now, when one man intentionally acts or speaks so as to mislead another and induces him to believe a certain state of facts exists,
(379) and the other relying on such statement pays out money and assumes contracts or obligations by reason of them, the party who makes such statements will be required to make his words good. He will not be permitted afterwards to assert the contrary; he is.

estopped to deny that his statements are true or to assert legal rights inconsistent with them, to the injury of another. If the jury are satisfied that before Hines bought he consulted with plaintiff, and plaintiff told him he had no claims on the land, to go on and buy, and defendant, acting on those statements and by reason of them, bought the land and paid for it, the plaintiff cannot now assert such claims; he is estopped, and the answer to the seventh issue should be 'Yes.' If the jury are not so satisfied, they should answer the seventh issue 'No.' In this they shall be governed by the greater weight of testimony, not the greater number of witnesses necessarily, but in the judgment of the jury the testimony of defendant must have the greater weight." Then, after summing up the testimony, the Judge added: "If defendant has satisfied you by the greater weight of evidence that these statements were made and that defendant bought and paid for the land, relying on them, the issue should be answered 'Yes,' otherwise it should be answered 'No.'"

The alleged ground of estoppel against the plaintiff falls under the head of representations or statements in relation to an intended abandonment of an existing right or claim in property, made to influence another, and by which that other has been induced to act. Before the plaintiff could have been estopped, it must have been shown that the defendant Hines not only acted on the representations which he alleged that the plaintiff had made to him, but that he acted to his *injury* and *damage* if the plaintiff should be allowed to make any statement to the contrary. In judicial proceedings the truth of a transaction must always be allowed to be told, and the rights of property and person protected, unless the party who desires to make the truth (380) known has, by his own conduct, so acted as to cause another person to act to his injury, thereby making it equivalent to a fraud in fact or in law, if the person making the statement should attempt to contradict it or show to the contrary. The law, as administered in this State, does not favor estoppels, and as to estoppels by matter *in pais* it may be said that, unless a person has induced another by representations or declarations to alter his position injuriously to himself, he will not be estopped to disclose the true state of facts in reference to the matter in dispute. The fundamental principle on which the doctrine of estoppel rests is an equitable one—a principle which is intended to suppress fraud and to compel just and fair dealings between all. On no principle of fair dealing and equity can it be said that one should be estopped to protect his rights in a matter because of his statements or conduct in reference thereto and upon which another has acted, but without prejudice to his interests. It cannot, with consistency, be said that a man has taken advantage of his own wrong where his statements have not dam-

aged or injured another. Bigelow in his Institutes, prefixed to his work on Estoppel, at p. 27, writes: "It (the representation) must have been acted upon to the damage of the party acting." The same author, in the same book, at p. 644, elaborating the principle above referred to, says: "It is not enough that the representation has been barely acted upon; if still no substantial prejudice would result by admitting the party who made it to contradict it, he will not be estopped." The same principle is laid down in Herman on Estoppel, sec. 797, in these words: "There can be no estoppel in equity, or in any principles of equity, unless the person who asks relief from the rigor of the law is a
(381) purchaser in the large and liberal sense in which the term includes all who have given value or changed their position for the worse in reliance on the act or declarations of others." And the same author, in the same work, at sec. 759, says: "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was induced to act upon it, in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." To the like effect are the cases of *East v. Dolihite,* 72 N. C., 562; *Adler v. Pin,* 80 Ala., 351; 47 Conn., 190; 67 Iowa, 14; 25 Pa. St., 449.

Now, if we apply the principle laid down in the text books referred to and announced in the above Supreme Court decisions, that is, that an essential element of estoppel is injury, as the legal result of a representation or declaration made by one to another, to the facts in this case, it will be seen that the defendant Hines has not been injured, nor could he have been injured in acting upon the representations which the jury found that the plaintiff made to him. Hines does not stand in the relation of a stranger to the action which he brought against Thomas and Boles to foreclose the mortgage, who wished to buy the land at the commissioner's sale and to pay cash down for it, who had heard of some claim which the plaintiff in this action set up to the land, and who was desirous to learn the nature of that claim before he should invest his money in the purchase. If such had been the fact, then the statement of the plaintiff would have estopped him to deny or contradict the declaration. But Hines was the plaintiff in that action of foreclosure, was the owner of the notes of Boles, the purchaser, from Thomas, secured by a mortgage upon the land; he had already brought the
(382) suit, procured the order of sale, had had appointed the commissioner to make the sale, and at the last named stage of the action notified the commissioner not to sell the land until he could see Rainey. Hines knew when he took the notes of Boles to Thomas and when he

went to Virginia to see Rainey and Rainey had executed no deed to Thomas, and that both Thomas and Boles were insolvent. Hines, knowing the insolvency of Thomas and Boles, sought the condemnation of the land for the payment of the notes and proceeded with the action for that purpose, even to judgment and the appointment of a commissioner of sale, before he ever thought of seeing Rainey. It is impossible to believe that Hines would have acted in any other way than he did, whether Rainey set up a claim to the land or not. Hines had no possible way to collect the money or any part of it except through a sale of the land—the maker Boles, and the endorser Thomas, being insolvent. Hines has given up nothing except a worthless note. By the record he has not advanced one cent in litigation after his conversation with Rainey, and his position is absolutely unaltered. He stands just where he did before his conversation with Rainey, and, as we have said, it is not enough that Rainey's representation has been barely acted upon; if still no substantial prejudice would have resulted by admitting Rainey to contradict it, he ought not to be estopped.

For the reasons set out there was error in his Honor's instruction to the jury.

New trial.

FURCHES, J., dissents.

Cited: Clark v. Moore, 126 N. C., 7; *Boddie v. Bond,* 154 N. C., 369.

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(383)

ZACK ADAMS v. J. L. HAYES.

Action for Contribution Among Sureties—Pleading—Principal and Surety—Contribution—Equitable Action.

1. An action at law by a surety for contribution lies only against the co-sureties, severally, for the aliquot part due from each.
2. While a party may, under the present practice, unite legal and equitable grounds of action or defense, they must be clearly set up in the pleading.
3. The remedy to which a party is entitled is determined, not by the prayer for relief, but by the facts alleged and approved.
4. Where a complaint in an action by a surety for contribution joined the principals as parties, and alleged the contract of suretyship, payment by the plaintiff and demand of the co-sureties "for their contributive shares," and asked judgment against all, but did not allege insolvency of the principal except by the averment that plaintiff was compelled to pay the

debt: *Held*, that though the proper relief was not asked, and the insolvency of the principals was imperfectly alleged, the cause of action will be construed, on demurrer, as equitable rather than legal, in order to confer jurisdiction below.

ACTION, heard on complaint and demurrer, before *Bryan, J.*, at Spring Term, 1896, of WATAUGA.

The complaint was as follows:

"The plaintiff in the above-entitled action, complaining of the defendants, alleges:

"1. That on 30 May, 1888, F. M. Hodges and R. A. Adams, doing business under the style and firm of Hodges & Adams, executed their promissory note to L. A. Green for the sum of $600, with J. L. Hodges, Wm. T. Hayes, E. H. Dougherty, E. F. Lovill and this plaintiff as sureties on said above note.

"2. The principals in above-mentioned note having failed to pay off and satisfy same at maturity, suit was accordingly entered at Spring Term, 1891, in the Superior Court of Watauga, by L. A. Green,
(384) plaintiff, for balance due on said note, towit, $526 principal, and $23.52 interest, together with $11.40 cost of action, making a total amount of $560.92; and at June Term of Watauga County Superior Court judgment was obtained against F. M. Hodges and R. A. Adams, principals, and J. L. Hayes, Wm. T. Hayes, E. H. Dougherty, E. F. Lovill and this plaintiff, Z. Adams, as sureties, when this plaintiff, Z. Adams, one of said sureties, paid off and satisfied said judgment in full.

"4. That $160.66 was paid by plaintiff as receiver of Hodges & Adams, out of funds of said Hodges & Adams, which came into his hands as said receiver, leaving a balance of $400.32, which amount this plaintiff was forced to pay under said execution out of his own private funds.

"5. That repeated demands have been made upon J. L. Hayes, Wm. T. Hayes, E. H. Dougherty, and E. F. Lovill, the co-sureties, for their contributive shares, which they have neglected and refused, and still neglect and refuse, to pay, to the great damage of this plaintiff.

"Wherefore, plaintiff prays that he may have judgment against the defendants in this action for the sum of $320.24, with interest from 10 October, 1895, which said amount is four-fifths of amount paid by this plaintiff, and for costs of this action, and for such other and further relief as the Court may adjudge."

The demurrer was as follows:

"The defendants in the above-entitled action demur to the complaint of the plaintiff, and for the demurrer, say:

"1st. That the plaintiff cannot maintain his action in the Superior Court jointly against all the defendants for contribution, but aver that if they have a cause of action against the defendants at all, it is not

joint, but several, in which the amount claimed from each de- (385)
fendant would be less than $200 and not within the jurisdiction of the Superior Court."

His Honor sustained the demurrer and plaintiff appealed.

Messrs. W. B. Council, Jr., and E. C. Smith for defendants.
No counsel for appellant.

FURCHES, J. On 30 May, 1888, F. M. Hodges and R. A. Adams borrowed $600 from L. A. Green, for which they executed their note as principals, with J. L. Hodges, W. T. Hayes, E. H. Dougherty, E. F. Lovill and the plaintiff Adams, as sureties. The note was not paid and Green brought suit thereon, and recovered judgment against the principals, and sureties for the full amount of the note, principal, interest and cost, which the plaintiff alleged he paid off and satisfied---paying $160.66 out of money in his hands as receiver of the principals in the note, and the residue $400.32 out of his own money, and this action is brought for contribution from his co-sureties.

The complaint is very inartistically drawn, which makes it difficult to determine whether it was intended to be what would have been an action at law or a suit in equity before the joinder of these jurisdictions. Before the joinder of these jurisdictions, this was determined by the Court in which the action was brought. But now, it must be determined by the pleadings. It is true that a party can now, in the same action, set up both legal and equitable grounds of complaint or defense. But these grounds should be set up if the party wants the benefit of them.

The Code abolishes the distinction between actions at law and suits in equity, but the principles that governed in the separate jurisdictions before their junction are still preserved.

There are some reasons for supposing that this action was (386)
brought under the conception that it would have been an action at law, as the plaintiff does not distinctly aver the insolvency of the principals in the note, as he demands a judgment, *in solido,* for four-fifths of what he paid against all his co-sureties. If it be considered that it is what would have been an action at law, it is clear that it cannot be maintained. While actions on the case, at law, were allowed under the doctrine of assumpsit, and in this State, under the statute of 1807, they could only be brought against one co-surety for his aliquot part; in this case, one-fifth of the amount the plaintiff had to pay. *Powell v. Matthis,* 26 N. C., 83; Bispham Eq., secs. 328 and 329. And treating the action as at law, the demurrer should have been sustained.

But there are other reasons for supposing that the plaintiff intended it as an equitable action. Among these are: That he made the principals

parties defendant; that he alleges that he had made demand of each of the co-sureties for their ratable portion of what he paid; and he also alleges, though in a very imperfect manner, the insolvency of the principals, by saying he was compelled to pay. It must be admitted that if this alleges insolvency at all, it is poorly done. But this appeal comes to us upon demurrer to the complaint, in which the grounds of demurrer are assigned, as our practice requires they should be. And this ground of objection to the complaint is not assigned, and therefore the question as to the insolvency of the principals in the note is not before us for determination. And we only notice what the plaintiff said, as to being compelled to pay, as tending to show this to be an equitable action.

If it is to be considered as an equitable action, that is, what would have been a suit in equity under the old jurisdiction, then the Court had no jurisdiction. And this is another reason why we are disposed (387) to treat it as an equitable action. When a party brings an action in which it is not plain to be seen whether it is an action at law or a suit in equity, we think, in favor of the jurisdiction of the courts and in fairness to the parties, we should so construe it as to maintain the jurisdiction of the court.

The doctrine of contribution between co-sureties is an original equitable jurisdiction, administered by courts of equity long before courts of law assumed to have any jurisdiction whatever in such matters. And when courts of law did assume jurisdiction, it was very imperfect and did not extend to cases where some of the sureties were insolvent or had died. And for these reasons, among others, courts of equity continued to hold and exercise their original jurisdiction. *Allen v. Wood,* 38 N. C., 386; *Rainey v. Yarborough,* 37 N. C., 249; Bispham Eq., sec. 329; 3 Pomeroy Eq. Jur., sec. 1418.

Upon reason and authority we must hold that this action is equitable in its nature, and must sustain the jurisdiction of the court.

But under this complaint, as now framed, the plaintiff is only entitled to a separate judgment against each of his co-sureties for one-fifth of what he was compelled to pay out of his own money.

But, sustaining the jurisdiction of the court, as we do, the demurrer should have been overruled. There is error.

CLARK, J., concurring: By alleging in his complaint that he made a demand on each of the defendants for "his contributive share" by having joined all his co-sureties as defendants, it seems plain that the plaintiff brought his action to recover of each defendant the *pro rata* which he should equitably contribute and this would depend upon the number shown to be solvent. The complaint and the prayer for relief are (388) not carefully drawn, but the remedy to which a plaintiff is en-

titled depends, not upon his prayer for relief, but upon the facts alleged and proved. See cases cited in Clark's Code (2 Ed.), pp. 150, 151; *Johnson v. Loftin,* 111 N. C., 319. Pleadings are now required to be construed liberally, and not (as formerly) most strongly against the pleader. The Code, sec. 260.

If the language of the complaint admits of any doubt of its object, when the case goes back the Judge below should, if it is requested by the plaintiff, permit an amendment in the liberal spirit of The Code (sec. 273), that in the furtherance of justice the rights of all the parties may be equitably adjusted and finally determined in one action.

Cited: Gilliam v. Ins. Co., 121 N. C., 372; *Collins v. Pettitt,* 124 N. C., 736; *Hudson v. Aman,* 158 N. C., 431; *Petree v. Savage,* 171 N. C., 439.

J. W. BAILEY v. BOARD OF COMMISSIONERS OF MITCHELL COUNTY.

Practice—Filing Answer—Extension of Time—Discretion of Court.

The Court may, in its discretion, allow an answer to be filed after the expiration of the time limited therefor.

ACTION, heard before *Norwood, J.,* at Fall Term, 1896, of MITCHELL, which was the Trial Term for the action. The Judge holding the previous term of the court had allowed defendants sixty days to file answer and an extension had been granted by plaintiff's counsel, who wrote, "You must file it before court." The answer was filed on Tuesday of the first week of court, being the day on which the court was opened. His Honor gave judgment for want of an answer, holding, as a matter of law, that he had not the power, under the circumstances, to grant further time. The defendants appealed.

Mr. E. J. Justice for defendants (appellants). (389)
No counsel contra.

Per Curiam: Reversed. See The Code, sec. 274.

Cited: Woodcock v. Merrimon, 122 N. C., 735.

G. D. RAY ET ALS. v. W. B. BANKS ET ALS.

Special Proceedings—Partition Sale—Commissioner—Compensation.

The compensation to a Commissioner for making partition sale, being fixed by sec. 1910 of The Code, no additional allowance can be made on account of extra trouble or expense.

SPECIAL PROCEEDING, for the sale of land for partition, pending in the Superior Court of YANCEY. The clerk refused to make an allowance to the commissioners appointed to sell the land in excess of that allowed by The Code, and upon appeal to the Judge of the Superior Court the clerk's ruling was reversed and plaintiffs appealed.

Messrs. Hudgins & Watson for plaintiffs (appellants).
Messrs. W. N. Moore and A. C. Avery for defendants.

Per Curiam: Judgment reversed upon section 1910 of The Code.

Cited: Turner v. Boger, 126 N. C., 302; *Williamson v. Bitting,* 159 N. C., 326.

(390)

T. C. PRESNELL v. J. B. MOORE AND CALLIE MOORE.

Action for Slander—Husband and Wife—Liability of Husband for Torts of Wife.

A husband is liable for slanderous words spoken by his wife in his absence and without his knowledge or consent.

ACTION, for damages for slander, tried before *Bryan, J.,* and a jury, at Spring Term, 1896, of WATAUGA Superior Court. The complaint alleges that Callie Moore, the wife of her co-defendant, J. B. Moore, uttered the slanderous words complained of, falsely and maliciously. The answer alleged the words were true. The jury found that the words were spoken by the *feme* defendant falsely and maliciously, and rendered a verdict against both defendants for $250. It appeared on trial that the defendant, J. B. Moore, was not present when the slanderous words were spoken, and they were spoken without his knowledge or consent. There was a motion in arrest of judgment as to the defendant, J. B. Moore, on the ground that no judgment could be rendered against a hus-

band for his wife's torts, if, at the time of the alleged wrong, he was absent and the wrong was committed without his knowledge or consent. The motion was refused and defendants appealed.

Mr. L. D. Lowe for defendants (appellants).
No counsel contra.

Per Curiam: Judgment affirmed.

(391)

ELIZA J. LACKEY v. LEVI MARTIN.

Action to Recover Land—Mortgage—Mortgagor and Mortgagee—Right of Possession.

The owner of an equitable estate in land, by way of resulting trust, who conveyed the "legal and equitable estate" by way of mortgage, being entitled to redeem and to possession until foreclosure or entry by the mortgagee, may compel a conveyance of the legal estate by the holder.

ACTION, tried before *Norwood, J.*, and a jury, at Fall Term, 1896, of CALDWELL. In deference to the opinion of his Honor, that she could not recover, plaintiff suffered a nonsuit and appealed.

Mr. W. B. Council, Jr., for plaintiff (appellant).
No counsel contra.

MONTGOMERY, J. The plaintiff, in her complaint, sufficiently alleges that she furnished to the defendant the money with which to buy for her the tract of land in Caldwell County, which is the subject of the action, and that he purchased the same but took the deed in his own name. The prayer is that the defendant may be compelled to convey the legal title and surrender to her the possession of the land. The defendant, on the trial, offered in evidence a mortgage executed by the plaintiff in 1789 to Linney & Welborne, which had never been foreclosed, and the same was admitted against the objection of the plaintiff. After the mortgage was received as evidence, the Court intimated that the plaintiff could not recover for the reason that both the legal and equitable estate was conveyed in the mortgage by the plaintiff. There was judgment of nonsuit and the plaintiff appealed.

There is error. Whatever interest the plaintiff may have had in the land, whether legal or equitable, she conveyed in the mort- (392)

gage subject to her right to redeem until foreclosure. It cannot be that, because she conveyed both her legal and equitable estate in the mortgage, the mortgagee took her whole estate absolutely. A mortgage is only a mortgage and not an absolute conveyance, and necessarily carries with it the right of the debtor to redeem the estate conveyed at any time before foreclosure; and the mortgagor is entitled to the possession of the land conveyed until the mortgagee forecloses, or by lawful demand or by due process of law, enters. The mortgagees here are not seeking to take possession. It may be that they knew, at the time of the execution of the mortgage, of the condition of the title to the land, and on that account inserted the words "legal and equitable estate" in its provisions.

New Trial.

R. S. AVITT v. J. W. SMITH, ADMINISTRATOR OF A. R. T. AVITT, DECEASED.

Post Mortem Claim—Services Rendered Parent.

1. The law does not look with favor on after-death charges for services rendered to a decedent in the absence of some agreement by the parties before the death.
2. In the absence of some contract, express or implied, showing an intention on the part of one to charge and the other to pay for services rendered, the presumption that the law raises of a promise to pay for services performed, is rebutted by the near relationship of the parties, such as parent and child, step-parent and child, grandparent, etc.
3. In an action against the administrator of plaintiff's mother for services rendered her before death, the plaintiff testified that he lived with her all his life, and for twenty-four years conducted her farm and attended to all her business for her; that she, one sister and himself constituted the family; that he supported them and they supported him, and that they all consumed together what they made. A witness testified that he heard the mother say that she wanted the sixty acres of land for his services. *Held*, that a nonsuit was proper.

(393) ACTION, tried before *Norwood, J.*, and a jury, at Spring Term, 1897, of STANLY. From a judgment of nonsuit the plaintiff appealed.

Messrs. Bennett & Bennett for plaintiff (appellant).
Messrs. Austin & Price for defendant.

FAIRCLOTH, C. J. The plaintiff brought this action to recover for services rendered his mother, the intestate of defendant. The plaintiff testified that he lived with his mother all his life, and that from 1871 to

1895 he ran her farm and rendered her all the service he could and protected her, and in a general way attended to all her business. He, his mother and one sister, composed the family, and they all worked. He says: "I supported them and they supported me. We all consumed together what we made on the place." Another witness said he heard the mother say, in the presence of the plaintiff, that "she wanted the plaintiff to have sixty acres of her land in consideration for his services in taking care of her." His Honor's opinion being against the plaintiff, he submitted to a nonsuit and appealed.

In ordinary dealings the law implies a promise to pay for services rendered by one for another. This presumption may be rebutted by the *relations* of the parties, as father and child, stepfather and child and grandfather and child, etc. In the absence of some express contract, express or implied, showing an intention on the part of one to charge and the other to pay, the presumption is rebutted by the relationship. The law does not look favorably on those after death charges, in (394) the absence of some agreement by the parties before death. *Hudson v. Lutz,* 50 N. C., 217. The old lady's remark about the sixty acres of land showed her kind disposition, but fails to furnish any evidence of a contract or promise to pay. There was not sufficient evidence to go to the jury. *Dodson v. McAdams,* 96 N. C., 149. An analogous case was recently decided in this court where the reasoning is more fully stated. *Callahan v. Wood,* 118 N. C., 752, and cases cited.

Affirmed.

Cited: Hicks v. Barnes, 132 N. C., 150; *Stallings v. Ellis,* 136 N. C., 72; *Dunn v. Currie,* 141 N. C., 127; *Rooker v. Rodwell,* 165 N. C., 82.

S. D. GREEN ET ALS. v. D. N. BENNETT ET ALS.

Action to Recover Land—Husband and Wife—Married Woman's Deed —Execution and Acknowledgment of Deed—Estoppel by Judgment.

1. In the conveyance of land by a wife with the assent of her husband, as allowed by sec. 6, Art. X, of the Constitution, the husband and wife should execute the same deed.
2. No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto was not proved and recorded until after the death of the wife.
3. Recitals in a decree for the partition of lands, as to the ownership thereof, are conclusive upon the parties to such proceedings and all persons claiming under them.

GREEN *v.* BENNETT.

ACTION, to recover land, tried before *Robinson, J.,* and a jury, at Spring Term, 1895, of STANLY. The facts are set out in the opinion. There was a verdict, followed by judgment for the plaintiffs, and defendants appealed.

(395) *Messrs. Brown & Jerome for plaintiffs.*

Messrs. S. J. Pemberton and McRae & Day for defendants (appellants).

MONTGOMERY, J. The plaintiffs, who are the heirs at law of Rosani Smith, claim title to and demand the possession of the two tracts of land described in the complaint, one containing three acres, and the other a one-eighth interest in a tract of one acre and a mineral spring on it. The defendant Foreman sets up title to the same through a deed to Rosani Smith to himself, dated 14 February, 1881, and the other defendants claim the possession under Foreman. The defendant Foreman also claims title to the one-eighth interest in the one-acre tract by virtue of a decree of the Superior Court of Stanly County, dated 17 November, 1888, in a case entitled *C. C. Foreman v. Hezekiah Hough and others.* The husband of Mrs. Smith did not sign the deed, nor does his name appear anywhere in it. On the back of the deed, on the day of its execution, the husband, Smith, made an endorsement in the following words: "I, John Smith, husband of R. B. Smith, the maker of the within deed, do hereby consent to the same." (Signed and sealed by John Smith, 14 June, 1881, and witnessed by J. P. Austin.)

The deed was registered 21 September, 1882; the alleged consent of the husband was proved and registered on 20 September, 1894, and after the death of the wife, which took place in 1888. His Honor refused to allow the deed to be received as evidence of defendant's title and right of possession; and his ruling was correct. In the argument here, the counsel of defendants frankly stated that the ruling of the Court below was proper unless the Court should reconsider and reverse its former decisions bearing upon the power given to a married woman to convey her separate property under section 6 of Art. X of the Constitution (396) and in the manner prescribed in section 1256 of The Code. It is not necessary to the decision of this case for us to discuss again the effect of the endorsement made by the husband on the deed; whether that act was sufficient execution of the deed. The Constitution, Art. X, sec. 6, provides that a married woman may convey her separate property "with the written assent of her husband" as if she was sole; and it was decided by this Court in *Ferguson v. Kinsland,* 93 N. C., 337, and in other cases, that the husband should execute the same deed with the wife. The reason assigned for that requirement in the cases above referred to

"was to afford her (the wife) his (the husband's) protection against the wiles and insidious act of others." But the defendant also offered the deed as color of title. The statute of limitations did not run against Mrs. Smith; section 141 of The Code. She died in 1888 and this action was begun in 1894—less than seven years after her death.

In addition to the claim of the defendants under the deed from Rosani Smith to the one-eighth interest in the one acre tract, on which is the spring of water, they set up an estoppel by record of the Superior Court of Stanly County in a proceeding instituted by Foreman, the plaintiff there, one of the defendants here, against Hezekiah Hough, Sarah (D.) Green and M. C. Underwood, as tenants in common, to sell the land for partition. It was stated in the judgment in that proceeding that it was admitted that Foreman owned by purchase and deed of conveyance in fee simple five-eighths of the same, one-eighth of which was the Rosani Smith interest, the subject of this action. M. C. Underwood and Sarah D. Green, who were the owners of one-eighth interest each in the one acre tract, were parties to the proceeding instituted for its sale in partition. Sarah D. Green is also plaintiff in this action and is estopped therefore to claim any interest in the acre lot and spring; and all the plaintiffs are estopped to claim the interest of M. C. (397) Underwood in the acre lot and spring. M. C. Underwood, from pleadings in the present action, appears to be dead. She was a child of the original grantor, Elizabeth Green, and the complaint mentions only the four plaintiffs as the heirs at law of Rosani Smith. The judgment in the proceeding for the sale of the acre tract also recited that Foreman owned by purchase and deeds of conveyance in fee simple the interest of LaFayette Green, D. Green and M. J. Biles therein; but as they were not parties to the proceeding they are not bound by the recitals of the judgment. There was no evidence offered on the trial in this action that they had conveyed their interests in the property to Foreman. The judgment below is affirmed, except that, instead of the plaintiffs' recovering the one-eighth interest in and to the acre spring lot, the plaintiffs D. D. Green, L. Green and W. H. D. Green recover two-thirds of the same.

Modified and affirmed.

Cited: *Slocomb v. Ray,* 123 N. C., 574, 576; *Jennings v. Hinton,* 126 N. C., 57; *Owen v. Needham,* 160 N. C., 383.

H. A. JUDD ET AL. v. THE CRAWFORD GOLD MINING COMPANY.

Attachment—Affidavit—Allegations of Belief—Grounds of Belief—Appeal.

1. An attachment lies for unliquidated damages arising out of breach of contract. (Sec. 347 of The Code).

2. An allegation in an affidavit for a warrant of attachment that defendants are about to assign or dispose of their property with "intent to defraud plaintiffs," is an assertion not of a *fact*, but of a *belief* merely and, hence, the grounds upon which such belief is founded must be set out in order that the Court may adjudge upon their sufficiency.

3. An appeal lies from the refusal to dismiss an attachment.

(398) MOTION to vacate an attachment, heard before *Norwood, J.*, at Spring Term, 1897, of STANLY, in an action for damages arising out of an alleged breach of contract.

The affidavit to procure the attachment, and upon which the order of attachment was made, is as follows, viz.:

"Henry A. Judd, being duly sworn, says: That the Crawford Gold Mining Co., the defendants, are justly indebted unto Henry A. Judd and Richard Eames, Jr., the plaintiffs, in the sum of $2,500, as nearly as he can ascertain the same, over and above all discounts which the said defendants have against them, which debt arose upon a contract of defendants to purchase the Ingram and Fesperman mining tract, and failure to perform said contract or agreement, and also for contract of services rendered in making maps and reports upon said properties, and that the said defendants are a domestic corporation chartered under laws of North Carolina, and have property in Stanly County, North Carolina. And this deponent further says: That said defendants, the Crawford Gold Mining Co., are about to assign or dispose of their property with intent to defraud plaintiffs."

The defendants entered a special appearance for the purpose of making motion to vacate, and moved to vacate the attachment:

1. Because this action is for unliquidated damages, and an attachment will not lie and cannot issue.

2. Because of the insufficiency of the plaintiff's affidavit to procure the attachment, in that it states, "that the defendants are about to assign or dispose of their property with intent to defraud plaintiffs," and does not state any reasons or grounds for this assertion.

His Honor, after hearing this motion, gave judgment declining to grant the defendant's motion, and refusing to vacate the attach-
(399) ment. From this judgment defendant appealed.

Messrs. S. J. Pemberton and MacRae & Day for plaintiff.
Messrs. L. S. Overman and J. M. Brown for defendant (appellant).

CLARK, J. The attachment law was materially amended by the Code Commission, and under section 347 of The Code "an attachment now lies for unliquidated damages arising out of breach of contract" or (under Acts 1893, chap. 77) for injury to real as well as personal property. *Long v. Ins. Co.,* 114 N. C., 465, 470; *Gas Co. v. Construction Co.,* 113 N. C., 549.

The affidavit for attachment was, however, insufficient on the second ground assigned in the motion to vacate. When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," that being not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out that the court may adjudge if they are sufficient. *Hughes v. Person,* 63 N. C., 548; *Gashine v. Baer,* 64 N. C., 108; *Clark v. Clark, ib.,* 150; *Penniman v. Daniel,* 90 N. C., 154. In an affidavit for arrest (where the requirements are very similar to those for an attachment) there is the same distinction between alleging *things done* and *those about to be done. Wood v. Harrel,* 74 N. C., 338; *Wilson v. Barnhill,* 64 N. C., 121; *Peebles v. Foote,* 83 N. C., 102. The same distinction obtains in applications for the appointment of receivers. *Hanna v. Hanna,* 89 N. C., 68. An appeal lies from the refusal to dismiss an attachment or arrest. *Sheldon v. Kivett,* 110 N. C., 408; *Fertilizer Co. v. Grubbs,* 114 N. C., 470.

Error.

Cited: Finch v. Slater, 152 N. C., 156; *Mitchell v. Lumber Co.,* 169 N. C., 398.

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(400)

J. H. HINSON ET ALS. V. MILLIE HINSON ET AL.

Action for Waste—Tenants in Common—Waste.

Under Section 627 of The Code, one tenant in common may sue his co-tenant for waste.

ACTION by plaintiffs as tenants in common against their co-tenants and life tenant for waste, heard before *Norwood, J.,* at Spring Term, 1897, of STANLY. Upon an intimation by the court that plaintiffs could not maintain the action, they suffered a nonsuit and appealed.

Messrs. Adams & Jerome for plaintiffs (appellants).
Mr. S. J. Pemberton for defendants.

FAIRCLOTH, C. J. The plaintiffs and defendants are tenants in common of the *locus in quo*, except the defendant Millie, who has a life estate, as doweress, in the same. The action is for waste committed by the defendants. It is agreed that defendants have cut down trees for crossties and hauled them off the land. His Honor was of opinion that plaintiffs, being co-tenants with defendants, could not recover in this action, and that their remedy was by account. However this may have been at common law, our statute expressly authorizes this action in a case like the present. The Code, sec. 627.

Error.

Cited: Morrison v. Morrison, 122 N. C., 599.

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(401)

CHAMBERS & CO. v. E. H. WALKER, TREASURER OF MECKLENBURG COUNTY.

County Convicts, Support of.

The Code, sec. 753, and chs. 19 (Vol. I) and 44 (Vol. II), places the support of county convicts upon the board of county commissioners; ch. 316, Acts of 1897, entitled an Act to create a Board of Commissioners to manage and control the convict and road system of Mecklenburg County, provides that "warrants for expenses on account of said system shall be paid by the county treasurer out of the 'special' funds in his hands for that purpose." *Held*, that the support of the convicts of that county must be paid out of the general county fund on orders of the county commissioners, and that the other "expenses and disbursements" of the system must be paid out of the "special fund" for the purpose on orders of the chairman of said system on the county treasurer.

ACTION pending in MECKLENBURG, heard on case agreed before *Norwood, J.*, at chambers, on 12 April, 1897. His Honor rendered judgment for the defendant and plaintiff appealed.

Messrs. Jones & Tillett for plaintiffs (appellants).
Messrs. Clarkson & Duls for defendant.

FAIRCLOTH, C. J. This agreed case is before us for construction of "An Act to create a Board of Commissioners to manage and control the convict and road system of Mecklenburg County," ratified 8 March, 1897.

The question is whether the County Commissioners are now liable for the support of the convicts to be paid out of the "general county fund," or is the Convict Commission liable for the support of the convicts to be paid out of the "special fund" raised by taxation for road purposes.

We were furnished with no authorities on the question and we suppose there are none. The only words in the act for us to look to are these: "The warrants for expenses and disbursements on (402) account of said system shall be signed by the chairman and paid by the County Treasurer out of the *special* funds he has on hand for this purpose." The duty of supporting and caring for the county convicts is placed by the general law on the Board of County Commissioners. The Code, chap. 19, Vol. 1; The Code, sec. 753; The Code, chap. 44, Vol. 2.

Our conclusion is:

1. That the support of the convicts must be paid out of the general county fund, upon an order of the County Commissioners on the Treasurer.

2. That the other "expenses and disbursements" of the system must be paid out of the "special fund" for the purpose, upon an order of the chairman of said system drawn on the County Treasurer.

Affirmed.

A. BLOCK v. W. F. DOWD.

Action to Recover Personal Property—Conditional Sale—Lien for Repairs—Release of Lien.

1. A mechanic's lien on a chattel for repairs is released upon its delivery to the owner after the repairs are finished.

2. Where one sold a bicycle to another, retaining title until the purchase price should be paid, and thereafter made repairs upon it and returned it to the purchaser and again obtained possession against the purchaser's protest: *Held*, that he had no lien on the property for such repairs.

3. A mortgagee in possession of the mortgaged lands, being chargeable with rents, is entitled to credit for necessary repairs; not so with the mortgagee of personalty which yields no income.

ACTION for the recovery of personal property, tried before *Norwood, J.*, and a jury, at January Term, 1897, of MECKLENBURG. There was a verdict for the defendant and from the judgment thereon plaintiff appealed. (403)

Messrs. J. A. Bell and T. H. Sprinkle for plaintiff (appellant).
Messrs. Jones & Tillett for defendant.

FURCHES, J. This is a civil action for the possession of a bicycle which the plaintiff bought of the defendant upon the instalment plan. The plaintiff has paid the defendant the price agreed upon, except the sum of $12. This he tendered to the defendant before he commenced this action, and kept the same good to the time of the trial. The wheel was delivered to the plaintiff at the time of the purchase. But the sale was a conditional one, and the property in the wheel was to remain in the defendant until all the purchase money was paid—thus placing the plaintiff in the attitude of a mortgagor and the defendant in the position of a mortgagee.

After the plaintiff had been in possession of the wheel for some time, he broke the same and took it to the defendant for repairs. The defendant had the repairs made, for which he charged $16, and returned the wheel to the plaintiff. After the repairs were made, the plaintiff made a part of the payment, which he claims reduced the amount due to $12. And it is admitted that if all the payments are to be credited on the purchase price, the amount still due would be only $12. There was some question as to whether all these payments had been credited on the purchase price of the wheel or not. But it was agreed by counsel, who argued the case for plaintiff and defendant, that this appeal depended on the defendant's right to retain the wheel (which he had taken from the possession of the plaintiff against his consent and protest) until both debts were paid—the defendant claiming that he
(404) had the right to hold the property, not only for the payment of the $12 balance due on the purchase price of the wheel, but also for the $16, the price of the repairs which had not been paid. This being so, we will not discuss the question of tender, nor the application of the money paid by the plaintiff.

The defendant places this contention of his right to retain the wheel until both debts are paid, on two grounds:

First, the right to retain the wheel for repairs, under the common law right of mechanics to retain property repaired until the charges for such repairs are paid.

And, secondly, upon the ground that he occupies the ground of a mortgagee in possession, and is entitled to pay for necessary repairs to the premises while in possession.

The court below sustained these contentions, and from a judgment in favor of the defendant the plaintiff appealed.

The defendant's first contention cannot be sustained, for the reason that if he had ever had a mechanic's lien for repairs, it was discharged

when he delivered the wheel back to the plaintiff after the repairs had been made. *McDougall v. Crapon,* 95 N. C., 292.

The defendant's second ground cannot be sustained. If the defendant had necessarily expended money to perfect the plaintiff's title to the wheel, which stood as a security for his debt, he would have been entitled to have this paid back before the plaintiff would be entitled to the wheel. That is, this would have been a superior equity to the plaintiff, and must have been paid. *Bank v. Clapp,* 76 N. C., 482. But this is not the case, as there is no question of title here; and if there had been, as the plaintiff bought of the defendant, the defendant would have been entitled to nothing for perfecting the same. It cannot be sustained upon the ground that the defendant was a mortgagee in possession and put necessary repairs upon the premises. This doctrine, as we understand (405) it, applies where the mortgagee is in possession of the mortgaged premises, receiving the rents and profits in discharge of his debt, and for which he is bound to account to the mortgagor. It is said in such cases that he is entitled to have such necessary repairs allowed *in his account.* This doctrine seems to obtain in mortgages of real estate. But we do not say but what the same doctrine would obtain in the mortgage of personal property, where the mortgagee was in possession of the mortgaged property that was yielding a profit for which he would have to account to the mortgagor. We see no reason why it should not.

But in this case, if the defendant is to be considered as a mortgagee in possession, it was of property that was yielding no rents or profits for which he was to account. There is error.

New trial.

Cited: Glazener v. Lumber Co., 167 N. C., 678; *Thomas v. Merrill,* 169 N. C., 627.

B. J. EDWARDS ET AL. v. W. W. PHIFER ET AL.

Practice—Setting Aside Verdict—New Trial—Discretion of Trial Judge.

This Court will not interfere with the discretion of a trial judge in setting aside a verdict as being against the weight of evidence.

ACTION tried before *Norwood, J.,* and a jury, at January Term, 1897, of MECKLENBURG. The jury returned a verdict for the plaintiffs, which his Honor set aside as being against the weight of evidence and granted defendants a new trial, from which judgment the plaintiffs appealed.

(406) *Messrs. Osborne, Maxwell & Keerans for plaintiffs (appellants). Messrs. Clarkson & Duls and G. E. Wilson for defendants.*

DOUGLAS, J. The sole ground of appeal is thus given in the statement of the case: "After the jury returned their verdict, the counsel for the defendants moved the court to set aside the verdict of the jury, upon the ground that the verdict was rendered against the *weight* of testimony. His Honor, in his *discretion,* granted the motion of the counsel for the defendants, set aside the verdict of the jury and ordered a new trial." The plaintiffs except and assign as error: "1. That the court erred in setting aside the verdict of the jury and exceeded its authority; 2. That the ruling of the court was arbitrary and illegal, unwarranted by the facts and prejudicial to the plaintiffs; 3. That in no aspect of the evidence was the court justified in setting aside the verdict; 4. That the action of the court in setting aside the verdict was oppressive, unjust and repugnant to the legal rights of the plaintiffs, and abuse of discretion."

No principle is more fully settled than that this court will not interfere with the discretion of a trial judge in setting aside the verdict as being against the weight of evidence. *Alley v. Hampton,* 13 N. C., 11; *Armstrong v. Wright,* 8 N. C., 93; *Long v. Gantley,* 20 N. C., 313; *Brown v. Morris,* 20 N. C., 429; *MacRae v. Lilly,* 23 N. C., 118; *Boykin v. Perry,* 49 N. C., 325; *Vest v. Cooper,* 68 N. C., 131; *Watts v. Bell,* 71 N. C., 405; *Thomas v. Myers,* 87 N. C., 31; *Goodson v. Mullin,* 92 N. C., 211; *Ferrall v. Broadway,* 95 N. C., 551; *Redmond v. Stepp,* 100 N. C., 212; *Davenport v. Terrell,* 103 N. C., 53; *Whitehurst v. Pettipher,* 105 N. C., 40; *Jordan v. Farthing,* 117 N. C., 181; *Spruill v. Ins. Co., ante,* 141. The rule has been well laid down by *Reade, J.,* in *Brink v. Black,* 74 N. C., 329, as follows: "The defendant had
(407) a verdict and the Judge set it aside and granted a new trial, because, in his opinion, it was against the weight of the evidence. The defendant appealed, and the only question is, can we review his Honor's order? We have so often said that we cannot that it is a matter of some surprise that we should have the question presented again. When a Judge presiding at a trial below grants or refuses to grant a new trial because of some question of law or legal inference which he decides, and either party is dissatisfied with the decision of the matter of law or legal inference, his decision may be appealed from and we may review it. But when he is of the opinion that, considering the number of the witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior, on the examination and all the circumstances on both sides, the weight of the evidence is clearly on one

side, how is it practicable for us to review it unless we had the same advantages? And even if we had, we cannot try facts." In many cases, setting aside the verdict is the only way in which substantial justice can be done, and in any event no irreparable harm can ensue, as a new trial is the result.

Where the Judge acts under a mistaken view of the law, he is liable to review, but nothing of that nature is presented here.

In support of their contention, the learned counsel for the plaintiffs (appellants) cited only three cases from this State—*Moore v. Dickson,* 74 N. C., 423; *S. v. Lindsey,* 78 N. C., 499, and *Allison v. Whittier,* 101 N. C., 490. In all of these cases, this court, while intimating that circumstances might possibly occur which would justify a review of such discretion, affirmed the judgment of the court below in every instance.

In this case we feel constrained to follow the unbroken line of authorities and affirm the judgment.

Affirmed. (408)

Cited: Cable v. R. R., 122 N. C., 901; *Norton v. R. R., ib.,* 937; *Benton v. R. R., ib.,* 1009; *S. v. Rose,* 129 N. C., 578; *Phillips v. Tel. Co.,* 130 N. C., 528; *Abernethy v. Yount,* 138 N. C., 342; *Slocumb v. Construction Co.,* 142 N. C., 353; *S. v. Hancock,* 151 N. C., 700; *Jones v. High Point,* 153 N. C., 372; *Trust Co. v. Ellen,* 163 N. C., 47.

JAMES & E. R. HARTY v. HARRIS & KEESLER.

Landlord and Tenant—Tenant from Year to Year—Continuation of Tenancy—Contract.

1. Ordinarily, when a tenant who has leased for a definite term, holds over without a new contract, a tenancy from year to year is created by presumption of law; but it is competent to rebut such presumption by proof of a special agreement; hence
2. Where the lease of a store building was for one year and as much longer as the lessees should remain in business, and the lessees held over after the expiration of the year, a tenancy from year to year was not created and they could terminate it at any time by quitting business.

ACTION tried on appeal from a Justice's court, before *Norwood, J.,* and a jury, at March Term, 1897, of MECKLENBURG. Plaintiffs sued for $83.33 as rent of a store room for the month of January, 1897. The facts appear in the opinion.

The defendants asked for the following instructions to the jury:

"1. If the jury believe, from the evidence, that the contract was that Harris & Keesler were to keep the store for one year from 1 September, 1895, and as much longer thereafter as the said firm of Harris & Keesler should remain in business, then the Court charges you that the fact that Harris & Keesler held over after 1 September, 1896, without further stipulation and agreement, did not make the said defendants tenants from year to year from the said 1 September, 1896, and the
(409) plaintiffs would not be entitled to recover in this cause.

"2. If the jury should believe, from the evidence, that it was understood and agreed between the parties to the said lease that the said Harris & Keesler should be bound to keep the property for one year from 1 September, 1895, but that they should not be bound to keep the said property for another year unless they remained in business that long, then the plaintiffs would not be entitled to recover in this action.

"3. Ordinarily where a tenant who has leased premises for a definite term and holds over after the termination of his term without any new contract or agreement between him and his landlord, a tenancy from year to year is thereby created by presumption of law, but it is competent for the defendants to show in this case any fact or circumstance which tends to rebut said presumption and to show that it was understood and agreed between the parties to said lease that the said tenants did not intend to hold over under the original contract, and if the jury shall believe that the defendant Harris informed the plaintiff Harty that he would not lease the premises for two years from 1 September, 1895, for the reason that he did not expect to be in business that long, but that he would lease it for one year and as much longer thereafter as he remained in business, this would be evidence to go to the jury tending to show that the defendants did not hold over after 1 September, 1896, under the original contract, but that they were holding with the understanding and agreement that they had a right to terminate said tenancy at any time before 1 September, 1897, and if the jury believe that they so held, then the defendants would not be tenants from year to year and would have the right to terminate the relation of
(410) landlord and tenant at any time."

The instructions were refused. There was verdict for the plaintiffs, and from the judgment thereon defendants appealed.

Messrs. Jones & Tillett for plaintiffs.

Messrs. Burwell, Walker & Cansler for defendants (appellants).

CLARK, J. Ordinarily, where a tenant has leased premises for a definite term and holds over after the expiration of the term without

any new contract between him and the landlord, a tenancy from year to year is thereby created by presumption of law, but here there was evidence tending to show that when the defendants leased the premises for one year from 1 September, 1895, they declined to make the lease for two years from that date, because they did not expect to be in business that long, and that the agreement was to lease it for one year and as much longer as they should remain in business. It was competent for the parties by such special agreement to rebut the legal presumption which would otherwise have arisen by their holding over after the expiration of the term without any agreement. The evidence should have been submitted to the jury, together with the three prayers for instructions asked by the defendants, which were correct statements of the law applicable. *Stedman v. McIntosh,* 26 N. C., 291; *Humphries v. Humphries,* 25 N. C., 363; *Kitchen v. Pridgen,* 48 N. C., 49; *Montgomery v. Willis,* 45 Neb., 434, which is almost identical with this case.

The statute of frauds cuts no figure. It is not pleaded, nor is the contract of leasing denied. On the contrary, the party who might plead the statute avers and is relying on the contract. The only controversy is as to its terms and legal effect. *Taylor v. Russell,* 119 N. C., 30. Besides, if the lease were void under the statute of frauds, the lessors could only recover for the time the premises were occupied. The Code, sec. 1746. (411)

Error.

Cited: Holton v. Andrews, 151 N. C., 341; *Rogers v. Lumber Co.,* 154 N. C., 111; *Brown v. Hobbs, ib.,* 546; *Murrill v. Palmer,* 164 N. C., 53.

(412)

CITY OF CHARLOTTE v. E. D. SHEPARD ET AL.

Municipal Bonds—Act Authorizing Issue of Bonds Without Authorizing Levy of Taxes for Their Payment—Power to Issue Bonds—Power to Levy Taxes—Implied Authority—Necessary Expenses.

1. Where an act of the General Assembly authorized a municipality to issue bonds for city purposes with the consent of a majority of its qualified voters therein, but did not provide for the levy of a tax to pay the interest accruing on and the principal of the bonds at maturity, an election held under such act was only an election concerning the issue of bonds and not concerning the consent of the voters to a levy of taxes to pay the principal and interest.

2. The power given by a statute to a city to issue bonds with the approval of a majority of the qualified voters of the city does not confer, by implica-

tion, the power to levy a tax to pay them unless the power to levy such tax has been conferred by the act authorizing the issue and ratified by a vote of the people, as required by Section 7, Article VII, of the Constitution.

3. Chapter 7, Private Laws 1866, chartering the city of Charlotte, authorized the city to issue bonds not exceeding $200,000 for any purpose promotive of the public good, and to levy a tax for their payment. Chapter 40, Acts of 1881, amending the Act of 1866, authorized the creation of a public debt and required the board of aldermen to provide a water supply. By the latter act taxation by the city for all purposes was limited to one dollar on the $100 valuation of property. Chapter 252, Acts of 1891, authorized the city to issue coupon bonds for such purposes as in the opinion of the aldermen would promote the general good and welfare of the city. Neither the Act of 1881 nor that of 1891 specifically authorized the levy of taxes to pay the bonds thereby authorized. Nearly, if not quite, all the bonds authorized by the Act of 1866 have been issued and the taxes authorized to be raised thereby up to the limit fixed by the Act of 1881 will not be more than sufficient to pay the ordinary or current expenses of the city and interest on bonds already issued. *Held*, that authority to levy taxes for the payment of additional bonds issued under the provisions of the Acts of 1881 and 1891 cannot be derived from the Act of 1866.

4. The furnishing of a water supply for a city is not a "necessary expense" within the meaning of Section 7, Article VII, of the Constitution.

CONTROVERSY submitted to the court without action, under section 567 of The Code, and heard before *Norwood, J.*, at chambers, on 6 April, 1897. His Honor adjudged that the city of Charlotte had the power to issue bonds mentioned in the case agreed and to levy taxes for their payment, and gave judgment for the plaintiff, from which defendants appealed.

Messrs. Burwell, Walker & Cansler for plaintiff.
Mr. James A. Bell for defendants (appellants).

MONTGOMERY, J. This is a controversy submitted without action upon a case agreed under section 567 of The Code, between the plaintiff, the city of Charlotte, and Shepard & Co., the *defendants*, arising out of an agreement of the defendants to purchase from the plaintiff certain coupon bonds of the amount of $250,000 to be issued by the city, the proceeds to be used by the city for the purpose of providing a supply of water and a sewerage system. It was agreed, at the time of the contract, to purchase the bonds, that the said E. D. Shepard & Co. would not be required, under the contract, to take the said bonds and pay the amount agreed to be paid therefor, if the said city of Charlotte did not have the power, by virtue of the said Acts of the General Assembly and the said election, to issue said bonds, nor if the city of Charlotte, through

the proper authorities, did not have full power under the said (413) Acts of the General Assembly, to levy the necessary taxes to pay the interest as it shall accrue and the principal at maturity, notwithstanding there is no express power in the said Act of 1891 to levy a tax to pay the bonds and interest, and notwithstanding the tax limit of one dollar on the hundred prescribed in paragraph one of section 29 of the Act of 1 March, 1881; nor if the bonds would not, when issued and sold and payment received therefor, be the valid and binding obligations of the plaintiff.

An election was held in Charlotte in February, 1896, at which the question of the issue of the bonds was submitted, and a majority of the qualified voters of the city voted in favor of the issue. Afterwards the bonds were prepared in proper form and tendered to the defendants, who refused to receive them, upon the grounds that "under the Acts of the General Assembly and the election held in pursuance thereof, the said city of Charlotte did not have the power to issue the said bonds; and further, that if the said city of Charlotte had the power to issue the said bonds, it did not have the power and authority, under the said Acts of the General Assembly, to provide by taxation a sufficient sum to pay the interest on the said bonds as it accrues, and to pay the principal at maturity, it being agreed by the parties that the taxes authorized to be raised under section 19 of the said Act of 1866, and section 29 of the said Act of 1881, will not be sufficient to pay the ordinary or current expenses of the city, and also the interest and principal of the said bonded indebtedness, and that unless section 27 of the said Act of 1866 is now in force, or unless the power to provide a fund for the payment of the principal and interest of said bonded indebtedness by taxation is otherwise provided for in said acts, or necessarily implied from the power to issue said bonds, the authority is not conferred upon the said city to levy taxes sufficient to pay the interest as it accrues (414) upon the said bonds sold to the defendants and the principal at maturity."

The plaintiffs contend that they had the right to issue the bonds under the provisions of Chapter 7, Private Laws 1868; Chapter 40, Private Laws 1881; Private Laws 1887, Chapter 180; Private Laws 1891, Chapter 252. The last act provided that the whole bonded indebtedness of the city for all purposes should not exceed at any one time the sum of $500,000; and it is admitted that the whole bonded indebtedness of the city, if it should be made to include the issue of the bonds, the subject of this action, would not exceed the sum of $500,000. The Act of 1866 need not be considered in this connection, as the amount for which the bonds of the city of Charlotte could be issued and their payment provided for by taxation under that act, was limited to $200,000, and it

is agreed that the most, if not all, of that amount has been heretofore issued. The Act of 1887 only amends the Act of 1881 by conferring upon the Aldermen the power to improve the sewerage service of the city and can also be eliminated from this controversy. The Acts of 1881 and 1891, referred to above, conferred a general power upon the Aldermen to issue bonds for city purposes, including that of providing for water; the Act of 1881 not stating the amount for which bonds might be issued, and the Act of 1891 limiting the amount of issue so that the indebtedness of the city should not exceed $500,000. Neither the Act of 1881 nor that of 1891 contains any provision allowing or authorizing the city authorities to levy any tax or taxes to pay the interest or principal of such bonds as might be issued under their provisions. If it should be conceded that the election, which was held in the city on the question of the issue of the bonds was regular and
(415) authorized (about which it is not necessary for us to express an opinion), it was only an election concerning the *issue of the bonds* and not concerning the consent of the voters that the Board of Aldermen might levy a tax to pay the bonds. That question was not submitted to a vote, nor was it voted upon. The plaintiffs, however, contend that the question of the issue of the bonds having been submitted to a vote, and the vote having been in the affirmative, the power to levy a tax for the payment of the interest and principal of the bonds was thereby conferred on the Aldermen by implication of law, and that it was not necessary, therefore, to have the power to tax expressly conferred on them. The defendants deny the correctness of this view of the law and insist that, while the bonds may have been properly issued, yet, under the election the Aldermen had conferred on them only the naked power to issue the bonds, and that they are not clothed with the authority to make the bonds of the highest value by being able, under a power legally conferred, of levying a tax for their payment, as was understood should be done when the contract to purchase was made; and that, therefore, under the agreement of purchase made between the defendants and the plaintiff, the defendants are not compelled to take any pay for the bonds. The question then necessary for us to decide is, does the power to issue the bonds, without the express authority having been conferred by law and ratified by a vote of the qualified voters of the city to levy a tax to pay the bonds, confer by implication upon the Aldermen the power to levy taxes for their payment? We think the Aldermen had no such authority by implication. Section 7, Article VII of the Constitution, forbids the levy of any tax by any county, city, town or other municipal corporation, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

The authorities relied on by the plaintiff to support its con- (416) tention upon, by examination are found to have no application to the facts of this case. *Ralls v. U. S.,* 105 U. S., 733, the court said: "It must be considered as settled in this court that when authority is granted by the legislative branch of the government to a municipality, or a sub-division of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred is conclusively implied, unless the law which confers the authority or some general law in force at the time clearly manifests a contrary legislative intention." In *that* case there was no such special limitation. In the case *before us* there is such special limitation. Const., Art. VII, sec. 7. This question was not involved in *Wood v. Oxford,* 97 N. C., 227.

The plaintiffs, however, further contend that if the first position of law is not tenable, then the Aldermen have power to levy a tax for the payment of the bonds without submitting that question to a vote, because the furnishing of water to the people, which the Aldermen are empowered to do under the Act of 1881, is a necessary city expense. If that last proposition were true, then there would be no difficulty about the matter, and the defendant would be compelled to receive the bonds and pay for them. But we think that the furnishing of a supply of water to the people of the city is not in itself a necessary expense in the sense that the city must own and operate a system of water works.

We are of the opinion that the plaintiff cannot make a tender of the bonds according to the agreement between it and the defendants, and that the defendants are not bound by the agreement to purchase the bonds. There is error in the judgment of the court below and the same is reversed.

Reversed.

Cited: Mayo v. Comrs., 122 N. C., 13, 27; *Thrift v. Elizabeth City, ib.,* 34; *Rodman v. Washington, ib.,* 41; *Charlotte v. Shepard, ib.,* 602; *Comrs. v. Call,* 123 N. C., 310; *Bear v. Comrs.,* 124 N. C., 212; *Edgerton v. Water Co.,* 126 N. C., 97; *Black v. Comrs.,* 129 N. C., 125; *Debnam v. Chitty,* 131 N. C., 678, 682; *Comrs. v. MacDonald,* 148 N. C., 131.

(417)

H. G. SPRINGS *v.* J. W. McCOY ET AL.

Action for Money Paid at Request of Defendant—Note—Payment by Accommodation Endorser—Implied Promise to Repay.

Where plaintiff, at the express request and for the benefit of defendants, endorsed a note executed by a third person for the benefit of, but not payable to, defendants, and, upon the insolvency of the makers, plaintiff was compelled to pay the note under a judgment thereon against him, the law will imply a promise by defendants to repay him.

ACTION, tried before *Norwood, J.*, and a jury, at March Term, 1897, of MECKLENBURG.

The plaintiff tendered the following issue, which was adopted by the court:

"Are the defendants indebted to the plaintiff, and, if so, what is the amount of the indebtedness?"

The plaintiff offered in evidence a note signed by E. F. McCoy and B. L. Wendenfeller, payable to W. B. Gooding, city tax collector, for $250 due 1 October, 1895, endorsed by the plaintiff H. G. Springs.

The plaintiff offered himself as a witness, and plaintiff's counsel stated that they proposed to show by the witness that the defendants, J. W. McCoy and A. R. Bowles, were partners, and that J. W. McCoy was the managing partner; that J. W. McCoy brought said note to the plaintiff Springs and told him that the note was given to secure a debt due by the co-partnership, and asked him to sign the note for the benefit of the firm of J. W. McCoy and A. R. Bowles, the defendants in this action; that plaintiff did so sign it at the request of the said McCoy, and solely for the benefit of the partnership business; that the note was thereafter used for the benefit of the partnership by being delivered to the city treasurer to secure the license tax of defendants; that thereafter plaintiff was sued upon this note, and judgment was taken against him,

(418) and plaintiff was compelled to pay and did pay that judgment; that when plaintiff approached A. R. Bowles, one of the defendants in this suit, in regard to paying this debt, said Bowles said that it was a partnership debt, and that his partner ought to have paid it out of partnership funds which he had had in his hands, but which he had converted to his individual purposes in paying for a lot for himself; that plaintiff has made a demand of payment on the partnership, and they have refused to repay plaintiff. The plaintiff also proposed to show that the signers, E. F. McCoy and B. L. Wendenfeller, are insolvent, and that this note is one of three of the same amount, given at the same time, signed and endorsed in same way, and that defendants have paid the other two.

Defendants objected to all this testimony as offered. Objection sustained and plaintiff excepted.

The court, having announced the opinion that the plaintiff could not recover *upon this testimony,* in deference to the intimation of his Honor the plaintiff submitted to a nonsuit, and appealed.

Messrs. Jones & Tillett for plaintiff (appellant).

Messrs. Osborne, Maxwell & Keerans and Clarkson & Duls for defendants.

MONTGOMERY, J. If there was any error committed by the court below, it is one of practice and of so slight importance and consequence that we are unwilling to remand the case for a new trial. No possible injury could have been sustained by the defendants in the matter complained of. It would have been more regular if the witness had been asked such questions as were calculated to show that he had endorsed the note, the circumstances attending the endorsement, *i. e.,* that he had endorsed it at the request of the defendants and for their (419) benefit, and his payment of it by the judgment of the law. The note could then have been proved and received as evidence of the endorsement and in corroboration of the witness. This is, however, not the defendant's appeal, and the plaintiff, of course, had nothing to appeal from as to the manner of the introduction of the evidence because his Honor admitted it. The plaintiff's appeal is from the judgment of nonsuit taken in deference to the intimation of his Honor that the plaintiff could not recover upon the testimony as received. So the real question in the case is, does the testimony offered and received, conceding it to be true, constitute a cause of action against the defendants and render them liable to the plaintiff as alleged in the complaint? We are of the opinion that the matters contained in the evidence, if true, make the defendants liable to the plaintiff on the cause of action set out in the complaint. The note, though executed by other persons than the defendants, was, according to the evidence, made for the benefit and advantage of the defendants; it was endorsed by the plaintiff at the express request of the defendants.

The maker of the note had no interest in it at any time and received no consideration for it. Of course, the fact that the makers received no consideration would not affect their liability to the payee, but it turned out that they were insolvent and the debt fell upon the plaintiff, who paid it after judgment was recovered against him for the amount. The testimony, if true, showed the payment by the plaintiff was for the use and benefit of the defendants under such circumstances as that the

law will imply a promise to repay on the part of the defendants. *Burns v. Parish,* 3 B. Mon. (Ky.), 3. The judgment of nonsuit is reversed and there must be a

New trial.

Cited: S. c., 122 N. C., 630.

(420)

J. S. THOMPSON ET ALS. v. NORTH CAROLINA BUILDING AND LOAN ASSOCIATION.

Building and Loan Associations—Insolvency—Receivers—Foreclosure of Mortgages by Trustee—Credits to Borrowing Stockholders—Fines—Distribution of Assets of Building and Loan Associations.

1. In the settlement of the affairs of an insolvent building and loan association, a borrowing member is entitled to have credit for fines paid by him.
2. While the receiver of an insolvent building and loan association cannot, without an order of foreclosure, sell property mortgaged to the concern, yet, when the debts to it are secured by a deed to a trustee, he may sell under the power in the deed without an order of Court.
3. It is the duty of a trustee, who sells property conveyed to secure the debts of a borrowing member of a building and loan association in the hands of receivers, to pay all proceeds to the receiver, although in excess of the amount due the association, inasmuch as the mortgagor is a member as well as a debtor of the concern and his liability cannot be ascertained until it is known to what extent the concern is insolvent.
4. The receiver of an insolvent building and loan association should pay out no money, except for necessary expenses in making collections, without the order of the Court.

ACTION, pending in the Superior Court of MECKLENBURG, instituted by the plaintiffs as stockholders of the defendant corporation, for the appointment of a receiver and to have paid to them, the plaintiffs, the amounts due to them on paid-up stock. Receivers were appointed, who made a report to the court that the assets would not be sufficient to repay to the stockholders the amounts they had paid into the association, made certain recommendations and asked the court for instructions and orders. *Norwood, J.,* made the following order:

"Upon reading and considering the petition of J. W. Keerans and E. T. Cansler, receivers, it is ordered that the said receivers be (421) directed to call upon the borrowing members of the North Caro-

lina Building and Loan Association to pay into their hands the net amount due from the said borrowing members to the association, the amount so due and called for to be ascertained as follows: that is to say, by charging the borrowing member with the sum paid to him by the association, and interest thereon according to contract, and giving him credit for all sums paid in by him with like interest thereon, *except fines collected,* if any, the matter of said fines to be left open for future settlement under a further order of this court; and that if any borrowing member shall fail to respond to this call within a reasonable time after it is made, W. C. Maxwell, trustee, and the receivers shall proceed to exercise the power of sale conferred upon W. C. Maxwell by such borrowing member and fully set out in the deed of trust made by him, and, out of the proceeds of the sale of the property thus made, the said trustees shall pay to the receivers the amount due to the association according to the rule of the Mills case, and shall hold the balance of the purchase money subject to the further order of this court and the final adjustment of the account between the borrowing member and the receivers and the association.

"The receivers will make no further call upon such of the borrowing members as will respond to the call directed by this order, until further direction of the court. They will report hereafter, as soon as practicable, the exact status of the affairs of the corporation, and the amount of deficiency of its assets, to the end that an adjustment of such loss or deficiency may be made among the members of the association, and no mortgage or trust deed made for the benefit of the association shall be cancelled or marked satisfied by the trustee or receivers until a final adjustment of the account between the borrowing member (422) and the association is made under the order of the court."

The plaintiff, John P. Long, excepted to and appealed from the said order upon the following grounds:

"I. That the court ordered that the said receivers be directed to call upon the borrowing members of the North Carolina Building and Loan Association to pay into their hands the net amount due from the said borrowing members to the association, the amount so due and called for to be ascertained as follows, that is to say, by charging the borrowing member with the sum paid to him by the association, and interest thereon according to the contract, and giving him credit for all sums paid in by him with like interest thereon, except fines, if any, the amount of such fines to be left open for future settlement under a further order of this court, the said John P. Long, contending that the court had no right to order a settlement to be made in the manner aforesaid, and especially that the court had no right to exclude from the said settlement the fines paid by the borrowing members.

"II. That the court ordered that if any member should fail to respond to said call within a reasonable time after it is made, W. C. Maxwell, trustee, and the receivers should proceed under the power given in the deed of trust to sell the land conveyed thereby and, out of the proceeds of the sale, that the trustee should pay the receivers the amount due the association according to the rule of the Mills case and should hold the balance of the purchase money subject to the further order of this court and the final adjustment of the account between the borrowing member and the receivers, and the association, the said John P. Long contending that the court or Judge had no right to make any such order, or to order a sale of the land under the deed of trust
(423) and the application of the proceeds and the retention of the balance of the purchase money, as above set forth.

"III. That the court further ordered that no further call be made on such borrowing members as responded to the call directed by said order, until the further direction of the court, and that the receivers report as soon as practicable the exact status of the affairs of the corporation and the amount of the deficiency of the assets, to the end that an adjustment of such loss or deficiency may be made among the members of the association and that no mortgage or trust deed made for the benefit of the association shall be cancelled or marked satisfied by the trustee or receivers until the final adjustment of the account between the borrowing members and the association is made under the order of the court, the said John P. Long contending that the court had no right to make such an order, and especially that the court had no right to withhold an adjustment and settlement from the borrowing member and the association or the receivers, until a report is made by the receivers and the status of the association and the amount of the deficiency of its assets, if any, is ascertained, and especially the court had no right to order that no mortgage or deed of trust made for the benefit of the association should be cancelled or marked satisfied by the trustee or receivers until a final adjustment between the borrowing member and the association, under the rule laid down by the court, thereby depriving the mortgagor or borrowing member or trustor from settling with the association upon payment of the amount justly due by him."

Mr. G. F. Bason for plaintiffs (appellants).

Messrs. C. E. McLean, P. D. Walker and F. I. Osborne for defendant.

FURCHES, J. The first exception of the appellant Long is sustained, so far as it extends to fines being allowed to the creditors of the association in the settlement of their debts to the concern. This is
(424) expressly so held in *Strauss v. B. & L. A.*, 117 N. C., 318, and

approved in the same case, 118 N. C., 556. We cannot distinguish this case from that, although this is attempted to be done by counsel.

It is also contended that the order is not applicable, as it is left open for future adjustment. But we can see no reason for leaving open a question that this court has in direct terms decided, and afterwards approved, unless it is supposed that time will change the law. But, as it is a payment the party has made upon his debt, he is entitled as a matter of right, to have it allowed him on settlement.

The second and third exceptions of the appellant, as understood in the light of his brief, can best be considered together. They relate to the directions to the trustee and receivers selling under the mortgage of the appellant, and as to their retaining the proceeds of sale until a final settlement. We said in *Strauss v. B. & L. A., supra,* that the receivers did not have the right to sell without an order of foreclosure. This was correct in that case, as the mortgages were made to the association. But in this case Maxwell, the trustee, is a party whose duty it was to foreclose the mortgage if default was made, and to pay the money to the association. This being so, it would seem that he might still sell under the power given to him in the mortgage. But we can see no reason why he should not pay all the proceeds of such sale over to the receivers, who are bonded officers, to be held by them until the settlement of the concern.

It is contended that the residue is the appellant's money, and there is no reason why it should not be paid to him at once. But as reasonable as this appears to be, it is not true; for the reason that it leaves out of consideration the fact that the appellant is a member of (425) the association, as well as a debtor. That as such member, his indebtedness is a trust fund for the benefit of the other members of the concern, as well as for himself, and that his liability cannot be known until it is ascertained to what amount the association is insolvent.

As is said in *Strauss v. B. & L. A., supra,* no money should be paid out by receivers, except for necessary expenses in making collection, but upon the order of the court. This rule may work a hardship in some instances, but it is necessary to the protection of the other members and creditors of the association.

It is said in the order that settlements may be made under *Mills v. B. & L. A.,* 75 N. C., 292. We do not know that we understand this part of the order. Strauss' case, *supra,* is the latest enunciation by this court upon the subject of winding up insolvent building and loan associations. And, while we do not understand Strauss' case to announce any doctrine in conflict with Mills' case, *supra,* but to be in entire harmony with that opinion, it discusses and provides for different phases arising in that case, and in this, that were not presented in Mills' case.

Therefore, what is said in Strauss' case and in this opinion will be sufficient, as we think, to enable the court to make proper orders for the direction of the receivers in this case. There is error, as is pointed out above.

Error.

Cited: *Meares v. Davis,* 121 N. C., 129; *Meares v. Duncan,* 123 N. C., 205; *B. & L. Asso. v. Blalock,* 160 N. C., 492.

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(426)

STATE ON THE RELATION OF J. H. QUINN v. T. D. LATTIMORE.

Quo Warranto—Elections—Rights of Voters—Registration—Voting in Wrong Township—Throwing Out Votes—Impeachment of Returns.

1. Where a registrar of election registers a person entitled, under the Constitution and laws to vote, but through inadvertence or fraud fails to administer the oath required to be administered, such person shall not be for that reason deprived of his vote.
2. Where a person entitled, under the Constitution and laws, to be registered as a voter, was registered by one with whom the registrar left the books and such registration was accepted as sufficient by the registrar and acted on by the judges of election, the vote of such person will not be rejected for such irregularity.
3. Where qualified voters living near the dividing line of two townships, which line was not definitely located, in good faith registered and voted in the township in which they did not actually reside, but it appeared that they had listed their property for taxation, sent their children to school, and, for many years previous, had registered and voted in the same township: *Held,* that the votes of such electors, having been cast, must be counted. (*Harris v. Scarborough,* 110 N. C., 232, *overruled.*)
4. Where the judges of an election received the ballot of a person entitled, under the Constitution and laws, to vote, who had, in proper time, presented himself for registration and taken the required oath, but whose name, through the inadvertence or fault of the registrar, had not been entered on the registration books: *Held,* that the vote of such person must be counted.
5. Where a person otherwise legally qualified, who had not been allowed to register because at that time he had not been a resident of the State for one year, but who became qualified in that respect on or before the day of election, asked to be allowed to register on election day and tendered his ballot, which was refused: *Held,* that such vote should have been received and should be counted for the candidate for whom he proposed to vote.
6. The declaration of the result of an election by the judges of election, after a count of the ballots by them, is *prima facie* evidence of the correctness of the count until rebutted by proper and competent evidence.

7. Where, at the close of an election in a township, the judges counted the ballots and officially declared the result, the correctness of such count and declaration is not rebutted by the introduction, in evidence, of a tally sheet showing a different result, which was kept overnight and during the day following the election, in a public office, where any one could have access to it and which bears signs of having been tampered with.

Quo warranto by the State, on the relation of J. H. Quinn (427) against T. D. Lattimore, to try the title to the office of Clerk of the Superior Court of CLEVELAND, heard, on exceptions by both parties, to the report of the referee, before *Bryan, J.*, at Spring Term, 1896, of CLEVELAND Superior Court. His Honor gave judgment for the defendant and both parties appealed.

Messrs. D. W. Robinson, M. H. Justice, R. Z. Linney and J. C. Pritchard for plaintiff (appellant).

Messrs. Jones & Tillett, W. J. Montgomery and Webb, Frick & Ryburn for defendant.

FURCHES, J. This is an action of *quo warranto* brought for the purpose of trying the title to the office of Clerk of the Superior Court of Cleveland County, resulting from the election of 1894. The case was referred by consent to Armstead Burwell, who filed his report to the Spring Term, 1896, to which the defendant filed fifty-seven exceptions, and the plaintiff, by way of assignment of error, filed thirty-seven. The case presented to this court on appeal, including the report of referee, the Judge's findings, exceptions and briefs, contains 368 pages of printed matter.

According to the referee's findings and report the plaintiff was elected by nine majority, and according to the findings and judgment of the court the defendant was elected by thirty majority.

The principal grounds of contention between the parties may be classified and reduced to four: 1. As to persons who registered and voted in other townships than those in which they resided. 2. As to those who were irregularly registered—some not being sworn when (428) they were registered, and others not being registered by the registrar, but by other persons who had the registration books in their possession and acted for the registrar in making these registrations. 3. An alteration of five votes in township No. 6, after the votes had been counted and announced on the night of election. 4. The alteration in township No. 8 of six votes after it had been counted, declared and certified by the judges of election on the night of the election. The consideration of these four questions, and a few others that do not fall

strictly within the principle involved in either of them, will decide the main issue and determine whether the plaintiff or the defendant was elected to this office.

This is a government of the people, by the people and for the people, founded upon the will of the people, and in which the will of the people legally expressed must control. Const., Art. I, sec. 2.

Every male person born in the United States, or naturalized, 21 years of age, and who shall have resided in the State 12 months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector. Const., Art. VI, sec. 1. It shall be the duty of the General Assembly to provide from time to time for the registration of all electors, and no person shall be allowed to vote without registration, or to register without first taking an oath to support the Constitution. Const., Art. VI, sec. 2.

In construing these provisions of the Constitution we should keep in mind that this is a government of the people, in which the will of the people—the majority—legally expressed, must govern and that these provisions and all Acts providing for elections should be liberally
(429) construed, that tend to promote a fair election or expression of this popular will. The second section of Article VI was adopted for this purpose, and we are to *presume* that all election laws, enacted since, have been passed with the same end in view. This section of the Constitution provides that the "General Assembly" shall pass registration laws, and that no one shall be entitled to register without taking an oath, and that no one shall vote who is not registered. This provision of the Constitution, that no one shall be entitled to register without taking an oath to support the Constitution of the State and of the United States, is directed to the registrars. It must be to them and to them alone, as is said by this court in *Southerland v. Goldsboro,* 96 N. C., 49. But if the registrar, through inadvertence, registers a qualified voter, who is entitled to register and vote, without administering the prescribed oath to him, shall he, for this negligence of the officer, be deprived of his right to vote, and thereby the will of the majority defeated? And, if this omission was not through inadvertence but with a view to entrap the voter and thus defraud him out of his vote, it is much more the reason why he should not be, and that such methods should not be allowed to prevail. We do not hold that, where a registrar proposed to administer the oath, and the party wishing to be registered refuses to take the oath, it is the duty of the registrar to register him. We would say that under such circumstances he should not be registered. These are matters for the registrar, as has been said in *Southerland's case, supra.* But it seems that all the parties who registered without being sworn, and voted without being objected to, had been regis-

tered before, and the presumption is they had been sworn at that time; and if they had been, how many times must they be sworn?

Article VI, section 1, prescribes the qualifications of an elec- (430) tor, and section 2 of this Article is a disabling clause (*R. R. v. Commissioners,* 72 N. C., 486; *Norment v. Charlotte,* 85 N. C., 387) placed in the hands of the registrar. And a qualified elector cannot be deprived of his right to vote, and the theory of our government that the majority shall govern, be destroyed by either the wilful or negligent acts of the registrar, a sworn officer of the law. This would be self-destruction, governmental suicide.

We, therefore, hold that where an elector's name appeared on the registration books he had a right to vote, whether he was sworn or not, unless he was challenged, and this was not made a ground of challenge. It was a matter for the registrar and not for the Judges—though in this case it does not appear that any of these voters were challenged. These rules are intended for the guidance and government of registrars, which they should observe in the discharge of their duties as registrars, so as to *promote* the object to be attained—the free, full and fair expression of the will of the qualified voters as prescribed in section 1, Art. VI, of the Constitution.

It appears that a number of persons were registered by other persons than the regularly appointed registrars; in one instance, by the son of the registrar in the absence of his father; and in another case by Williams, the register of deeds, with whom the registrar had left the registration books. These registrations were irregularly made and might have been rejected and erased by the registrars. But it would not have been fair for them to have done this without notifying the parties, so registered, in time for them to have registered again. But instead of their doing this, they retained these names on their books, which they and the judges of election used on the day of election, thereby ratifying and approving these registrations. And it would now be a fraud on the electors, as well as on the parties for whom they voted (431) and also upon the State, to reject these votes for this irregularity. These votes cannot be rejected for this reason.

Another class of voters are a number of persons who lived on or near the dividing line between different townships, and voted in a different township from that in which they lived. The most of these votes were allowed by the learned and painstaking referee. But a number of those allowed by the referee were rejected by the court, and it is found and made a part of the judgment of the court that they so voted in bad faith. We say, it is found, and we say this advisedly, as it appeared from the argument before us and the Judge's notes, which were exhibited to us and commented upon, that the Judge found no facts, but simply

noted that the exception was "sustained" or "overruled." And, it was contended, this was handed to counsel who prepared the judgment and findings therein, and sent them to the Judge who signed and returned them to the clerk some time after the court adjourned. Permission was given him to make out his findings and to put them in writing, and to sign the judgment after court, and there is no complaint as to the time when these findings and judgment were filed. But the complaint is that they are not the findings of the court. But the learned counsel for the defendant argued that this was the practice in North Carolina; that the attorney of the successful party prepares the judgment of the court. And this is true. But the counsel for the plaintiff, while admitting this to be the practice, contends that this practice only obtains as to the preparing the judgment upon facts found, and not as to the findings of fact. And this must be the correct rule of practice. But this is a matter we do not care to discuss further; for if, in fact, they were not originally found by the court, as the plaintiff contends, the court
(432) signed them and stands sponsor for what is found, and we will treat them as his findings.

The findings of the court, of bad faith, bring these liners within the rule laid down in *Boyer v. Teague,* 106 N. C., 576, and the court rejects their votes.

But as the plaintiff contends that this finding of bad faith on the part of these voters *is without any evidence* to support the finding (*Wittkowsky v. Wasson,* 71 N. C., 451) it becomes our duty to examine the evidence upon this finding of bad faith. And we find from the evidence that one or two of these voters stated that they knew at the time of the election that they did not live in the township in which they voted. But we find from the uncontradicted evidence that they all lived at or near the dividing line—some of the evidence tending to show that the line ran through the house of one of them, there was no definitely located line, and that they had all registered and voted before the election of 1894 in the same township in which they then voted, some of them for as long a time as fourteen or fifteen years; that they gave in and paid taxes in the townships in which they voted, and sent their children to school in these townships; and that they were qualified under section 1, Art. VI, of the Constitution. Taking this undisputed testimony into consideration, in connection with that of one or two of them who stated that they knew they were outside by a few yards, does not, in our opinion, show any evidence of bad faith. *Wittkowsky v. Wasson, supra.* They were entitled to vote somewhere. So there was no bad faith in voting. These votes would have counted just as much as they did, if they had been cast in the township where the defendant contends they should have been cast. The object of the law—a fair and full

expression of the will of the qualified voters—must be kept in mind. And if this has been obtained and no fraud appears, this court will not look for mere irregularities to defeat this will. *R. R. v. Commissioners,* 116 N. C., 563; *McDonald v. Morrow,* 119 N. C., (433) 666; *Harkins v. Cathey,* 119 N. C., 649. All these parties, whose votes we have been considering, were registered voters—some of them, as we have seen, in an irregular manner, still they were registered, and *Southerland v. Goldsboro, supra,* cited and relied on by defendants, does not apply to them.

But what may be a good reason for not allowing a party to register is not always a good reason for rejecting his vote after it has been cast. There is some similarity between a vote cast and an objection to evidence, under section 590 of The Code, where the answer does not suit the opposite side, but it is too late to object after the answer is made. *Meroney v. Avery,* 64 N. C., 312.

We have been discussing the right to register and the right to reject a vote when once cast, mostly on general principles. We now propose to show that the views we have expressed are sustained by authority.

A vote received and deposited by the judges of election is presumed to be a legal vote, although the voter may not have complied with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and this cannot be shown by showing that the registration law had not been complied with. Pain on Elections, sec. 360. A party offering to vote without registration may be refused this right by the judges for not complying with the registration law. But, if the party is allowed to vote and his vote is received and deposited, the vote will not afterwards be held to be illegal, if he is otherwise qualified to vote. Pain, *supra,* sec. 361. And where a voter has registered, but the registration books show that he had not complied with all the minutiæ of the registration law, his vote will not be rejected. Pain, *supra,* sec. 361. If a voter is registered in one township, he has no right to register and vote in another. (434) But if he is allowed to do so, his vote received and counted, and he is otherwise qualified, and votes at no other place, his vote should not be thrown out on that account. Pain, *supra,* sec. 366. It is the right of parties to have the fairness of elections inquired into for the protection of honest electors. But such legislation is not to be regarded as hostile to the right of a free exercise of the right of franchise, and should receive such construction by the courts as will be conducive to a full and fair expression of the will of the qualified voters. Pain, *supra.*

It follows from what we have said and the authorities cited, that *Harris v. Scarborough,* 110 N. C., 232, is overruled, and the more liberal construction placed upon the statute in the dissenting opinion, is approved.

For the reasons heretofore given and the authorities cited, we are of the opinion that the vote of the liners, who voted in different townships from those in which they resided, being qualified voters and voting at no other place, should not have been rejected by the Court.

The vote of E. R. Rudisel and the exception raise another ground of infirmity, that he had changed his residence to South Carolina and did not return to this State till within less than one year prior to the election. It was shown and not disputed that he went to South Carolina, where he remained for more than a year, exercising his right of franchise, voting in a town election while there. But it was contended by the defendant that he did not intend to change his citizenship; that he was a member of a military company in Cleveland County during all this time; that he returned to attend its musters and was elected a lieutenant during this time. The referee Burwell held that he had changed his citizenship, and excluded his vote. But the Court found that he had not changed his citizenship, and overruled the referee and restored
(435) this vote to the defendant. And as there is some evidence to sustain the finding of the Court, this finding must stand.

We also sustain the vote of George Otterson. He went to the registrar within the time allowed, and the registrar administered the registration oath to him, and he left, thinking he had been registered. But, through the neglect of the registrar, or for some other reason, his name did not appear on the registration books on the day of election. These facts being made to appear, he was allowed to vote and did vote. The Court held that this vote was improperly received and excluded it. In this there was error. The judges might have refused to allow him to vote, and this would have presented another question. But they allowed him to vote, as they should have done, in our opinion. And his vote being in, and he being in all other respects a qualified elector, his vote should not have been excluded.

In our opinion, E. L. Jenkins should have been allowed to vote. He was born and raised in this State, afterwards moved to South Carolina, but returned to Cleveland County, in this State, one year and three days before the election. He offered to register the day the registration books were closed, but was not allowed to do so, as it lacked seven days of being one year since he returned to live in this State. This action of the registrar was proper. But on the day of election, when he had been a resident of this State for one year and three days, he asked to be registered, and with tickets in hand proposed to vote. But he was refused registration and his vote was also refused. He proposed to vote for the plaintiff, and being otherwise a qualified voter his vote should have been received and counted. Code, sec. 2682; McCrary on Elections, sec. 102.

This brings us to the consideration of No. 6 and No. 8 town- (436)
ships, and we propose to consider No. 6 first. The referee Burwell finds as facts that on the evening of the election, at the close of the polls at No. 6, the boxes were opened and the vote counted by the judges and such other electors as chose to attend; and at this counting it was found that the defendant Lattimore had received 548 votes, and this result was then and there so declared. The referee further finds that the defendant had not produced evidence sufficient to change the result of this count and declaration of the vote, and declares that the defendant's vote at No. 6 was 548.

But the judgment of the Court finds that the vote was counted and declared, after the polls were closed on the evening of the election at No. 6, and at this count the defendant only received 548 votes, and this was officially declared as the result. The Court further finds that this count was not correct, and that defendant insists that this is a finding of fact, and there being some evidence to support it, it is binding on this Court.

This is admitted to be the rule adopted by this Court, that where there is evidence, both ways, the Court will not review the findings of the Court below, and we do not propose to invade this rule of practice, whatever our opinion may be as to the correctness of the finding. But the law makes this count and declaration of the result *prima facie* at least, the legal result of that election, until it is shown to be incorrect by proper and competent evidence. This, of course, might be shown by competent evidence, such as showing that a fraud had been committed upon the plaintiff in falsely declaring the vote. But no such evidence as this was introduced. The only evidence introduced to show that this count on the evening of the election was not correct was a tally sheet kept at the time of the count, turned over to Tiddy and placed by him in an unlocked safe in the register's office, where it re- (437)
mained all night. Next morning he took it out of the safe and put it in a pigeon hole over a desk in the same office, where it remained during that day. It appeared that this was a public office, where all persons could go that had occasion to do so; that during this day it became known that the election between the plaintiff and defendant was very close, and that a few votes would change the result, which then appeared to be in favor of the plaintiff. It cannot be that such evidence as this, if it possessed no internal evidence of having been tampered with, could be allowed to rebut a legal presumption and change the result of an election. This count, at the time of election, is held to be more reliable than any count, after there had been an opportunity for the vote to be tampered with. McCrary on Elections, sec. 440. The Supreme Court of California refused to allow a recount upon its being

shown that the ballots had not been kept in such a manner that they *could not* have been tampered with. McCrary, *supra,* sec. 441. Where there has been an opportunity for the vote to be tampered with, it loses its character as primary evidence. McCrary, *supra.*

We, therefore, hold that the findings or declarations contained in the judgment of the Court, that the referee committed no error in sustaining the original count, and that the defendant only received 548 votes at No. 6 township, is error, but that he received 553 votes is without evidence to support these findings; that the tally sheet relied on by the defendant (and this being the only substantive evidence), having been exposed and liable to be tampered with, had lost its character as primary evidence, and could not be relied on to prove anything.

We therefore overrule the Court, and sustain the ruling of Referee Burwell, and find that the defendant Lattimore's vote at No. 6 precinct was 548 and not 553.

(438) As we have passed upon this exception, overruling the Court, holding that there was no competent primary evidence to sustain the finding, we will state that we have thoroughly examined this tally sheet, without and also under a heavy magnifying glass. And while, under the rules of this Court, we do not consider ourselves at liberty to find facts upon which to base our judgment, it is manifest to us that this tally sheet has been tampered with. The figures are admitted to have been changed from 548 to 553. But this is not what we refer to. The right hand tally on the third row bears internal evidence of not being of the same make as the others. The cross stroke of every other tally is horizontal, or the right end is the highest, while in this tally the right hand end of the cross stroke is considerably lower than the other end. Also, the first two down strokes bear evidence of not having been made at one stroke of the pencil as would likely be the case in the hurry of tallying the vote, as it was counted. The second down stroke, especially, is forked at the lower end, as is quite apparent under a heavy glass. Without making any charge against any one, as this could not be done, the paper having been exposed in a public office for so long a time, and without any disposition to do so, if we could, we are of the opinion it has been tampered with.

The discussions and rulings we have made, being decisive of the question before us, no matter whether we should decide the controversy as to the vote in No. 8 one way or the other; and as any ruling we might make as to this contention would not affect the result, and as we have examined it sufficiently to know that its solution is not without trouble, we have not and will not consider this exception.

The investigation of the case results in finding that the plaintiff is entitled to have counted for him the following votes that he was

not allowed to have by the finding and ruling of the Court, towit: (439) John Surat, Lawson Kindrick, Henderson Sanders, John Jameson, James Crosby, Julius Crosby, Pinckney Crosby, R. C. Hoyle, W. P. Costner, R. C. Ledford, Caleb Ledford, David Pratt, Ed. Rankin, Reuben Posten, J. McRollins, John Porter, Batts McIntyre, William McLaney, S. A. McLaney, W. A. Pryer, Sylvanus Gordon, Sam Towrey, George Otterson, John Chapion, S. R. McMurray, E. L. Jenkins, Bish Hamrick, Daniel McSwain, Calhoun Russ, Ezzell Russ, George Price, Webb White, Floyd Havener, A. A. Hendrick, M. V. Turner, and G. R. Smith. And the plaintiff is also entitled to five votes in No. 6 Township that he was not allowed by the judgment of the Court—making in all, forty-one.

And we find that the defendant is entitled to have counted for him the following named voters that he was not allowed by the ruling and judgment of the Court, towit: John Posten, Will Posten, F. P. Gold, Philip Martin, and Randall Roberts—making five in all.

Thirty, the majority found for the defendant by the Court, deducted from forty-one, leaves eleven, and five which we find the defendant entitled to, that he was not allowed by the judgment of the Court, deducted from eleven, leaves the plaintiff elected by six majority.

The judgment of the Court, therefore, should have been that the plaintiff Quinn was duly elected to the office of Clerk of the Superior Court for the county of Cleveland, and is entitled to the same and the fees and emoluments thereof from the first Monday in December, 1894, and for the next four years then next ensuing. There is error, and judgment will be rendered according to this opinion.

Error.

DEFENDANT'S APPEAL.

FURCHES, J. The exceptions in this appeal have been considered and passed upon in the plaintiff's appeal. But as some of defendant's exceptions have been sustained he should recover his costs of this appeal.

Cited: McNeely v. Morganton, 125 N. C., 379; *Thrash v. Comrs.,* 150 N. C., 694; *Gibson v. Commrs.,* 163 N. C., 512; *Hill v. Skinner,* 169 N. C., 410; *Bray v. Baxter,* 171 N. C., 9.

(440)

H. A. SHUTE ET AL., EXECUTORS OF JOHN SHUTE, DECEASED, v. J. W. AUSTIN ET AL.

Action by Executors to Have Their Sale of Decedent's Land Confirmed —Purchase by Executors—Pleading—Aider—Jurisdiction.

1. While, in order to perfect a title, the Superior Court has jurisdiction, in a proper case, of an action to confirm a sale made without authority, such jurisdiction will not be exercised to perfect an illegal sale made by a party who has ample power to make a legal sale.
2. Where executors, fully empowered by the will to make sales of lands for division of the proceeds among the devisees, sold to third persons, who purchased for the benefit of the executors, and then instituted an action in the Superior Court against the devisees to have such sales confirmed: *Held*, that the court will not entertain jurisdiction of such action.
3. A purchase of testator's land by executors, at their own sale, whether directly or indirectly, and however fair, is fraudulent in law.
4. The doctrine of *aider* can only be invoked in aid of a defective statement of a good cause of action, but cannot be so used to aid the statement of a bad or defective cause of action.

PETITION, by the executors of John Shute, deceased, against his devisees, to have certain sales of land, made by them under power contained in the will, confirmed, commenced before the Clerk of the Superior Court of UNION, and heard on appeal before *Norwood, J.*, at January Term, 1897, of said Superior Court. His Honor gave judgment confirming the sales and defendants appealed.

Messrs. Shepherd & Busbee for plaintiffs.
Messrs. Adams & Jerome for defendants (appellants).

(441) FURCHES, J. On 17 September, 1896, John Shute died in Union County, leaving a last will and testament which was duly admitted to probate, and the plaintiffs, who were named as executors therein, qualified and undertook the administration of the testator's estate and the execution of said will. The will directed the sale of the testator's real estate, and an equal distribution of the proceeds arising therefrom among the defendants Mary A. Austin, Amanda Brewer, Florence Houston, Ellie J. Wilson, Eva B. Shute, and S. R. Shute. That said executors (the plaintiffs) were fully empowered and authorized by the will to sell and convey all of the testator's land; and on 21 September, 1896, after due advertisement, they proceeded to sell the same, when S. J. Welsh bid off two of the tracts, W. S. Lee three of the tracts, and W. C. Heath two of the tracts so sold.

The plaintiffs then commenced this proceeding in the Superior Court of Union County before the clerk, and in their complaint they allege the facts above stated, and also allege that the sale was fair and open, and that the land brought a fair price, and that the purchasers were ready, able and willing to pay for the land upon the Court's confirming the sales, and they ask the Court to make an order confirming the same.

The defendants answer and admit that the parties named as purchasers bid off the lands. But they allege that they bid them off for the plaintiffs, who are the real purchasers. And they admit that all said lands, except two tracts—"The Correll lot" and the "Big Survey tract" brought a fair price.

But the defendants deny that the Court has any jurisdiction of the case; deny that the Court has any power to confirm a sale made under the power contained in the will, and not made under order of Court; allege that plaintiffs have not stated a cause of action, and ask that said sale "be not confirmed, except as above admitted in this (442) answer." It was not denied but what the lands were bid off for the plaintiffs, as alleged in defendants' answer. And plaintiffs' counsel contended that this statement in defendants' answer, by way of aider, constituted a cause of action, and constituted what would have been a bill in equity under the old practice to confirm a sale of land already made. And it is true that this jurisdiction was exercised in courts of equity under the old practice, and we have no doubt would be exercised now in the Superior Courts in proper cases. But this jurisdiction obtains for the purpose of perfecting the title where the sale has been made without authority to do so. But it is never exercised to perfect an illegal sale, made by a party who has ample authority to make a legal sale.

It is too clear to argue that this complaint, unaided, states no cause of action. And if we could consider it aided by the answer, such aider discloses a legal fraud which would prevent the Court from granting the prayer of the complaint. The purchase of land by an executor, directly or indirectly, at his own sale, is fraudulent, and such sales will be set aside, whether the property has brought a fair price or not and without any allegation of actual fraud, unless it has been ratified by the parties interested in the lands. *Highsmith v. Whitehurst, ante,* 123. Whether there has been a ratification of any of these sales or not, is not before us for determination. But we notice that several of the defendants are *femes* covert.

The doctrine of aider can only be invoked in aid of a defective statement of a good cause of action; but cannot be so used to aid the statement of a bad or defective cause of action. *Johnson v. Finch,* 93 N. C., 205. This is a defective cause of action and cannot be aided by the answer.

(443) There was considerable discussion before us as to whether the Superior Court could treat this proceeding as a bill in equity, having been commenced before the Clerk as a special proceeding. But we do not feel called upon to discuss this question, as no cause of action is stated, whether it be considered in the Superior Court or not.

Reversed.

CHARLES HEISER v. G. A. MEARS & SONS.

Action for Damages for Breach of Contract—Executory Contract to Manufacture and Deliver Goods—Countermanding Order—Rescission of Contract.

1. A contract for specific articles to be thereafter manufactured and delivered is executory, and no title to the articles passes until finished and delivered, and the buyer has no title to or interest in the material used.
2. Where the buyer countermands his order for goods to be manufactured for him under an executory contract, before the goods are finished, it is notice to the other party that he elects to rescind his contract and submit to the legal measure of damages resulting from the breach.
3. Where an executory contract for the manufacture of goods is rescinded by the buyer before the work is finished, the measure of damages is the difference between the contract price and the market value of the goods at the time of the breach.

ACTION, tried at April Special Term, 1896, of BUNCOMBE, before *Hoke, J.*, and a jury. The plaintiff sued for $347.50, the contract price of a lot of shoes, manufactured for defendants, under their order, which they countermanded before the work was finished. Notwithstanding the rescission plaintiff finished and shipped the goods to defendants. The jury found the issues in favor of the plaintiff, but, under the (444) charge of his Honor that the measure of damages was the difference between the contract price and the market value of the shoes at the time they were to have been delivered, assessed plaintiff's damages at only $86.75, and plaintiff appealed, assigning as error the said instruction as to damages and the failure of his Honor to give certain other instructions prayed for.

Messrs. T. H. Cobb and C. A. Webb for plaintiff (appellant).
Messrs. Moore & Moore for defendants.

FAIRCLOTH, C. J. The defendants, retail merchants in Asheville, N. C., on 21 May, 1894, contracted with the plaintiff, a wholesale manufacturer, of Baltimore, Md., for a lot of shoes to be soon thereafter manu-

factured and delivered. On 26 May, 1894, the plaintiff received written notice from the defendants not to make the shoes, and that the defendants could not take them. At that time the plaintiff "had cut the leather for the uppers preparatory to making the shoes and partly fitted them to the lasts." The plaintiff refused to accept the countermand, finished the shoes and tendered them to the defendants, who refused to receive and pay for them. The plaintiff now sues for the entire contract price. His Honor charged the jury that the measure of the plaintiff's damages was the difference between the contract price and the market value of the goods at the time they were to be delivered. Plaintiff appealed.

In a contract for the sale of specific articles, then in existence and ready for delivery, and the purchaser refuses compliance, the seller has three remedies at his option:

1. To treat the property as his own and sue for damages.
2. As the property of the buyer and sue for the price.
3. As the property of the buyer, and to resell it for him and sue for the difference between the contract price and that ob- (445) tained on resale.

A contract for specific articles to be thereafter manufactured and delivered is executory, and no title to the article passes until finished and delivered, and the buyer has no title to, or interest in, the material used.

The option, in the instance first above stated, is allowed the vendor, because he is ready to comply and the vendee is guilty of a breach of promise.

When the contract is executory and the buyer countermands his order, this is notice to the other party that he elects to rescind his contract and submit to the legal measure of damages, which must result from every breach of contract.

We think his Honor gave the jury proper instruction, except that he should have said, "at the time of the breach," instead of "at the time the goods were to be delivered." That error does not hurt the defendant, as he does not appeal. His Honor properly refused the plaintiff's prayer for special instructions. When the plaintiff was notified of the defendants' rescission of the agreement, it seems unreasonable that the plaintiff should continue to manufacture and thus continue to increase his damages. This conclusion assumes that the title to the shoes never passed, as it could not possibly do, before they were finished and put in the condition contemplated by the contractors. Benjamin on Sales, secs. 1117, 1121, 860n (9); *Hosmer v. Wilson,* 7 Mich., 294, 303; *Devane v. Fennell,* 24 N. C., 36. This was the only question in the case.

Affirmed.

Cited: Register Co. v. Hill, 136 N. C., 275; *Clothing Co. v. Stadiem,* 149 N. C., 8; *Flour Mills v. Distributing Co.,* 171 N. C., 417.

(446)

STATE ON RELATION OF SAMANTHA C. WILSON v. CLARA M. FEATHERSTONE ET AL.

Action on Administrator's Bond—Right to Trial by Jury, How Reserved—Exceptions to Referee's Report.

1. Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for issues.
2. Exceptions to a referee's report made the basis of a demand for a trial by jury should be explicit enough for the opposing party to see clearly what the issue will be, so as to prepare to meet it with his evidence.
3. Where the gist of an action as to the ownership of moneys in the hands of R at decedent's death, and, on a compulsory reference the referee found adversely to defendant, who had properly reserved his right to a trial by jury at every previous stage of the proceedings, an exception that the referee should have found that decedent merely deposited the money with R for safe keeping, as such deposits are made with a bank, and that R held the money as such depositary, sufficiently showed what the issue for the jury would be, and entitled the defendant to a jury trial demanded by him on such exception.

ACTION, brought by the State, on relation of S. C. Wilson, widow of John W. Wilson, on the administration bond of the defendant Clara M. Featherstone, heard on exceptions to the report of a referee at December Term, 1896, of BUNCOMBE.

On the minute docket of the court, where the error of reference was entered, the following entry was made below the order: "The defendant objects and reserves his objection," and upon the hearing before the referee he made an entry as follows: "Defendants here made objection again to the reference and do not waive a jury trial of the issues in the case." The defendants filed eight exceptions to the referee's report and demanded a jury trial on four of them. His Honor ordered a trial by jury of the issues raised by the pleadings and exceptions to the
(447) referee's report, and plaintiff appealed.

Messrs. Merrimon & Merrimon for plaintiff (appellant).
Messrs. Jones & Barnard and T. H. Cobb for appellee.

FAIRCLOTH, C. J. In all controversies respecting property the parties are entitled to a trial by jury. Const., Art. I, sec. 19. In all issues of fact joined in any court the parties may waive a jury trial and submit the findings of fact to the Judge. Const., Art. IV, sec. 13. All such

issues may be referred for trial by consent of parties, The Code, secs. 420 and 423, and the Court may order a compulsory reference on its own motion, sec. 421.

In the case before us a compulsory reference was ordered, and on the trial before the referee the defendants repeated their demand for a jury trial. The referee tried the case and reported his findings of fact and law, and the defendants excepted to the findings of fact, and renewed their exception to the reference and demanded a jury trial. At the conclusion of each exception to certain findings of fact the defendants reiterated their demand for a jury trial upon that exception. At the hearing his Honor ordered a trial by jury and continued the case for that purpose. The plaintiff excepted and appealed.

Every litigant has this constitutional right of trial by jury, unless he voluntarily waives the privilege. *Green v. Castlebury,* 70 N. C., 20; *Bernheim v. Waring,* 79 N. C., 56. The object of a reference is to facilitate the trial, and the purpose of the exceptions is to point out the terms of the inquiry as a basis for an issue to be submitted to the Court or the jury, as the case may be. The usual pleadings set forth the facts according to the contention of the several parties, out of which the issues arise. These issues shall be made up by the attorneys or the (448) Judge presiding. The Code, sec. 395. And so the facts, pointed to in the exception, serve as a basis for an issue, to be put in legal language by the attorneys or the Judge, for the better comprehension of the jury. The facts stated in the exception should be explicit enough for the opposing party to see clearly what the issue will be, in order that he may be prepared to meet it with his evidence.

In *Driller Co. v. Worth,* 118 N. C., 746 (also 117 N. C., 515), "the demand, made at the end of the exceptions filed, was a general one for a trial upon each and every issue raised, not by the pleadings, but by the exceptions to the report, however immaterial." Such notice did not enable the plaintiff to prepare his case for trial, and the Court held that his exception was too indefinite and did not entitle him to a jury trial. In the same case, in 118 N. C., 748, the Court said: "The exception ought either to embody a formal issue arising out of the pleadings and covered by the adverse finding, or it ought plainly and unmistakably to point out the terms of the inquiry that it is proposed to submit to the jury." This would seem to be the utmost extent to which this Court can go on this question.

The contention between the parties was to the ownership of certain moneys in the hands of one Rankin at the death of J. W. Wilson. The referee found adversely to the defendant's contention. The exception was that the finding was erroneous upon the evidence, and that he should have found "that the said Wilson simply deposited the said money

and the said bonds with the said Rankin for safe keeping, as such deposits are made in a bank, and the said Rankin so held the said money and bonds at the time of said Wilson's death, as such depositary, and in the same manner as a bank would hold such deposits."

There were eight findings of fact, but a jury trial was de-
(449) manded by the exceptions in only four. The plaintiff could not fail to see from said exceptions, in connection with the pleadings, what the issue for the jury would be, and she was, therefore, in a condition to prepare for the contest.

The defendants certainly intended at every step to save their right of jury trial, and it appears to this Court that they did so.

Affirmed.

Cited: Featherstone v. Wilson, 123 N. C., 625; *Porter v. Armstrong,* 132 N. C., 67; *Ogden v. Land Co.,* 146 N. C., 446; *Mirror Co. v. Casualty Co.,* 153 N. C., 374; *Keerl v. Hayes,* 166 N. C., 555.

SAMANTHA C. WILSON v. CLARA M. FEATHERSTONE ET AL.

Practice—Injunction—Bond—Solvency of Defendants—Adequate Legal Remedy.

1. It is improper to grant an injunction where the written undertaking required by Section 341 of The Code is not filed or tendered.
2. Where there was no allegation of insolvency of the defendants, but on the contrary, there was an admission in plaintiff's affidavit that the defendants were amply able to respond in damages for any wrong done to plaintiff, it was improper to grant an injunction against defendants who cut off the water supply from premises allotted to the plaintiff as dower, and built a high fence around the same so as to close up her windows.

MOTION for an injunction, heard before *Bryan, J.,* at December Term, 1896, of BUNCOMBE.

John Wilson died in August, 1893, leaving certain property, which descended to his only child, Clara Featherstone, and out of said property his widow (the plaintiff) was allotted her dower, the same consisting of certain lands, "together with the improvements thereon." After the allotment of dower, defendants built a high fence on three sides of the prop-
erty so allotted, completely closing up every window on three
(450) sides of the house, and also an alleyway which afforded a rear entrance to the property. They also cut off the water supply which was in the premises at the death of Wilson. The defendants alleged, as a reason for their action, that the plaintiff had rented the house

so allotted to her to disreputable women and the fence was necessary as a protection to their own property from the nuisance adjoining.

His Honor granted the injunction and defendants appealed.

Messrs. Merrimon & Merrimon for plaintiff.

Messrs. Jones & Barnard and T. H. Cobb for defendants (appellants).

FAIRCLOTH, C. J. There are two reasons why an injunction should *not* have been granted in this case:

1. No written undertaking was written or tendered as required. The Code, sec. 341; *Miller v. Parker,* 73 N. C., 58; *James v. Withers,* 114 N. C., 474.

2. There is no allegation of defendants' insolvency; on the contrary, the plaintiff's affidavit admits that the defendants "are wealthy and amply able to respond in damages for any wrong done this affiant." *Hettrick v. Page,* 82 N. C., 65; *McNamee v. Alexander,* 109 N. C., 242; *Land Co. v. Webb,* 117 N. C., 478.

Reversed.

Cited: Rope Co. v. Aluminum Co., 165 N. C., 576.

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(451)

WILLIAM WIKEL v. THE BOARD OF COMMISSIONERS OF JACKSON COUNTY.

Action for Mandamus—Repeal of Statute Pending Appeal—Abatement —Right to Costs—Practice—Judicial Notice of Statute.

1. Where, pending an appeal from a judgment for plaintiff in an action for *mandamus* to compel the defendants, board of county commissioners, to build a bridge, the statute requiring the bridge to be built was repealed: *Held,* that such repeal abated the action.
2. Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, this Court will not go into consideration of the abstract question as to which party ought to have prevailed, in order to adjudicate the costs, but the judgment below as to costs will be allowed to stand.
3. The courts will take judicial notice of a public statute.

MANDAMUS to compel the defendants, the Board of Commissioners of JACKSON, to build a bridge, heard before *Timberlake, J.,* at Spring Term, 1896, of JACKSON Superior Court. A peremptory *mandamus* was granted and defendants appealed.

Messrs. Moore & Moore for defendants (appellants).

No counsel contra.

CLARK, J. This was an application for a *mandamus* against the County Commissioners of Jackson County to compel them to build a certain bridge over the Tuckaseegee river and to levy a tax for that purpose, as required by chap. 12, Laws 1895. The defendants filed a demurrer denying the power of the Legislature to enact such statute. The demurrer was overruled, and the defendants, not availing themselves of the leave granted them to answer over, judgment for a peremptory *mandamus* and for costs was given against them, from which they (452) appealed. Pending the appeal to this court, the Legislature, by an act ratified 6 March, 1897, repealed the aforesaid chap. 12, Laws 1895. This destroyed the cause of action and there only remains the judgment against the defendant for costs.

It has been repeatedly held that where, pending an appeal, the subject-matter of an action, or the cause of action, is destroyed, in any manner whatever, this Court will not go into a consideration of the abstract question which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. *S. v. Horne,* 119 N. C., 853; *Blount v. Simmons,* 119 N. C., 50. Here the demurrer raises grave questions of constitutional law, and the court will not consider and determine them after the cause of action has been destroyed. The court takes judicial notice without formal supplemental plea, of the repealing statute, which is a public act. By the judgment below, the plaintiff, who sued as a taxpayer, acquired no personal rights except as to the judgment for costs, and of that he could not be deprived by the repealing statute. The Code, sec. 3764. The judgment for costs below is affirmed, and each party will pay his own costs in this court, as the repealing statute was enacted before judgment here. Action abates.

Cited: Wilmington v. Cronly, 122 N. C., 391; *Herring v. Pugh,* 125 N. C., 438; *Reid v. R. R.,* 162 N. C., 359.

K. F. ALEXANDER v. H. S. HARKINS ET AL., ADMINISTRATORS OF J. L. MURRAY ET AL.

Partnership—Dissolution—Notice—Liability of Retiring Partner for Subsequent Debts.

1. In order to relieve a retiring partner from liability for subsequent transactions by the continuing member, it is necessary to give public notice of the dissolution.

2. Where no public notice of the dissolution of a firm was given, and shortly after the dissolution the continuing member had a transaction with a person who knew the parties had been partners and, believing they were still such, extended credit to what she thought was a partnership: *Held*, that the retiring partner was liable for the debt.

ACTION, begun before a Justice of the Peace, against J. L. (453) Murray and P. L. Lance, and carried by appeal to the Superior Court of BUNCOMBE County. Pending the action J. L. Murray died and the defendants Harkins and Rankin, his executors, were made parties. The matters involved were referred and the case was heard, on exceptions to the report of the referee, before *Bryan, J.*, at December Term, 1896. Judgment was rendered for the plaintiff and defendants appealed.

Mr. T. H. Cobb for plaintiff.
Messrs. Moore & Moore for defendants (appellants).

FURCHES, J. The defendant Lance and J. L. Murray, the intestate of the defendants Harkins and Rankin, were partners, doing a mercantile business in the city of Asheville. In March, 1888, this partnership was dissolved and the defendant Lance purchased the stock of goods and the unexpired term of Keller in the store house and premises of the plaintiff, and on 1 April, 1888, moved into that house and continued the business of merchant.

Soon after the first of April the goods that had belonged to the firm of Lance & Murray were also moved into the store house of plaintiff, and both Lance and Murray occupied it.

What rents were paid to plaintiff seem to have been paid by Lance; but the plaintiff testified that she was told and believed that Murray was a member of the firm; that she knew that Lance & Murray had been doing business together as partners, and that she be- (454) lieved they were still partners till after the rent sued for was due.

The referee also finds that there was no public notice given of the dissolution of the firm of Lance & Murray, and there is still due the plaintiff $101.50 as a balance of rent. We are of the opinion that there was evidence justifying the referee in his finding of these facts; and this being so, his findings are conclusive and cannot be reviewed by us. *Foushee v. Beckwith,* 119 N. C., 178.

It was contended by the plaintiff that the whole term of Keller, in the lease, was purchased, and that this made the purchaser or purchasers tenants of the plaintiff, and for this position cite *Krider v. Ramsay,* 79 N. C., 354. While this contention is correct as a proposition of law, it does not seem to us to be material to the plaintiff in this case. For

while it constituted the purchasers tenants, with the rights of the original lessees, as to the terms of the lease and estate granted, it did not release the original lessee from the obligation of his contract to pay the rent. Nor did it have the effect to make the sub-lessee the plaintiff's debtor for the rent, until the plaintiff elected to make him so. This she did, and the greater part of the rent for the unexpired term has been paid to her as above stated.

The defendants, in their argument and in their printed brief, treat this case as being one of estoppel, and contend that the plaintiff has shown no fact that estops Murray from showing the truth of the matter; that he was not, in fact, a partner of Lance at any time after the purchase of the unexpired lease from Keller. But in this the defendants are in error. It was shown—indeed, admitted by Murray—that he was a partner of Lance before and until some time in March, 1888. This being so, the plaintiff was authorized to act upon the presump-
(455) tion that the partnership still existed (as she swears she did) until she had notice of its dissolution. As she had not dealt with the firm before its dissolution, she was not entitled to direct personal notice. But it was necessary that there should have been such public notice given of the dissolution as would have amounted to constructive notice. *Ellison v. Sexton,* 105 N. C., 356; Bates on Partnership, sec. 606.

This notice is usually given through the public press, and if given for a sufficient length of time and in a sufficiently public manner, will be sufficient to protect the retiring partner from after-made liabilities. *Ellison v. Sexton, supra;* Bates, *supra.*

In this case it is not claimed that there was any kind of notice given to the public of this dissolution. But the evidence is that Murray had goods in this house, which he and Lance were engaged in selling at auction and otherwise. This was well calculated to induce the plaintiff to believe that they were still partners.

But the judgment of the court is not put on the ground that it is found and admitted that Murray had, just before, been a partner of Lance, and there had been no notice given of the dissolution. The judgment below must be

Affirmed.

Cited: Bynum v. Clark, 125 N. C., 353.

RICHARD LEDBETTER ET AL. v. J. H. PINNER AND WIFE.

Special Proceedings—Partition of Land—Appeal From Clerk, Where Heard—Notice of Hearing—Jury Trial—Waiver.

1. Appeals from the Clerk of the Superior Court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of the county where the proceeding is pending, and within the district, being governed by sections 254 and 255 of The Code, which provide that the clerk shall send a statement of the case by "mail or otherwise" to the judge, who shall fix a time "and place" for hearing.
2. Where nothing in the record indicates that a judge, who rendered a judgment on an appeal from the Clerk of the Superior Court, was requested in writing to fix a time for the hearing and to give the parties notice, as required by section 255 of The Code, it will be presumed that the proceeding was rightly and regularly conducted.
3. On an appeal to the judge from a judgment of the Clerk of the Superior Court in a special proceeding for the partition of land the judge may (since the enactment of chapter 276, Acts of 1887) either render judgment himself or remand the proceedings to the clerk with direction to enter the proper order for the sale.
4. The controversy involved in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal.
5. The right to a jury trial on questions of fact involved in a special proceeding for the sale of land is waived by the failure of a party to demand a jury before the clerk makes his decision.

APPEAL from *Bryan, J.,* at chambers, for refusal to set aside (456) a judgment in a special proceeding. The plaintiffs filed their petition for partition before the Clerk of BUNCOMBE Superior Court, making the other tenants in common defendants, averring that an actual partition would be injurious for reasons set out and praying a sale for partition. The defendants answering admit all the allegations of the complaint except on this point, and aver that actual partition is desirable, and that a sale at the present depressed state of prices would be injurious. The Clerk decreed actual partition by metes and bounds and appointed commissioners. From this judgment the plaintiffs appealed, the papers being sent to the Judge at Webster, in Jackson County, in the same district, who reversed the Clerk and directed that the property be sold for partition. The defendants moved subsequently to set aside the order as irregular, and on the refusal to vacate, appealed to this court.

Messrs. Moore & Moore for plaintiffs.
Mr. T. H. Cobb for defendants (appellants).

(457) CLARK, J. (after stating the facts): The defendants insist that the judgment was irregular and should have been set aside on four grounds:

1. Because it was entered outside of the county. It has been held that, as a rule, motions in causes pending in the Superior Court cannot be heard outside of the county except by consent. *McNeill v. Hodges,* 99 N. C., 248; *Godwin v. Monds,* 101 N. C., 354; *Skinner v. Terry,* 107 N. C., 103. This restriction does not apply to all orders in such cases, applications for restraining orders, injunctions and receivers being expressly excepted by statute, The Code, secs. 334-337 and 379, *McNeill v. Hodges, supra;* nor to orders in proceedings for examination of a party to the action under The Code, secs. 580, 581; *Fertilizer Co. v. Taylor,* 112 N. C., 141. Indeed, the restriction was fully considered and held, in *Parker v. McPhail,* 112 N. C., 502, to apply only to judgments on the merits or motions in the cause, strictly speaking, and to be not applicable to orders in arrest and bail, nor, indeed, to any other ancillary remedy. Appeals from the Clerk and special proceedings have never been subject to the restriction and are governed by The Code, secs. 254, 255, which provide that the Clerk shall send the statement of the case by mail or otherwise to the Judge, which contemplates that he need not be at the county seat, and that the Judge, if parties desire to be heard, shall "fix a time and place for the hearing," which would be a contradiction if the Judge were required to be at a time and place already fixed by statute, towit, at the courthouse of the county of the Clerk from whom the appeal came. From the very nature of the proceedings on appeal from the Clerk to the Judge, it is clear that
(458) such appeals can be heard at chambers and anywhere in the district.

2. The second ground is that the Judge gave the appellant's counsel no notice. The Code, sec. 255, provides that if the Judge "shall have been informed in writing by the attorney of either party that he desires to be heard on the questions, the Judge shall fix a time and place for such hearing and give the attorneys of both parties reasonable notice thereof." Nothing in the record indicates that such written request was made by counsel, and in its absence the presumption is in favor of the regularity of the proceedings.

3. The third ground alleged is that the Judge, on reversing the Clerk's order, should have simply remanded the proceedings to the Clerk to enter the proper order in conformity with the opinion of the Judge, and not have made the order directing the sale himself. This was formerly so, *Tillett v. Aydlett,* 93 N. C., 15; but now chap. 276, Acts 1887, vests the Judge with discretion to pursue either course. Clark's Code, 2 Ed., p. 198; *Lictie v. Chappell,* 111 N. C., 347.

4. That the pleadings raised an issue of fact and the cause should have been transferred to the docket of the Superior Court for trial at term. The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact, but a question of fact for the decision of the Clerk in the first instance, subject to review by the Judge on appeal, whose conclusion is binding upon us. If there had been an issue of fact raised as to title, or sole seisin, this would have been for the jury at term.

Besides, if there had been an issue of fact raised, the defendant waived his right to a jury trial by not insisting upon it before the Clerk made his order. *R. R. v. Parker,* 105 N. C., 246, and cases there (459) cited.

In refusing to set aside the judgment there was

No error.

Cited: Faison v. Williams, 121 N. C., 153; *McCaskill v. McKinnon, ib.,* 195; *Beckwith ex parte,* 124 N. C., 115; *Herring v. Pugh,* 126 N. C., 860; *Roseman v. Roseman,* 127 N. C., 497; *Moore v. Moore,* 130 N. C., 334; *Anderson, In re,* 132 N. C., 247; *Navigation v. Worrell,* 133 N. C., 94; *Durham v. Rigsbee,* 141 N. C., 130; *Oldham v. Rieger,* 145 N. C., 257; *Batts v. Pridgen,* 147 N. C., 135; *Tayloe v. Carrow,* 156 N. C., 8; *Vanderbilt v. Roberts,* 162 N. C., 274.

HOMER W. NASH v. C. H. SOUTHWICK AND L. P. McLOUD, ASSIGNEE OF C. H. SOUTHWICK.

Mechanic's and Laborer's Lien—Bookkeeper—Scope of Employment.

1. Where plaintiff was employed as a bookkeeper and "to make himself generally useful," during reconstruction of a hotel building, the fact that he occasionally did manual labor during the remodeling does not entitle him to a mechanic's lien, such manual work not being within the scope of his employment.
2. One acting as a bookkeeper for the reconstruction of a building is not entitled to a laborer's lien.

ACTION, tried before *Bryan, J.,* and a jury, at August, 1896, Term of BUNCOMBE. The facts are stated in the opinion of the court. There was a verdict for $267.96 in favor of the plaintiff, and from the judgment thereon defendants appealed.

Messrs. Moore & Moore for plaintiff.

Mr. F. A. Sondley for defendants (appellants).

MONTGOMERY, J. Southwick, the lessee of the property known as Hotel Berkley, in the City of Asheville, was, in the fall of 1893, engaged in having the property repaired and remodeled, and employed the plaintiff, according to his testimony, as his general clerk and bookkeeper, and further, in witness's own language, the plaintiff was "to make himself generally useful during such reconstruction of the Hotel Berkley" at the fixed salary of $80 per month. The plaintiff was, by the
(460) contract, to be at the hotel all the time. It was agreed between Southwick and the plaintiff that, when the repairs on the hotel should be completed the latter was to be the clerk and steward at the hotel.

The witness, Southwick, also stated "that the plaintiff was engaged as a laborer in the actual work of repairing and reconstructing the hotel about one-half of the time during which he was employed by the witness, but he was not employed to do work of that kind." The deposition of the defendant was read in evidence, and it contained nothing contradictory of, or inconsistent with, the matters testified to by Southwick.

His Honor instructed the jury "that, if from all the evidence in the case, they were satisfied that the plaintiff was employed to aid in the actual work of reconstructing the hotel, and that he, in pursuance of the contract of employment entered into between him and the defendant, Southwick, did actually aid in the work of constructing the hotel, they should answer the first issue—'Is the plaintiff entitled to a lien upon the leasehold property in the Hotel Berkley described in the complaint?' —'Yes.'" There was error, for the reason that there was no evidence tending to show such work by contract between him and the defendant, Southwick. In fact, the evidence was that he was not employed to do such work. Where there is no evidence the court should not leave the issue to be passed upon by the jury. *Covington v. Newberger,* 99 N. C., 523; *State v. Powell,* 94 N. C., 965. The plaintiff was not entitled to a lien on the property for his services as bookkeeper. *Whitaker v. Smith,* 81 N. C., 340; *Cook v. Ross,* 117 N. C., 193. The judgment, in so far as it declares that the plaintiff is entitled to a laborer's lien upon the lease of the defendant, Southwick, in the hotel property to the amount of $267.96, with interest thereon, is erroneous, and is reversed, as
(461) is also that part of the judgment ordering a sale of the property for the purpose of having the lien satisfied. The balance of the judgment is

Affirmed.

Cited: Moore v. Industrial Co., 138 N. C., 307; *Bruce v. Mining Co.,* 147 N. C., 644; *Alexander v. Farrow,* 151 N. C., 323; *Stephens v. Hicks,* 156 N. C., 241.

G. B. CARDON v. W. R. McCONNELL.

Action for Damages—Slander of Title—Malice.

An action for damages for slander of title cannot be maintained unless the plaintiff shows the falsity of the words published or spoken, the malicious intent with which they were uttered and a pecuniary loss or injury to himself.

ACTION, for damages for slander of plaintiff's title, whereby he lost an opportunity to make an advantageous sale of land, tried before *Bryan, J.*, and a jury, at Fall Term, 1896, of CLAY. On the trial, and after the plaintiff's evidence was closed, his Honor intimated that plaintiff could not recover and plaintiff took a nonsuit and appealed.

Mr. J. W. Cooper for plaintiff (appellant).
Messrs. MacRae & Day for defendant.

FAIRCLOTH, C. J. This action is for slandering title to real property. The plaintiff alleges that he had title and had negotiated a good sale when the defendant interfered and falsely and maliciously misrepresented the plaintiff's title, and on that account the plaintiff's sale failed and he was damaged. The defendant averred that he had an interest in the land; that he, in good faith, asserted his claim and sold his interest to another party. The deed, relied upon as divesting the defendant's interest in the land, contains these words in the (462) *habendum* clause: "To have and to hold to the said Ledford, his heirs and assigns forever, together with all the woods, waters and *one-half* of the minerals," etc.

At the close of the plaintiff's evidence the court held that he could not recover, among other reasons, because there was not sufficient evidence to sustain the second issue, which was in these words: "Did the defendant falsely and maliciously interfere with the plaintiff's sale to A. H. Isbell or his assigns and falsely and maliciously slander the plaintiff's title as alleged?" We express no opinion on the title, as the case turns upon the sufficiency of the evidence in support of the second issue.

Slander of title of property may be committed and published orally or by writing, printing or otherwise, and the gist of the action is the special damage sustained, and unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to himself, he cannot maintain the action. If the alleged infirmity of the title exists, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damages for speaking the truth. It is essential to the

action that the words be maliciously uttered and with intent to injure, and the burden of proving such malice, express or implied, rests upon the plaintiff. If he can show that the utterances were not made in good faith to assert a real claim of title, or facts and circumstances that warrant such an inference, then malice may be fairly implied.

If the defendant should assert title to the property in question or to some interest therein, which turned out to be unfounded, malice will not be presumed from such a fact, because malice must be shown as a substantive fact. It is the duty of one, believing that he has such a claim or interest, to proclaim and assert it when a sale is in contempla-
(463) tion by another, in order that innocent persons may not be deceived or misled to their injury. If one be inquired of, he must speak the truth as he understands it and believes it to be. If he is present at a public sale of property claimed by himself, he must speak for the protection of purchasers or he will be forever estopped. If, at last, upon investigation, the defendant fails to show any title or interest in possession or in remainder, still, if his acts were done in good faith at the time he spoke, no action will lie. The plaintiff, claiming damages, must show malice—that there was no probable cause for the defendant's belief—that he could not honestly have entertained such belief. The prevention of a sale by the assertion of a claim by A, although unfounded, is not actionable unless it be knowingly bottomed on fraud. 4 Rep., 18; 4 Burr, 2422. On this subject generally see Townsend on Slander and Libel. Isbell, who contracted with the plaintiff, refused to complete his contract because his principal doubted the title and was so advised by counsel.

Looking carefully at the evidence, we agree with his Honor that there was not evidence of falsehood and malice sufficient to be submitted to the jury.

Affirmed.

Cited: Davis v. Keen, 142 N. C., 502.

N. B. GRAHAM v. J. J. O'BRYAN ET AL.

Practice—Special Appearance—Defective Service by Publication—Attachment—Statute of Limitations—Burden of Proof.

1. Where the motion of defendants who entered a special appearance for the purpose of having the action dismissed for want of legal service of summons, and for want of jurisdiction, was overruled, their subsequent appearance did not bring them into court.

2. A service by publication on a non-resident in an action affecting property is invalid without attachment.

3. Where the plea of the statute of limitations is pleaded, the burden of proof is upon the opposite party to show that the cause of action accrued within the statutory time.

ACTION, tried before *Timberlake, J.*, and a jury, at Spring Term, 1896, of CHEROKEE. On the trial, after the plaintiff had (464) rested his case, his Honor held that plaintiff could not recover and entered judgment for defendants, from which plaintiff appealed.

Mr. F. P. Axley for plaintiff (appellant).
Mr. J. W. Cooper for defendant.

CLARK, J. The Judge held that the plaintiff could not recover, and rendered judgment in favor of the defendants for costs. The judgment must be affirmed for several reasons. The defendants, entering a special appearance, moved to dismiss for want of legal service of summons and for want of jurisdiction. The plea was overruled. The defendants, having excepted, their subsequent appearance did not bring them into court as a general appearance otherwise would have done. *Farris v. R. R.*, 115 N. C., 600. The record shows only a summons and a return that the defendants "could not be found in the county." The appellee's counsel, however, admits that the record is defective, and that, in fact, the defendants were served by publication, but contends that being non-residents and no attachment having been served, the service was not a legal service. Upon that state of facts, the proposition of law is correct. *Bernhardt v. Brown*, 118 N. C., 700; *Lony v. Ins. Co.*, 114 N. C., 465. But nothing in the record shows either that the defendants were non-residents or any publication made or any attachment. In this confused state of the record we find, however, that the Sta- (465) tute of Limitations was pleaded. This devolved the burden upon the plaintiff of showing that the cause of action accrued within the statutory time. *Hussey v. Kirkman*, 95 N. C., 63; *Moore v. Garner*, 101 N. C., 374; *Hobbs v. Barefoot*, 104 N. C., 224. Upon the face of the complaint the plaintiff's claim was barred, and his evidence did not show anything to place his claim within date. There are other defects barring the plaintiff's right to recover, but we need not go further.

Affirmed.

Cited: Parker v. Harden, 121 N. C., 59; *House v. Arnold*, 122 N. C., 221; *Vick v. Flurnoy*, 147 N. C., 213.

G. M. ROBERTS v. W. J. COCKE, ADMINISTRATOR OF W. M. COCKE, JR., DECEASED.

Action on Note—Payment—Evidence.

In the trial of an action on a note given by C, defendant's intestate, to M, endorsed by M to plaintiff, which purported on its face to be for the balance due plaintiff for land, it appeared that plaintiff contracted to sell the land to D, and took notes for the purchase money, retaining title, and that D contracted to sell the land to C, who agreed to pay to plaintiff the balance due him; and that plaintiff had agreed with D to make conveyance to whomsoever he might direct, and subsequently conveyed to C's wife by a deed in which D and wife joined, and which recited that the several contracts had been complied with. On a former trial of the action C had testified that the note sued on was given in payment of the balance due to plaintiff for the land and settled the matter with him. Evidence was also admitted that a mortgage, which was on the land at the time of the various contracts concerning the land, had been marked satisfied on the records. *Held*, that neither the deed so executed by plaintiff and D to C, nor the cancellation of the mortgage, nor the said several contracts between the parties should have been received as evidence of payment of the note sued on, although the latter were relevant to explain the reason for the execution of such note.

(466) ACTION, tried before *Bryan, J.*, and a jury, at August Term, 1896, of BUNCOMBE. The action was upon a note executed by defendant's intestate to C. M. McLoud and endorsed to the plaintiff, the facts concerning which are fully set out in the opinion of this court. There was judgment for the defendant upon the finding of the jury that the note sued on had been paid and plaintiff appealed, assigning error as follows:

1. In that the Judge erred in permitting the deed from the plaintiff, G. M. Roberts, and others, bearing date 13 May, 1885, to be taken as evidence in behalf of the defendant in the trial of the issue submitted to the jury in this action.

2. In that the Judge erred in permitting a paper-writing purporting to be a contract between G. M. Roberts and R. M. Deaver, bearing date 3 January, 1876, to be taken as evidence, etc.

3. In that the Judge erred in permitting the paper-writing purporting to be a contract between R. M. Deaver, A. E. Deaver and Wm. M. Cocke, Jr., bearing date 12 October, 1881, and purporting to have been approved by the plaintiff, G. M. Roberts, on same date, to be taken as evidence, etc.

4. In that the Judge erred in permitting the paper-writing purporting to be a contract between the plaintiff, G. M. Roberts, and one C. M. McLoud, bearing date 2 June, 1884, to be taken as evidence, etc.

5. In that the Judge erred in permitting the introduction as evidence what purported to be a note, executed by G. M. Roberts, the plaintiff, to one Mrs. Sarah E. Buchanan, bearing date 7 March, 1874, with the endorsement of payment thereon by said plaintiff.

6. That the Judge erred in permitting the introduction of the testimony of Captain T. W. Patton in reference to the release of the mortgage or deed of trust executed by the plaintiff, G. M. Roberts, (467) to Mrs. Sarah E. Buchanan.

7. In that the Judge erred in permitting Wm. J. Cocke, the son and administrator of the defendant intestate, to speak of a conversation between him and his said father about the payment of the note sued on, in order to corroborate the testimony of said Wm. M. Cocke, Jr., deceased.

Messrs. Merrimon & Merrimon and S. H. Reed for plaintiff (appellant).

Messrs. Moore & Moore for defendant.

MONTGOMERY, J. This action was brought to recover the amount of a sealed promissory note executed by the defendant's intestate to C. M. McLoud and assigned by the payee to the plaintiff. The note is in the following words and figures: "Three months after date, with 8 per centum per annum interest after maturity (and payable semi-annually if note allowed to run) I promise to pay to the order of C. M. McLoud nine hundred and forty-six 81-100 dollars, for value received, negotiable and payable at the Bank of Asheville, and being part of purchase money still due by me on the P. W. Roberts place in Asheville, on which I now reside. W. M. Cocke, Jr. (seal), 2 Sept., 1895."

It is agreed that the consideration upon which the note was executed, towit, a part of the purchase money due at the time of its execution by the maker for the Roberts place, upon which the intestate of the defendant resided, was not an original transaction between the parties to the note. The property, the Roberts place, was in the first instance the subject of a contract dated 3 January, 1876, in which G. M. Roberts, the plaintiff, was to convey the same to R. M. Deaver upon the payment by Deaver of the sum of $8,525, to become due at differ- (468) ent times and in different amounts. Among the future instalments was one of $1,000, due 1 March, 1876; one of $631, 15 May, 1876; one of $869, due 15 May, 1876; one of —— due 15 May, 1876; and three of $1,341.62½, each with interest on all from 14 January, 1876. The contract between Roberts and Deaver contained the following provision: "It is further agreed that the three last above named notes, together with that of $631 above named, with interest thereon, are to be

paid by the said Deaver to Mrs. S. G. Buchanan in order to discharge a lien in her favor to the extent of the amount of said notes on the property hereby sold; and the said notes are to be left in the possession of C. M. McLoud, through whom the said application of said payments is to be made."

Afterwards, on 12 October, 1881, R. M. Deaver and A. E. Deaver, the latter being jointly interested though not named in the contract between Roberts and R. M. Deaver, contracted to sell their interest to the Roberts place to W. M. Cocke, Jr., the intestate of the defendant for the sum of $8,300, payments to be made in the following manner: "Said Cocke is to assume and pay to Mrs. S. E. Buchanan the amount that may be found to be due her upon a mortgage held by her upon said land, and also to pay to G. M. Roberts the balance of the purchase money due to him for said land, and to pay the balance of the said sum of $8,300 to said R. M. and A. E. Deaver, in equal instalments, at one, two and three years, notes to be given for said balance, bearing interest from date at the rate of 6 per cent. per annum, and title to be retained until all the purchase money shall be paid."

Roberts agreed in writing to the terms of the last named contract, and agreed that he would convey the title, as he might be requested to do by the Deavers, upon the payment to him of the balance of the
(469) purchase money under his contract with the Deavers. Afterwards the plaintiff and his wife, R. M. Deaver and his wife, and A. E. Deaver and his wife, executed a deed for the property to Mrs. Cocke, the wife of the defendant's intestate, at the request of the husband, in which deed all the particulars of the contracts above referred to were recited, and it was further recited that all the conditions and terms therein set out had been fully met and complied with. The defendant's intestate went into possession of the property. The probate of the deed as to the plaintiff and his wife was had on 10 January, 1886; that of R. M. Deaver and his wife on 15 January, 1886, and that of A. E. Deaver and his wife on 15 September, 1886. The intestate of the defendant on the first trial was examined as a witness in his own behalf and stated that the note sued on in this action was given in payment of the balance due to the plaintiff for the lot of land on which he lived in the City of Asheville. He testified further that the note was for the balance of the purchase money due Roberts, and settled the matter with him. This evidence was admitted on the last trial by consent, the witness having died between the times of the two trials. On the trial the defendant was permitted to introduce the deed from Roberts and wife and others to Mrs. Cocke as evidence of the payment of the notes sued on, and the plaintiff's first exception is to that ruling of his Honor. The deed was not competent evidence to show pay-

ment of the note. The testimony of the defendant's intestate was to the effect that he wished to get the deed to the land made to his wife, and to that end got the plaintiff to take his note, made payable to McLoud and by McLoud endorsed to the plaintiff (which is the note in suit) for the balance that was due by the Deavers on the land. This balance was to have been paid by the defendant's intestate to the plaintiff under the contract between the Deavers and the defendant's in- (470) testate. The note sued on then was, at the time of the execution, the balance due to the plaintiff by the Deavers, and, according to the evidence of the defendant's intestate, the note was given for the balance of the purchase money due to the plaintiff and settled the transaction with him. The deed, therefore, could be no evidence of the payment of the note as the note was given, according to the testimony in the case, that the deed might be made and it collected, and on its face that it was for a balance due for the land.

The evidence which was admitted, and upon which the plaintiff bases his exceptions, Numbers 2 and 3, was not competent to show payment of the note, but was relevant to show the connection the defendant's intestate had with the purchase of the land and with the Deavers in relation thereto, and to explain the reason for the execution by the defendant's intestate of the note sued on.

Exception 6 ought to have been sustained. The Buchanan note and mortgage, even if it had been paid at the time satisfaction of it was entered in the registry, could have tended in no wise to prove that the note sued on had been paid. But the Buchanan mortgage was not paid at the time the entry of satisfaction was made, and that fact was admitted on all sides at the trial. Under the contract between the defendant's intestate and the Deavers, the Buchanan note and mortgage had to be paid by the defendant's intestate, and also several notes to the Deavers as a part of the purchase money which the defendant's intestate agreed to pay to the Deavers. The Buchanan mortgage was not satisfied of record until 16 January, 1886, and on that day the execution of the deed was proved by Roberts and wife; that of R. M. Deaver and wife on 19 January, 1886, and that of A. E. Deaver and wife on 13 September, 1886. The Buchanan mortgage was satisfied by an entry to that effect on the registry, but it was not, in fact, paid, as by admission (471) in the case the defendant's intestate made payments on it long after satisfaction had been entered on the registry and the deed from Roberts and wife and others to the defendant's intestate had been delivered. That was conclusive proof that some satisfactory arrangement had been made between the defendant's intestate and the holder of the Buchanan note and mortgage by which the land was relieved of the encumbrance.

The plaintiff's exception, No. 4, to the admission of the Gump settlement ought to have been sustained. The note which was deposited with McLoud as a collateral to secure the debt which Roberts, the plaintiff, owed to Gump & Co., was one which expressly declared to be a lien on the P. W. Roberts property. The note sued on could not, therefore, have been referred to. It was no lien on the property, and was executed, as testified by defendant's intestate, to relieve the property of the lien resting on it under the several contracts of sale with the plaintiff. The note which was deposited with McLoud clearly was one of those notes which the Deavers owed to Roberts under the contract between them. There was error in the rulings of the court below as pointed out, and there must be a

New trial.

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K. F. ALEXANDER ET AL. v. W. J. ALEXANDER, ADMINISTRATOR OF JAMES M. ALEXANDER ET AL.

Practice—Reference—Referee's Report — Appeal—Exceptions—Guardian and Ward—Negligence of Guardian—Correction of Judgment —Printing Record on Appeal.

1. No appeal lies from an order passing on referee's report and recommitting it for correction, but if an exception be noted to the ruling it can be heard on the appeal from the final judgment.
2. An appeal taken from an interlocutory order, but abandoned because prematurely taken, will operate as an exception to such order upon an appeal from the final judgment.
3. Where a guardian accepts from the administrator of an estate a smaller sum than his ward's share in the estate, the guardian or the administrator can, at the option of the ward, be held to account for the deficiency.
4. It is not competent for a judge, on the final hearing of a case, to review and set aside a former interlocutory order or judgment rendered by another judge, to which an exception was taken, such review being reserved for this Court on the final appeal.
5. A note given by brothers of an intestate for an attorney's fee to assist in prosecuting the slayer of an intestate, being a debt created after the death of the intestate, is not a proper charge against the estate.
6. When any part of a record on appeal is printed, it should not only be paged, but the index and marginal references required in the original (Rules 19 and 21) should also be printed.
7. Well considered briefs being of great advantage to an appellate court in all cases, and the cost of printing the same being allowed to the successful party, it is desirable, though not required by the rules, that they should be printed and filed.

ALEXANDER *v.* ALEXANDER.

ACTION, tried before *Bryan, J.*, at August, 1896, Term of BUNCOMBE, on a referee's report and exceptions thereto. There was judgment for the plaintiffs and defendants appealed.

Mr. T. H. Cobb for plaintiffs.
Messrs. Moore & Moore for defendants (appellants).

CLARK, J. The order of *Armfield, J.*, passing upon the report (473) of the referee, but recommitting it for correction was not appealable, and an exception should have been noted so as to bring up the ruling on appeal from the final judgment. *Wallace v. Douglas,* 105 N. C., 42, and other cases cited; Clark's Code (2 Ed.), p. 562. The appeal then noted, but abandoned because premature, is a sufficient exception. *Luttrell v. Martin,* 112 N. C., 593. The settlement of the guardian, P. A. Cummings, with the administrator, and the receipt given in full by him, is binding upon such guardian, who, from having been present at the statement of the account before the Clerk, had full knowledge of the transaction, and, indeed, there is no allegation of fraud or mistake, nor any proof, if it had been alleged, which would justify setting aside the receipt. But this action was brought by the wards in their own behalf by a next friend (the guardian subsequently being made a party), and, if he accepted a lesser sum than the wards were entitled to, they have their option to sue either the guardian or the administrator for the deficiency. *Culp v. Lee,* 109 N. C., 675. The receipt in full given by the plaintiff, K. F. Alexander, widow of the deceased, is *prima facie* binding upon her, and there is neither allegation nor proof to rebut this, but it appears from the "additional findings of fact by agreement of parties" that the McLeod note in question was paid out of the money derived from sales of land which belonged to the children and was deducted out of the balance which should have been paid over to the guardian. The widow, Mrs. Alexander, is entitled to no part of this recovery, and therefore her estoppel does not affect the judgment. The defendant's exceptions filed at August Term, 1896, are solely because the wards are not held estopped by the guardian's receipt and that the court did not hold the payment of a proper charge. It was not competent for *Judge Bryan,* at the final hearing, to review or set aside the former judgment of *Judge Armfield. Scroggs v. Stevenson,* 100 (474) N. C., 354; *May v. Lumber Co.,* 119 N. C., 96. That was reserved for the judgment of this court by the exception entered thereto at the time.

The note given by the two brothers of the deceased for a fee to counsel to assist in prosecuting the alleged murderer of the intestate, was not a proper charge against the estate. *Banking Co. v. Morehead,* 116

N. C., 410; *Froelich v. Trading Co.*, 120 N. C., 39. That one of the obligors subsequently qualified as administrator did not entitle him to retain the sum paid.

We note that in this case the printed record contains an index as required by Rule 19 (3). The original record is required by Rules 19 and 21, to be paged and indexed, with marginal references to the contents, under a penalty (Rule 20) of a reference to the clerk of this court to add the paging, indexing and marginal references with an allowance of $5 therefor. When any part of the record is printed, it should not only be paged as is usual, but the index and marginal references required in the original should also be printed. Those requirements, if complied with, will much facilitate the argument of cases by counsel and their consideration by the court. There are too many cases in which this has been neglected. It is now called to the attention of appellants and their counsel that an expense of $5 may not be incurred by some who might overlook this matter, which is required by the rules and which is observed by others. While the rules do not yet make it obligatory to file a printed brief in every case, it is always desirable that counsel should do so. They are taxed in the bill of cost in favor of the winning party. A well considered brief is an assistance much to be desired by any appellate court, and in all cases.

No error.

Cited: Lucas v. R. R., 121 N. C., 508; *Pretzfelder v. Ins. Co.*, 123 N. C., 168; *Baker v. Hobgood*, 126 N. C., 152; *Hahn v. Heath*, 127 N. C., 28; *Brinkley v. Smith*, 130 N. C., 226; *Sigman v. R. R.*, 135 N. C., 182; *Cobb v. Rhea*, 137 N. C., 298; *Gray v. James*, 147 N. C., 141.

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(475)

FIRST NATIONAL BANK OF SPRINGFIELD ET AL. V. ASHEVILLE FURNITURE AND LUMBER COMPANY.

Practice—Appeal—Res Judicata—Attachment—Intervening Claimants —Title—Evidence—Damages.

1. On the second appeal, where errors assigned are the same as those passed upon by the former appeal, the former decision will be adhered to, the proper course for the correction of error in the former opinion, if any exist, being by petition to rehear.

2. Where a claimant intervenes in attachment proceedings and in his affidavit of claim avers that an attachment has been levied, he cannot be afterwards allowed to deny the levy.

3. Where a claimant of attached property intervenes in attachment proceedings, he cannot be allowed to deny that a levy has been made, for the reason that it does not concern him whether the levy has been made or not; he is interested in but one issue, to-wit, the title to the property.

4. Where an intervening claimant in attachment proceedings had purchased the property only twelve days before the levy of the attachment, at which time it was in the factory of the debtor and in an incomplete condition, and on the trial the validity of the sale under which claimant claimed was the only issue, evidence that the claimant was in possession at the time of the levy was not admissible as showing title to him.

5. Where, in the trial of an action involving the title to personal property upon which an attachment had been levied and was claimed by an intervener, the parties agreed that, if the jury should find for the plaintiff, the damages should be six per cent interest on the value of the property from the time of the levy, and the jury found for the plaintiff and fixed the value of the property at date of levy, it was not improper for the court to make the computation of interest and enter the result as the answer to the issue as to damages.

ACTION, tried at August Term, 1895, of BUNCOMBE, before *Robinson, J.*, and a jury. The nature of the action and the facts pertaining thereto appear in the report of former appeal in same case, contained in 116 N. C., 825, and in the opinion of *Furches, J.* There was a verdict for the plaintiff, and defendant appealed. (476)

Messrs. W. W. Jones, James H. Merrimon, C. M. Stedman and Shepherd & Busbee for appellants.

Messrs. F. A. Sondley and Moore & Moore for appellees.

FURCHES, J. This case was before us at February Term, 1895, on the appeal of the plaintiffs, at which time a new trial was awarded. 116 N. C., 825. A new trial has been had and the case is again before us on appeal from the interveners.

Upon an examination of the record in this appeal and the record of the former appeal, we find that the case presented now is substantially the same as that before us on the former appeal. The points of difference will be noted. But so far as it is the same, the former opinion must stand. If it was not correct, the proper course to have it reviewed was by petition to rehear. The greater part of the brief and the authorities cited are to show that the former opinion is erroneous. But for the reasons we have stated, these arguments and authorities cannot avail the interpleading appellants.

In the former appeal, the interpleading appellants, for the purpose of showing the agency and authority of Avery to sell and thereby to show their title to the attached property, introduced evidence tending to show a meeting of the directors of the defendant company in Cincinnati,

Ohio. On the last trial they did not introduce this evidence. And this is alleged by the interveners as a difference between this case and the former case on appeal. The appellants are correct in claiming that the cases differ in this respect, but we are unable to see how this helps them. How it is that, because they did not introduce all the evidence relied upon to show their title on the last trial, which they did on the (477) first, can benefit them, we cannot see. This exception can avail the interpleaders nothing, and this is the only substantial difference in the evidence in this and the former trial.

There are many other exceptions—as to the Glen Rock Hotel meeting, the sale to the Tennessee Company, as to what took place between Avery and the interveners at the time of the sale to the interveners, and as to other matters—but these were all passed upon on the first trial and by the former opinion of this court.

There are three exceptions not passed on by the former trial and by the former opinion of this court. One of these is that the interpleaders offered evidence, or proposed to offer evidence, to show that the attachment of the plaintiffs had never been levied on the property in controversy. This evidence was excluded on objection by plaintiffs and the interveners excepted. This evidence was incompetent for two reasons:

First—For the reason that the interveners, in their affidavit upon which they were allowed to make themselves parties, aver and allege that the attachment had been levied. They cannot now, and at this stage of the proceeding, be allowed to contradict their sworn statement.

Secondly—For the reason that interveners in attachment proceedings are not allowed to make any such issue—it is none of their business. If the property is theirs, they recover it whether the attachment is levied or not; and if the property is not theirs, it makes no difference to them whether it is levied or not. The interveners can have but one issue, viz., does the property attached belong to them? *Blair v. Puryear,* 87 N. C., 101; *Sims v. Goettle,* 82 N. C., 268; *Toms v. Warson,* 66 N. C., 417.

It was also contended by the interveners that they proposed to offer evidence to show their possession, which they say would have tended to prove their title, and were not allowed to do so. Whether (478) evidence of possession may not be competent as tending to show title in some cases, we do not say. But it does not seem to us that such evidence would be proper in this case, where the property in controversy is only claimed to have been bought by the interveners twelve days before the attachment was levied—was in an incomplete condition at the time—had not been moved from the defendant's factory, and where the validity of this sale to the interveners is the very

question involved in the trial. It does not seem to have been proper evidence, and we see no error in this ruling of the court.

Another exception is, that the court found the third issue as to damages without submitting it to the jury. This exception, without explanation, would have to be sustained. But when we examine the case on appeal and find that it was agreed by the parties that, if the jury found for the plaintiffs, the answer to the third issue should be the interest on the amount found as the value of the property at the rate of 6 per cent., and the court only computed the interest according to the agreement of the parties and entered the result of this calculation as the proper answer to that issue, we fail to see the error complained of.

After seeing that the case presented by this appeal is, in all respects, substantially the same as that presented on the former trial, after disposing of the exceptions not involved in the first trial, it seems to us that the ruling of the court on the first issue was proper.

Affirmed.

Cited: S. c., 122 N. C., 752; *Redman v. Ray,* 123 N. C., 507; *Glass Plate Co. v. Furniture Co.,* 126 N. C., 889; *Cotton Mills v. Weil,* 129 N. C., 455; *Mfg. Co. v. Tirney,* 130 N. C., 613; *Maynard v. Ins. Co.,* 132 N. C., 713; *Carson v. Ins. Co.,* 165 N. C., 136; *Forbis v. Lumber Co., ib.,* 406; *Latham v. Fields,* 166 N. C., 215.

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(479)

W. L. HENRY, INDIVIDUALLY AND AS ADMINISTRATOR OF R. M. HENRY, DECEASED, v. W. L. HILLIARD, INDIVIDUALLY AND AS EXECUTOR OF JAMES R. LOVE, DECEASED.

Consent Order—Attorney and Client—Res Judicata—Jurisdiction of Judge Commissioned to Hold Court Out of His District—Arbitration and Award.

1. An order which was, by consent of the attorneys of record for one of the parties, made in a county other than that in which the cause was pending, will not be set aside because one of the attorneys never was and the other was not at the time, though he had previously been, authorized to act for the party, neither of such attorneys not being attorney for the adverse party.

2. Where an order recites that it was made "by consent of all parties," this Court is bound by such statement, and a party to the action will not be permitted to contend that his attorney of record was not authorized to consent to the order.

3. While consent will not confer jurisdiction where the court has no jurisdiction of the subject matter, yet where a judge has jurisdiction of the

subject matter and a case is transferred to him to be heard in a county other than that in which it is pending, by an order of Court, made by consent of all parties, they cannot be afterwards heard to dispute the right of such judge to act in the matter.

4. A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties.

5. In an action pending in Haywood Superior Court, which had been committed to arbitrators, a consent order was made authorizing the arbitrators to file their award "under the orders heretofore given in this cause" at Swain Superior Court, as of that term of Haywood Superior Court. The orders referred to provided for judgment on the award and the filing thereof in Haywood County. *Held*, that such provisions by the reference thereto in the order for filing at Swain Superior Court became a part of the latter order.

6. Arbitrators are "a law unto themselves," and it is not necessary that they shall decide or undertake to decide any matters before them according to the rules of law, and their award need not state the facts or reasons on which it is based.

7. An award of arbitrators cannot be set aside for error not appearing on the face of the award and terms of submission.

8. One Superior Court judge cannot reverse or set aside an order or judgment of another; hence, an order refusing a motion to vacate an award cannot, on the same grounds, be renewed before or passed upon by another judge.

(480) ACTION, heard before *Bryan, J.*, at Fall Term, 1896, of BUNCOMBE, on a motion to set aside a judgment which had been rendered on the award of arbitrators. The motion was allowed, and defendant, Mrs. M. E. Hilliard, appealed.

Mr. T. H. Cobb for Mrs. M. E. Hilliard (appellant).
Messrs. Merrimon & Merrimon for plaintiff.

FURCHES, J. At Spring Term, 1891, this case was pending in HAYWOOD, involving the settlement of the estate of J. R. Love, deceased, in which a large trust fund was involved and in which there were over fifty defendants, related to the testator in different degrees and entitled to different and unascertained amounts. At that term there was a reference by consent of all parties to W. W. Jones and J. K. Boone, as arbitrators, and their award was to be "final and to be enforced as a rule of court." This was signed by *Merrimon, J.*, then presiding and holding said court. Under this judgment and order of reference, said Jones and Boone commenced their work of taking evidence and investigating the matter, but their report was necessarily delayed until spring of 1895.

But the parties interested being anxious for a settlement of the matter at Spring Term, 1894, of HAYWOOD (the arbitrators not yet being ready to report), by consent of all the parties, an order was made and signed by *Shuford, J.*, that said arbitrators might file their award during December Term, 1894, of Buncombe Superior Court, "and the judgment of the court upon such motion shall be entered in the minutes of this court as of this term." But at said December Term (481) of BUNCOMBE the arbitrators, still not being ready to file their award, *Boykin, J.*, made another order extending the time to Spring Term, 1895, of MADISON. But no report was made at Madison, and at Spring Term, 1895, of HAYWOOD, which convened on 8 April, *Graham, J.*, presiding, made an order, towit: "In the above entitled action it is ordered by the court, by consent of all parties, that W. W. Jones and J. K. Boone, arbitrators heretofore appointed in said cause, may file their report and award under orders heretofore taken in this cause, at Spring Term, 1895, of SWAIN County, as of this term of HAYWOOD Superior Court." SWAIN Superior Court was in June, 1895, and the term was held by *Starbuck, J.*, under an exchange with *Winston, J.*, for SWAIN and GRAHAM Counties and under the Governor's commission for those two counties. During said Spring Term, 1895, the arbitrators, Jones and Boone, filed their award, and upon motion of Ferguson & Welch, two attorneys appearing of record for the defendants, Judge Starbuck granted and signed a judgment confirming the award. This judgment was taken to HAYWOOD, together with the award, which became a part of the judgment, and was entered of record in the Superior Court of HAYWOOD, as of Spring Term, 1895. There were no exceptions filed or objections made to Judge Starbuck's judgment confirming the award, during that term of court or thereafter, until Spring Term, 1896, of HAYWOOD Superior Court. At that term, as it appears of record, R. D. Gilmer, who was one of the defendants and who some time prior to Starbuck's judgment had been appointed trustee and receiver of the fund, made a motion in behalf of himself and all the defendants, except the defendant Hilliard to set aside the Starbuck judgment. The notice of this motion shows that it was made principally (482) upon the ground that Judge Starbuck had no jurisdiction of the matter and no right to grant the judgment of confirmation. And for the further reason that by mistake or some other means there was an error of several thousand dollars in the award. These allegations were denied by the defendant Hilliard and the motion to set aside was heard before *Timberlake, J.*, at Spring Term, 1896, who, after hearing the whole matter upon the record and various orders and upon affidavits of Gilmer and those moving to set aside the judgment and also the affidavits of defendant Hilliard and the arbitrators Jones and Boone and argu-

ment of counsel, refused the motion to set aside the judgment. And in his judgment refusing the motion to set aside, he ratified and confirmed the Starbuck judgment by requiring the trustee and receiver Gilmer in express terms, to proceed to pay out the money in his hands due Jones and Boone under the Starbuck judgment.

The defendant Gilmer and those interested with him in making the motion to set aside before Judge Timberlake, took an appeal from his judgment to this court; bond was filed and the case on appeal made out, in which Judge Timberlake found the facts, which are now on file and are made a part of the record of this appeal. Among many other things which Judge Timberlake found, are these: That said Gilmer, in making this motion, acted for all the defendants, except the Hilliards; that the judgment of Starbuck was made by consent of all the parties, and that said "Gilmer admitted on the argument before him that the Starbuck judgment was made by consent of all the parties."

Although this appeal was perfected, the appellants did not bring it to this court, and the matter rested until August, 1896, when (483) another notice was served on the defendant Hilliard, in substance, if not in the exact terms, of the notice returnable to Spring Term, and which was heard by Judge Timberlake. This came on to be heard at Fall Term, 1896, before Judge Bryan, at HAYWOOD, but, by agreement, was continued from time to time and from place to place until it was heard at December Term, 1896, of Buncombe Superior Court.

Judge Bryan finds that D. L. Love and his children did not give their consent to the Graham judgment; that R. D. Gilmer, administrator and trustee, did make a motion before Judge Timberlake to set aside the Starbuck judgment, but that none of the parties to this motion were parties to that motion; that W. B. Ferguson, one of the attorneys who made the motion before Starbuck to confirm the report and for judgment, and who is now of counsel for those asking to have it set aside, was not then acting for them, though he had been; and that Mr. Welch was a young attorney and was not authorized to act for those parties. But it is not denied that both Ferguson and Welch were marked as attorneys of record for the *defendants.* It seems that one of them has placed himself in a condition that calls for an explanation, and the other is repudiated. The movers in this matter seem to think that these facts are of benefit to them. But we cannot see that they are. Neither of them ever was counsel for the Hilliards, and their action does not fall under *Gooch v. Peebles,* 105 N. C., 411, and *Arrington v. Arrington,* 116 N. C., 170.

It seems that Judge Starbuck was commissioned to hold Swain and Graham courts in January, 1895, and that Haywood court was in April,

1895, and Swain Court was in June, 1895. So, as a matter (484) of fact and legal inference, it was known when the order was made at April Term that Judge Starbuck would hold Swain court. It cannot be disputed, as a legal conclusion, but what this order was made by consent of all the parties to the action, although Judge Bryan finds that D. L. Love and his children did not agree to it. It is not disputed but what all the parties were represented by counsel, and would be bound by any order made during that term of the court in furtherance of the rights of the parties, that the court had the right to make. But we do not think the court had the right to make this order, except by consent of the parties. Neither do we believe the Judge would have made this order except by consent of the parties. With their consent, it was properly made in furthering the interest of the parties and is binding on them.

And it is expressly stated in the order that it is made by *consent of all the parties.* We are bound by the statement as a matter of record. *Woodworking Co. v. Southwick,* 119 N. C., 611.

It would be utterly destructive of all our ideas of the verity of records if they could be destroyed by some one coming in after court and saying he did not agree that such an order should be made, although his attorney did.

This brings the case by consent of all the parties to Judge Starbuck at SWAIN. And if he had jurisdiction, that is, the legal right to make the judgment, it would seem that it is regular and should not be set aside on the ground of irregularity. *Godwin v. Monds,* 101 N. C., 354; *Bear v. Cohen,* 65 N. C., 511; *Gatewood v. Leak,* 99 N. C., 363; *Anthony v. Estes, ibid.,* 598.

But it is contended by the movers that Judge Starbuck had no authority, even if the Graham judgment was made by consent of all the parties, for the reason that he was not the Judge of the district—that he was only commissioned to hold two courts, Swain and Graham. But we are unable to see what difference that makes. He had the same powers while there and holding that court that Judge Win- (485) ston would have. *Bear v. Cohen, supra; White v. Morris,* 107 N. C., 92; *Benbow v. Moore,* 114 N. C., 263. It seems to us that after we have seen that the case had gotten before him by consent of all the parties, he certainly had the right to act upon it. Indeed, it is seen that as a matter of law the parties knew it would go before him when the order was made at April Term of Haywood court. It is true that consent will not confer jurisdiction where the court has no jurisdiction of the subject-matter. But that is not the case here. And where he has jurisdiction of the subject-matter and the case is transferred to him by an order of court made by consent of all the parties, they cannot be

heard afterwards to dispute his right to act. It seems to be conceded that, if the consent be established and he had been the Judge assigned to ride the whole district, the judgment would be regular. We can see no difference on this account, as is shown by the authorities cited above.

But the movers further contend that the consent order of Judge Graham only authorizes the arbitrators to file their award at SWAIN court. This would, it seems to us, be a very narrow and strained construction of the order. Why should there have been an order authorizing it to be filed there, if nothing else could be done? Why should the order have provided that it should then be filed in HAYWOOD court, as of Spring Term, 1895? But we are not left alone to this means of construing the Graham order. It says they may file their award at Spring Term of SWAIN "under orders heretofore taken in this cause." And Judge Shuford's order made at Fall Term, 1894, in express terms provides for judgment, and that it be afterwards filed in HAYWOOD court. The Graham order refers to the Shuford order, and thereby makes it a part of the Graham order. *Alexander v. Norwood,* 118 N. C., (486) 381; Freeman on Judgments, sec. 45.

The case was discussed as an agreed judgment—a contract between the parties. This is not true, except so far as it may refer to the consent or agreement to transfer it to Swain court. As we understand a consent judgment, or as it is sometimes called a contract judgment, it is where the parties agree upon the terms of the judgment, that is, as to what shall be put in the judgment. There is nothing of that kind in this case. The award, in fact, constitutes the terms of the judgment, and the judgment of the court is only to enforce the award. In fact, the judgment of the court in such cases—where there has been a submission to arbitrators in a suit pending and the award to be a *rule of court* and an award has been made and no exceptions filed—follows as a matter of course, just as a judgment would follow where there had been a verdict of the jury and no exceptions to the rulings of the court. *Keener v. Goodson,* 89 N. C., 273; *Lusk v. Clayton,* 70 N. C., 184; *Leach v. Harris,* 69 N. C., 537. As there were no exceptions filed, it hardly seems necessary that we should discuss that question.

But it is not necessary that the arbitrators shall decide or undertake to decide any matter before them according to law. It is said "they are a law unto themselves." *Osborne v. Calvert,* 83 N. C., 365; *Keener v. Goodson, supra.* Neither is it necessary that they set out the facts upon which they base their findings, or assign any reason for their findings. It is said it is best they should not do so. *Osborne v. Calvert, supra.* Neither can an award be set aside where exceptions are made to the award upon the ground of error alone, in the findings, unless they appear upon the face of the award and the terms of the submission. To

set aside an award, it must appear there has been fraud, undue (487) influence or some improper conduct on the part of the arbitrators. No allegations are made here, or, if they are, nothing of the kind is found by the Judge who set aside the judgment. *King v. Mfg. Co.*, 79 N. C., 360, and cases there cited.

But there is another ground upon which the judgment appealed from must be reversed, and that is, that the movers are estopped. We have a state of things here that cannot be allowed in our judicial procedure—an appeal from one Superior Court Judge to another. We have Judge Timberlake finding that this order of Spring Term, 1895, was made by consent of all the parties, and that the judgment of Starbuck was made by consent of all the parties—that Gilmer, the mover in the matter, admitted that it was made by consent of all the parties; while we have Judge Bryan finding that the Graham order was made without consent of D. L. Love and children and that the Starbuck judgment was without the consent of anybody, unless it was Mrs. Hilliard. So, we have the state of things so graphically described in *Roulhac v. Brown*, 87 N. C., 1. That was a case like this, where an order had been asked of one Judge, and upon failing, it was asked of another Judge, and the court said: "So we have the conflicting rulings of two of the Judges of the Superior Courts in the very same case, in fact, one Judge reverses the decision of the other Judge. How is this unseemly conflict of opinion to be prevented? It can only be done by enforcing the rule *res judicata.*" *Roulhac v. Brown, supra; Wilson v. Lineberger*, 82 N. C., 412; *Jones v. Thorne*, 80 N. C., 72.

From the facts found by Judge Timberlake, the movers had no case and they abandoned their appeal. They waited for another Judge to come around and took their chances with him. He reviewed and overruled Judge Timberlake in his findings of fact and law, and set aside the judgment that Judge Timberlake had refused to set (488) aside but had in effect approved and affirmed. "Such unseemly conflict as this" will not be tolerated by this court. There is error and the judgment appealed from is

Reversed.

Cited: Johnson v. Marcom, 121 N. C., 85; *Mayberry v. Mayberry, ib.*, 250; *Fertilizer Co. v. Marshburn*, 122 N. C., 413; *Woodcock v. Merrimon, ib.*, 735; *Hairston v. Garwood*, 123 N. C., 348; *Ladd v. Teague*, 126 N. C., 549; *Moore v. Moore*, 131 N. C., 373; *Cobb v. Rhea*, 137 N. C., 298; *Mangum v. Mangum*, 151 N. C., 271, 272; *Bank v. McEwen*, 160 N. C., 425; *Bonner v. Rodman*, 163 N. C., 3.

J. A. ARRINGDALE v. ENFIELD LUMBER COMPANY.

Broker—Negotiating Sale—Commissions.

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.

ACTION, tried before *Robinson, J.*, and a jury, at Fall Term, 1896, of HALIFAX. The cause of action was a claim for commissions for sale of real estate for defendant. The plaintiff was nonsuited and appealed.

Messrs. H. G. Connor and MacRae & Day for appellant.
Messrs. T. N. Hill and David Bell for appellee.

Per Curiam: There was not sufficient evidence to go to the jury. This case is governed by *Mallonee v. Young*, 119 N. C., 549.
Affirmed.

(489)

J. W. MESIC v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Action for Damages—Killing Stock—Negligence—Contributory Negligence—Proximate Cause—Presumption—Rebuttal—Demurrer to Evidence.

1. Where, in the trial of an action against a railroad company for killing stock, it appeared that plaintiff's servant in charge of a horse failed to look when approaching a railroad crossing with an unobstructed view of the track and the horse was struck by the rear car of a passenger train: *Held*, that the negligent conduct of plaintiff's driver was the proximate cause of the accident, and the trial judge properly sustained a demurrer to the evidence, even though the effect of the demurrer was an admission that the engineer failed to sound the whistle or give other warning of the approach of the train.
2. The statute (The Code, sec. 2326), raising the presumption that the killing of stock by a railroad train is negligence of the defendant, is construed to apply only when the facts are uncertain or not known.

ACTION, to recover $250 damages for the negligent killing by the defendant of a horse belonging to plaintiff, tried before *Robinson, J.* and a jury, at Fall Term, 1896, of CRAVEN. The action was brought within six months from the killing. Upon the conclusion of plaintiff's testimony, the defendant demurred thereto, and, from a judgment sustaining the demurrer the plaintiff appealed.

MESIC *v.* R. R.

Messrs. David L. Ward and L. J. Moore for plaintiff (appellant).
Messrs. P. M. Pearsall and Clark & Guion for defendant.

MONTGOMERY, J. The railroad track was in part the outside boundary of the City of New Bern. The horse driven toward the city by the plaintiff's servant, just as the track was reached at the crossing, was struck on the head and killed by a passing train. There was no (490) controversy as to the facts. It appeared that the driver did not look, as he approached the crossing, for an approaching train. There was no testimony that he listened for any signal from the engineer, though he said he did not hear the whistle or the bell.

There was no obstruction of any kind between the crossing and the depot from which the train started out, and the driver, if he had looked ahead, could have seen the train all the way from the time it left the depot. Just as the driver approached the track he was called by some one behind and he looked back, and the next moment the horse, still going on, was knocked down by the passing train. The engine had passed before the animal was struck. He was first hit by the car next to the engine and was killed by the rear car. His Honor sustained a demurrer to the evidence.

We think there was no error in this ruling. If it be conceded that the effect of the demurrer is an admission that the engineer failed to sound the whistle or give other signal of the approaching train, and that the defendant was on that account negligent, it is yet clear that under the circumstances of this case the conduct of the plaintiff's servant was the proximate cause of the collision by which the horse was killed. It may be said that under the decisions of this Court the rule is that generally and usually, whenever an approach to a public crossing over a railroad is made by any one in charge of a wagon and team, such person is bound to look and listen for approaching trains, and to take every proper precaution to avoid a collision; and this is so even though the approach be made at a time when no regular train is expected to pass; and in case the driver fails to look and listen and to take proper precaution to avoid a collision, and one does occur, the plaintiff cannot recover, even though the defendant was negligent in the first in- (491) stance. *Randall v. R. R.*, 104 N. C., 410; *Gilmore v. R. R.*, 115 N. C., 57; *Russell v. R. R.*, 118 N. C., 1098.

The rule, however, does not prevail, where to look would be useless on account of obstructions, natural in themselves or such as had been placed by accident or design by the companies upon their tracks, and when, at the same time, the engineer had failed to give the usual signal—sounding the whistle or ringing the bell—for the crossing, and in consequence of which failure the person approaching the crossing had been induced to

take the risk. The failure to look and listen is deemed excusable because the person is misled by the conduct of the company. *Hinkle v. R. R.*, 109 N. C., 472; *Alexander v. R. R.*, 112 N. C., 720.

Nor would the rule apply where the approach was made over the crossing in darkness, when there was no light on the end of the approaching train, and the jury should find that a headlight would have enabled the defendant, by due diligence on the part of its servants, to have seen the person crossing its track in time to stop the train before striking him; for such neglect being a continuing negligent omission of a duty is regarded as the proximate cause of the injury. *Lloyd v. R. R.*, 118 N. C., 1010; *Mayes v. R. R.*, 119 N. C., 758.

In the case before the Court the plaintiff's servant gave no attention to his surroundings. There was nothing to threaten the safety of the horse of which he was in charge, if he had only exercised a half reasonable foresight. He allowed some person behind him to distract his attention, and turning his head backwards allowed the horse to go right into the moving train. He made no effort to stop him, if, indeed, he saw the animal when he was struck. It was argued here that under sec-
(492) tion 2326 of The Code, the killing of the horse having been proved, the same was *prima facie* evidence of negligence on the part of the defendant—the action having been commenced within the time prescribed by the statute. The Court, in construing this statute in the case of *Doggett v. R. R.*, 81 N. C., 459, held that "the force of the presumption only applies when the facts are not known, or when from the testimony they are uncertain. There is no uncertainty about the facts as brought out in the testimony in this case, and, as we have said in the beginning, they are undisputed. From them, in our opinion, but a single inference can be drawn, and that is that the plaintiff's servant's conduct was the proximate cause of the accident by which the horse was killed, or as stated in *Hardison v. R. R., post,* 492, the presumption is rebutted. There is no error.

No error.

Cited: Stanley v. R. R., post, 516; *Purnell v. R. R.*, 122 N. C., 840; *Norton v. R. R., ib.,* 935; *Cooper v. R. R.*, 140 N. C., 213, 214, 220, 227; *Osborne v. R. R.*, 160 N. C., 312; *Johnson v. R. R.*, 163 N. C., 444; *Hill v. R. R.*, 166 N. C., 596; *Powers v. R. R., ib.,* 601; *Horne v. R. R.*, 170 N. C., 651.

C. W. HARDISON v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Action for Damages—Killing Stock—Negligence—Presumption—Directing Verdict.

1. The statute (sec. 2226 of The Code) applies to all cases of killing stock by a railroad, and while the presumption of negligence arising from the killing may be rebutted, it is only where the undisputed facts show there was no negligence that the trial judge should direct a verdict for the defendant.
2. Where, in the trial of an action against a railroad company for killing stock, the plaintiff showed the killing and that the action was commenced within six months thereafter and the defendant introduced evidence tending to show that it was not negligent, it was error to direct a verdict for the defendant.

ACTION for damages against the defendant railroad company (493) for killing stock, tried on appeal before *Robinson, J.*, and a jury, at Fall Term, 1896, of CRAVEN. After plaintiff had proved the killing of his cow by the defendant's freight train, within six months before commencement of the action, the defendant introduced the engineer, who testified that, while he was giving the alarm for a flock of cattle ahead, the cow rushed into the engine from a five foot ditch; that he could not have seen her, though the track was straight and one could see up and down it for half a mile. The fireman testified that he saw the cattle ahead, but did not see the cow until she came up out of the ditch.

Plaintiff then introduced a witness, who testified as follows:

"It was thirty steps from the bridge to where she was struck, and she was dragged thirty steps. I heard the train blowing. I saw a cow's tracks in the middle of track at a point just before the point at which the train struck the cow."

His Honor instructed the jury that the plaintiff had failed to make out a case of negligent killing against the defendant and that they should answer the first issue "No." The jury so found.

The plaintiff moved for a new trial upon the ground of error in law in the instructions given the jury by the Court upon the question of negligence.

The motion was refused and plaintiff appealed.

Messrs. L. J. Moore and D. L. Ward for plaintiff (appellant).
Messrs. P. M. Pearsall and Clark & Guion for defendant.

FURCHES, J. This action was commenced in the court of a justice of the peace to recover damages for killing a cow.

(494) The plaintiff's evidence showed that defendant's train ran over plaintiff's cow and killed her and that this action was commenced within less than three months thereafter and rested his case. The defendant introduced evidence tending to show there was no negligence on the part of the defendant in killing the cow, and rested.

At the close of the evidence the Court instructed the jury as follows: "That plaintiff had failed to make out a case of negligent killing against the defendant, and that they should answer the first issue 'No.'" And the jury found the issue as directed by the Court for the defendant.

The plaintiff moved for a new trial for misdirection to the jury. This motion being overruled and judgment for the defendant, plaintiff appealed.

There was error in the instructions given to the jury, for which the plaintiff is entitled to a new trial.

When the plaintiff showed the killing and that the action had been commenced within less than six months thereafter, this in law made a *prima facie* case of negligence against the defendant. Section 2326 of The Code.

Under this statute, as we understand it, at the close of plaintiff's evidence (if the defendant had introduced no evidence), it would have been the duty of the Court to instruct the jury to find the first issue for the plaintiff. But as the defendant introduced evidence tending to show there was no negligence on the part of defendant in killing the cow—that is, to rebut the presumption, or *prima facie* case of the plaintiff—it then became an issue of fact, which could not be found by the Court and should have been left to the jury.

It is true that it has been said in *Doggett v. R. R.*, 81 N. C., 459, and in *Durham v. R. R.*, 82 N. C., 352, that, where the facts are known and show there was no negligence on the part of the railroad, this (495) statutory presumption does not apply. If this statement of the law is correct it does not apply to the case under consideration. For in this case the facts were not known—that is, they were disputed.

But it seems to us that the language used by the Court in *Doggett v. R. R.*, and *Durham v. R. R., supra,* is calculated to produce an erroneous impression and that it would have been much more accurate to have said the *prima facie* case created by the statute is *rebutted* where the undisputed facts show there was no negligence on the part of the defendant, than it was to say the statute *did not apply* to such a case. There is no exception in the statute. It is in terms general and applies alike to all cases of killing stock by a railroad. But this *prima facie* case may be rebutted, and that is what we suppose the Court meant in the cases of *Doggett* and *Durham, supra.* Error.

New trial.

Cited: Spruill v. Ins. Co., ante, 149; *Mesic v. R. R., ante,* 492; *Collins v. Swanson,* 121 N. C., 69; *Everett v. Receivers, ib.,* 521; *Bank v. School Committee, ib.,* 109; *Malloy v. Fayetteville,* 122 N. C., 484; *Mfg. Co. v. R. R., ib.,* 886; *Cable v. R. R., ib.,* 897; *Cox v. R. R.,* 123 N. C., 607, 613; *Gates v. Max,* 125 N. C., 143; *Thomas v. R. R.,* 129 N. C., 394; *Mfg. Co. v. Bank,* 130 N. C., 609; *Baker v. R. R.,* 133 N. C., 33; *Alexander v. Statesville,* 165 N. C., 531.

W. A. NICHOLS v. THE NORFOLK AND CAROLINA RAILROAD COMPANY.

Action for Damages—Permanent Injury to Land by Construction of Railroad—Pleading—Statute of Limitations.

1. In an action against a railroad company for injury to plaintiff's land by the construction of defendant's roadbed, an allegation in the complaint that the fertility of plaintiff's land was almost wholly destroyed by such construction, and thereby rendered unfit for agricultural purposes, was notice to the defendant that the action was for permanent damages.

2. Before the Act of 1895 (ch. 224) a railroad could acquire the prescriptive right to pond water on adjacent lands only by subjecting itself to an action for the injury continuously for twenty years.

3. The Legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened "a reasonable time must be given for the commencement of an action before the statute works a bar."

4. Chapter 224, Acts of 1895, reducing the time for bringing actions against a railroad company for permanent injury to land, caused by the construction or repair of defendant's road, to five years, does not apply to a suit begun before its passage.

ACTION, begun 10 January, 1894, tried before *Robinson, J.,* (496) and a jury, at Fall Term, 1896, of BERTIE. The case had been formerly heard at Spring Term, 1896, by *Graham, J.,* and a jury, upon these issues:

1. Has the land of the plaintiff been damaged by the negligent and unskillful construction of the defendant's roadbed and ditches? Answer: Yes.

2. What amount of damages has the plaintiff suffered, if any? Answer: $500.

The Court (*Graham, J.,*) set aside the issue as to damages, and this issue alone was tried before *Robinson, J.,* at this term.

The plaintiff introduced himself and other witnesses to show that his land has been permanently damaged, because of the negligent and unskillful construction of defendant's roadbed and ditches, to the amount claimed by him.

The plaintiff testified that the first damage suffered by him was in 1888 or 1889; that road and ditches were built in 1887, and he tended his land for three years thereafter, when he was compelled to abandon it because of said damages. This evidence was uncontradicted.

There was evidence on the part of the defendant tending to show that the damage was not so great as claimed by plaintiff.

The defendant, in apt time, requested the Court to charge the jury as follows:

"The purpose of this action being to recover for permanent damages to the plaintiff's land, and it being found in this case that the damages sustained have come to the plaintiff because of the defective con-
(497) struction of the defendant's railroad, and it appearing from plaintiff's evidence, uncontradicted, that the first injury complained of to this land occurred in 1888 or 1889, the plaintiff's claim is barred by the Statute of Limitations, and he cannot recover."

This charge the Court refused to give and defendant excepted.

The Court charged the jury, among other things, "the defendant could only acquire the prescriptive right to pond water on plaintiff's land by subjecting itself to an action for the injury continuously for twenty years; and as it is admitted the road was not built until 1887, the Court holds, as a matter of law, that the action is not barred by the Statute of Limitations." To this charge the defendant excepted.

Thereupon the jury rendered a verdict upon the issue as to damages for plaintiff for $800, and from the refusal of a motion for a new trial, etc., the defendant appealed.

Mr. Francis D. Winston for plaintiff.

Messrs. John L. Bridgers and George Cowper for defendant (appellant).

CLARK, J. The allegation in the complaint that the fertility of the plaintiff's land was almost wholly destroyed, and thereby rendered unfit for agricultural purposes, was notice to the defendant that the action was for permanent damages (*Parker v. R. R.*, 119 N. C., 677, and cases there cited), and the defendant's prayer for instruction was also based upon such being the nature of the action. The Court, therefore, properly refused to charge, as prayed, and instructed the jury that the action would be barred only by the lapse of twenty years. This was held in *Parker v. R. R., supra,* which action, like the present, was begun before chapter

224, Laws 1895, which reduces the limitation for an action (498) against the railroad company "for damages caused by the construction of said road or repairs thereto" to five years, and also requires that the jury "shall assess the entire amount which the party aggrieved is entitled to recover by reason of the trespass on his property." The evident meaning of this act is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. It is settled beyond controversy that while the Legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened "a reasonable time must be given for the commencement of an action before the statute works a bar." *Strickland v. Draughan,* 91 N. C., 103, and cases there cited; Cooley Const. Lim., 450 (8 Ed.), and cases there cited. This action, having been instituted before the passage of the act, is not affected by it.

No error.

Cited: Culbreth v. Downing, 121 N. C., 206; *Harrell v. R. R.,* 122 N. C., 823; *Narron v. R. R., ib.,* 860, 861; *Ridley v. R. R.,* 124 N. C., 36; *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; *Matthews v. Peterson,* 150 N. C., 133; *Graves v. Howard,* 159 N. C., 603.

D. B. BEACH AND WIFE v. WILMINGTON AND WELDON RAILROAD COMPANY.

Action for Damages—Injury to Land by Construction of Railroad—Ponding Water on Land—Compensation—Presumption—Statute of Limitations.

1. In an action for damages to lands resulting from the construction of a railroad (which action, on the trial, was treated as one for permanent damages) it appeared that the railroad was constructed in 1889, and that the plaintiffs acquired title in 1890 and commenced their action in 1893. There was no evidence that the damage was caused simultaneously with the construction of the railroad, but it appeared that it was the result of the gradual filling up of plaintiffs' drains by deposits discharged from defendant's ditches. *Held,* that, in such case, there can be no presumption that the permanent damage occurred before the plaintiff's ownership, and plaintiff's action is not barred. (Clark and Montgomery, JJ., dissenting).
2. A railroad company's right to discharge its ditches on adjacent lands is, in effect, an easement appurtenant to the right of way, for which payment, as permanent damage, may be required by the owner of the servient estate.

(499) ACTION for damages to land, caused by the construction of defendant's road, tried before *Graham, J.*, and a jury, at September Term, 1895, of PITT.

B. D. Beach, for the plaintiffs, testified that he and his wife had been in the possession of the lands on Briery Swamp, described in the complaint, clearing, cultivating and residing upon them continuously since 1871. Record of division of lands of Albert Moore was introduced, in which both tracts of land described in the complaint were allotted to the *feme* plaintiff in 1890 did not go into possession of Mill Branch tract till 1890. There was testimony tending to show that the crops on both tracts had been damaged by the defendant during the three years next preceding the institution of this suit, which was begun in June, 1893. The railroad was constructed in 1889. The defendant requested the Court to instruct the jury as follows: "That it is admitted that the defendant's railroad was constructed during the year 1889, and if you believe the plaintiffs' evidence, the plaintiffs acquired title to the land in the year 1890; that the original trespass or cause of damage was done by the construction of defendant's railroad in 1889, and the plaintiffs not being the owners of the land at the time the original trespass was committed cannot sustain their action and are not entitled to recover anything in this action." The Court declined to give the instruction; defendant excepted. Judgment was rendered for the plaintiffs for $2,000 and costs and defendant appealed.

Messrs. Blount & Fleming for plaintiff.
Mr. John L. Bridgers for defendant (appellant).

(500) DOUGLAS, J. This action was begun in 1893. The complaint, among other things, alleges the ownership of the land, its previous proper drainage by the plaintiffs, the construction of the branch road in 1889 and the injury resulting from the diversion of the water. Paragraphs 5 and 6 are as follows:

"5. That in the construction of its road the defendant dug or caused to be dug a ditch on each side of this bed of said road, whereby a large and unusual volume of water was diverted from its natural channel and proper course and turned upon the lands and into the canal and ditches of the plaintiffs, thereby flooding the lands and choking the ditches with sand, mud and trash so that the diverted waters, as well as the waters of the plaintiffs' lands, became ponded upon the said lands, rendering the same, which heretofore yielded good crops, worthless, or nearly so, for purpose of agriculture.

"6. That by reason of said diversion of waters and obstruction to the fall of plaintiffs' canal and ditches the defendant has within the three

years next before the bringing of this action negligently and unlawfully caused large quantities of water to be poured upon the lands of the plaintiffs to the great damage of the land and the crops growing thereon, to-wit, five hundred dollars."

The defendant requested the Court to instruct the jury as follows: "That it is admitted that defendant's road was constructed during the year 1889, and if you believe the plaintiffs' evidence, the plaintiffs acquired title to the land in the year 1890; that the original trespass or cause of damage was done by the construction of defendant's road in 1889, and the plaintiffs, not being the owners of the land at the time of the original trespass was committed, cannot sustain their (501) action and are not entitled to recover anything in this action." This instruction was refused and defendant excepted, which is the only exception before us.

We think the instruction was properly refused. The jury found that the plaintiffs were the owners and in possession of the land, and no other issue on this point was submitted, or tendered by the defendant. All of the issues were found in favor of the plaintiffs.

It appears from the evidence that these lands belonged to the *feme* plaintiff, having been allotted to her in 1890 in the division of her father's lands. When her father died does not appear, but certainly before the division of his lands in 1890. The plaintiffs are shown to have been in actual possession of one tract when the road was built in 1889.

The action was brought, apparently, to recover continuing damages for the three years next preceding, but by consent, or at least with objection, the issues were submitted covering only permanent damages. When this permanent damage occurred does not appear, further than by the allegation in the complaint that the injuries complained of were within three years next preceding the bringing of the action. The ditches, dug in 1889, when the road was built, were the *primary cause* of the permanent damage, but the damage itself immediately resulted from the filling up of the plaintiffs' ditches with sand, mud and trash, so that the *diverted* waters, as well as the waters of the plaintiffs' land, became ponded upon the said lands, thereby rendering them practically worthless. These lands were not immediately on the railroad or adjacent to the right of way, and it is evident that the damage could not have occurred simultaneously with the construction of the road. The cause must precede the effect and, as ditches do not fill up instantly, considerable time may have intervened. There can, therefore, be no presumption that the permanent damage occurred before the (502) plaintiffs' ownership, and we find no evidence to that effect.

The case of *Ridley v. R. R.*, 118 N. C., 996, cited and approved in *Parker v. R. R.*, 119 N. C., 687, lays down the rule that "the statute

of limitations begins to run in such cases, not necessarily from the construction of the road, but from the time when the first injury was sustained." This means, of course, the first *substantial* injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal, and yet would be a bar to any future action. The same rule would apply, by analogy, where the first substantial damage occurred after a change in ownership. The word "permanent," as applied to injuries and damages, is apt to mislead, as it is used not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent," because it proceeds from a permanent cause and will probably continue indefinitely as the natural effect of the same cause. Such is the case where the cause is apparently permanent and the damage necessarily continuing or recurrent. The interest and convenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. Therefore, a lump sum is recoverable, at the demand of either party, in consideration of which the defendant acquires the *right* to discharge its ditches upon the plaintiff's land. This is nothing more than an easement appurtenant to the defendant's right of way. The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damages, running indefi-
(503) nitely, perhaps forever, would be utterly incapable of calculation; and, moreover, it would be giving the defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use thereof as may be necessary to the easement. The right of leading and discharging surface water over or upon the land of another is always enumerated among the usual easements recognized both by the common and civil law.

It is true, it has been sometimes said that easements are acquired only by grant or prescription, but this applies only as between private parties and is usually a mere denial of assessment by parol. It does not apply to condemnation proceedings or other actions in the nature thereof. Indeed, this Court has held, in *Blue v. R. R.*, 117 N. C., on page 649, that nothing but an easement can be acquired by judgment of condemnation. While the opinion does not use the word "easement," it accurately describes an easement, and does use the appropriate term "servient tenement," as applied to the land itself. The right of the defendant to hereafter discharge its ditches upon the lands in question being an easement, acquired only by the result of this action, the plaintiffs are clearly entitled to damages resulting from the acquisition of the

easement. There is no allegation that the railroad company has ever paid any damages to any one for this injury or in consideration of the easement.

In the argument of this case before us, counsel insisted that the opinions of this Court in *Ridley's* and *Parker's cases, supra,* are mutually inconsistent, and that one or the other would necessarily be overruled in the decision of the case. Although the statute of limitations is not raised in this case, we have carefully examined the cases above cited and can find no such inconsistencies and certainly none relating to the principles herein involved. (504)

The judgment of the Court below is affirmed.

MONTGOMERY, J., dissenting. This action was commenced in 1893. The defendant's road was constructed in 1889. The plaintiff alleges, with sufficient clearness, that the land, of which he was in possession, was permanently injured by the unskillful construction of its roadway and ditches by the defendant company. The fifth section of the complaint alleges "that in the construction of its said road, the defendant dug or caused to be dug a ditch on each side of the bed of said road, whereby a large and unusual volume of water was diverted from its natural channel and proper course, and turned upon the lands and into the canal and ditches of the plaintiff, thereby flooding the lands and choking the ditches with sand, mud and trash, so that the diverted waters, as well as the waters of the plaintiff's land, became ponded upon the said land, rendering the same, which heretofore yielded good crops, worthless or nearly so for purposes of agriculture." In another paragraph of the complaint (the sixth) the plaintiff alleged that, by reason of the diversion of water and the obstructions complained of, the land had been damaged, and also that the crops grown thereon have been injured within three years next before the bringing of this suit.

The question of damages for a continuing injury, such as might be recovered upon the theory of abating a nuisance, and raised by the sixth paragraph of the complaint, seems to have been abandoned on the trial and the issue which was submitted to the jury was on the matter of permanent injury to the land. In fact, in the argument here, it was admitted that by consent in the trial below the action was tried on the issue whether the land had been permanently injured or not.

The land alleged to have been damaged was described in the (505) complaint as consisting of two tracts, Briar Swamp and Mill Branch. The plaintiffs had been in possession of the first-named tract since 1871, and the other since 1890. Both tracts were allotted to the *feme* plaintiff in the partition of the land of Albert Moore in 1890.

The defendant requested the Court to instruct the jury "that it is admitted that the defendant's railroad was constructed during the year 1889, and if you believe the plaintiffs' evidence, the plaintiffs acquired title to the land in 1890; that the original trespass or cause of damage was done by the constructing of defendant's railroad in 1889, and the plaintiffs, not being the owners of the land at the time the original trespass was committed, cannot sustain their action and are not entitled to recover anything in this action." The Court declined to give the instruction. It ought to have been given. The plaintiffs alleged that the damage was done by the *cutting of the ditches* along the defendant's railroad in 1889, and there was no allegation of permanent injury to the land at any other time. At that time (1889) the plaintiffs had no title to either of the tracts of land. They could not recover for permanent injury to the land, because they were not its owners. The only right they had in 1889 was that of possession.

The counsel who argued the case before this Court seemed to think that there were some inconsistencies, especially as to the application of the statute of limitations, in the cases of *Ridley v. R. R.*, 118 N. C., 1010; and *Parker v. R. R.*, 118 N. C., 996. I have examined those appeals and can see no inconsistency.

In *Ridley's case,* on p. 1019, four principles of law were deduced and held to be decisive of the questions involved in that appeal. In *Parker's case* the same rulings were approved. No. 4 of the deductions re-
(506) ferred to in *Ridley's case* was in the words: "The statute of limitations begins to run in such cases, not necessarily from the construction of the road, but from the time when the first injury was sustained"; and, in *Parker's case,* the Court said "the right of action accrues in such cases when the first injury is sustained." This last statement was intended to be that of the general rule. There may be cases, however, where the action necessarily should be brought at the time of the construction of the road, as where the injury is manifestly permanent, and done at once by the construction of the road, and is dependent upon no contingency.

The rule, as announced in Ridley's appeal, had in view such cases, as well as those where the first injury was the beginning of the running of the statute.

CLARK, J., dissenting. I concur in the dissent of Mr. Justice Montgomery. Since Laws 1895, chap. 224, all damages accruing from the construction of a railroad must be sued for within five years and the entire amount of damages must be recovered in one action. This is a very just enactment and protects such corporations from the oppression of being sued again and again *ad infinitum* on the ground of continuing

damages. But this action was instituted before the passage of the act and is governed by the former law which permitted the plaintiff to bring, at his option, an action for permanent damages, in which case the entire damages, "past, present, and prospective," could be sued for in one action to which twenty years was the limitation, or, at plaintiff's election, from time to time, actions could be brought for the continuing damages, in which actions the recovery was limited to damages accruing within three years. *Ridley v. R. R.,* 118 N. C., 996; *Parker v. R. R.,* 119 N. C., 677.

Here the complaint could have been construed either as an action for permanent damages or for the continuing annual damages and the plaintiff could elect which remedy he would pursue. *Lewis* (507) *v. R. R.,* N. C., 179; *Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601; *Holden v. Warren,* 118 N. C., 326; *Sams v. Price,* 119 N. C., 572 (on p. 572). The plaintiff and defendant agreed upon treating this as an action for permanent damages and an issue on that aspect of the case was submitted by consent. It was tried as such, and there was consequently error in refusing the prayer of the plaintiff. The allegation of the complaint and the proof was that the permanent damage was sustained, if at all, in 1889. The statute necessarily ran, therefore, from that year, and as it further appeared that, as to one tract at least, the plaintiff was not the owner thereof till 1890, it was error to grant him judgment. The case should go back for a new trial, when the plaintiff may elect to take a nonsuit as to damages for that tract, or the Court may, in its discretion, permit him to amend the complaint so as to sue for the continuing damages only. It would seem clear that a person acquiring title to any property—whether real or personal —in 1890 cannot recover damages for a permanent impairment or injury inflicted upon that property in 1889 before he acquired it. *Salisbury v. R. R.,* 98 N. C., 465 (on p. 471).

Cited: Hocutt v. R. R., 124 N. C., 219; *Mizzell v. McGowan,* 125 N. C., 445; *Lassiter v. R. R.,* 126 N. C., 512; *Geer v. Water Co.,* 127 N. C., 354; *Shields v. R. R.,* 129 N. C., 3; *Mullen v. Water Co.,* 130 N. C., 505; *Phillips v. Tel. Co., ib.,* 526; *Dale v. R. R.,* 132 N. C., 707, 708; *Candler v. Electric Co.,* 135 N. C., 18; *Stack v. R. R.,* 139 N. C., 368; *Mast v. Sapp,* 140 N. C., 538; *Thomason v. R. R.,* 142 N. C., 331; *Beasley v. R. R.,* 147 N. C., 365; *Staton v. R. R., ib.,* 441; *Pickett v. R. R.,* 153 N. C., 150.

(508)

A. D. WILLIS v. THE ATLANTIC AND DANVILLE RAILROAD COMPANY.

Action for Damages—Principal and Agent—Master and Servant—Authority of Section Master—Evidence.

1. Where an agency is limited it is the duty of the person dealing with the agent to ascertain its value and extent of his authority and to deal with him accordingly.
2. A section master of a railroad has such general authority only as is incidental to the duty assigned to him, and no power whatever as to the transportation of passengers, and notice of this limited authority will be implied from the natural and apparent divisions of the business of a railroad company among its various departments.
3. In order to render the principal or master liable for the act of his agent or servant, the act (in the absence of express authority to do it) must be one that pertains to the business and one that is fairly within the scope of the employment.
4. A section master of a railroad company, by gratuitously taking a person walking along the track upon a hand-car in use by him in the performance of his duties, cannot thereby render his principal liable as a common carrier to such person as a passenger.
5. When a person riding on a hand-car with a section master is injured by collision with a train, a conversation after the accident between the section master and the conductor of the colliding train is inadmissible as part of *res gestae*.
6. In the trial of an action for damages for injuries to a person who was hurt while riding on a hand-car in use by the section master of a railroad, it was competent for the defendant to show the limited authority of the section master under the printed rules of the company.

ACTION, for damages, tried before *McIver, J.*, and a jury, at Fall Term, 1896, of GRANVILLE.

There was a judgment for the plaintiff, and defendant appealed, assigning the errors referred to in the opinion of the Court.

Messrs. J. A. Long and J. W. Graham for plaintiff.

Messrs. E. B. Withers, W. A. Fentress, and A. P. Thom for defendant (appellant).

(509) FAIRCLOTH, C. J. The issues submitted by the Court, without exception by either party, were: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Was the plaintiff guilty of contributory negligence? (3) After the plaintiff's negligence, could the defendant, by the exercise of reasonable care, have avoided injury to the plaintiff? The jury answered each issue, "Yes."

Defendant's road runs from Norfolk to Danville, Va., and a section of it lies between Danville and Blanch Station of several miles in length, including Moore's Creek trestle. C. E. Vaughan was the section master of said section, with several hands at work. He was using a hand-car, which was used to carry hands and tools to and from work. The plaintiff was walking along the track of the defendant between Moore's Creek and Blanch Station, when the hand-car passed him, going towards Blanch; and he asked permission to get on the hand-car and ride, and he was permitted to do so by the section master. This was on 6 August, 1895, and plaintiff says he was hurt between 5 and 6 o'clock, p. m. Four or five hundred yards out from Blanch is a sharp curve in the road, with banks twenty or thirty feet high. While rounding this curve, an excursion train from Norfolk struck the hand-car, and plaintiff was injured. The section master and hands jumped off and were not hurt. The engineer was on the lookout, but did not see, and could not have seen, the hand-car in time to prevent the collision.

There was no evidence that passengers either habitually or occasionally rode on this car. No fare was paid or charged. There was no arrangement or seats on it for passengers, and it was used for transporting employees and their tools. It was the duty of the section master to keep the road and bridges in repair.

Upon these facts, the plaintiff alleges that he was a passenger (510) on defendant's road, and was entitled to the same care and protection as other passengers, and that defendant owed him the same duty as if he had been on a passenger train. The defendant denies this proposition, and avers that plaintiff had only the rights of any stranger walking along the defendant's roadbed, and insists that the permission of the section master to allow plaintiff to ride on the car, and thereby establish the relation of passenger and carrier between the plaintiff and defendant, was *ultra vires*. This is the principal question on the merits of the case.

We find in the exceptions ground for a new trial, but it will not be proper for us to give our opinion on the principal question. The law of common carriers will not solve this question. It must be settled by the principles of the law of agency. The defendant is a common carrier, but every employee of the defendant is its agent with such powers as pertain to the duties of his department or such others as may be expressly given him. And this presents the question whether the section master, as an agent of the defendant, had authority to take the plaintiff on the hand-car in such a way as to fasten on the defendant the duties of a carrier to him as a passenger.

It must be conceded that any carrier has a right to make reasonable regulations in the management of his business. He may, if he sees fit, have the freight and passenger business carried on upon the same train

under one management, or he may completely separate these transactions by arranging them in distinct departments. He may have a conductor for a freight train and a conductor for a passenger train, but such conductor would have very different powers. The name has but little significance. The law would confer upon one such authority as was
(511) incident to the business of moving freight, and no authority for moving passengers. This would clearly be so to one having actual notice of such a division of the business. The carrier may also arrange and allow freight to be carried on the "hand-car," and the law would confer on the section master such authority as was incidental to the business in which he was engaged, but no authority as to the transportation of passengers. In the great transactions of commercial business and corporations, as railroads and the like, convenience requires a subdivision of their work among numerous agents, each of whom may have a distinct employment, and is a general agent in his particular department, with no powers beyond it. He is identified with his master to that extent only. In the absence of actual notice of the extent of the power of these agents, is there anything in the nature and apparent division of the business which would imply notice to a supposed passenger, as the plaintiff in this instance? There is no real analogy or resemblance between the duties of a conductor of a passenger train and those of a section master in charge of a hand-car. A different class of men would be employed for such places, and the principal (the defendant) would have a right to assign specific and distinctly separate duties to each. The difference in the appearance of a passenger train and a hand-car would be significant. The conveniences of the former and the inconveniences of the latter would suggest to a wayfarer that one was for passengers, and that the other was not. Such evidences in the actual operations of defendant's business would negative the conclusion that the carrier would allow passengers on the hand-car, and would suggest that the authority of the foreman of the section was limited to the business in which he was actually engaged. Under such circumstances, although a stranger to
(512) the company may take a free ride with the foreman's assent, he could scarcely be regarded as a passenger and the defendant as a carrier, as to him.

The presumption, then, is, that one riding on a hand-car is not legally a passenger; and it would rest upon him, under the circumstances of such cases, to rebut the presumption. This he may do by showing such general and continuous custom of the agent as would be notice to the principal and to the public, or that the agent had express authority from his principal, or that the rules and regulations did not inhibit such conduct.

An agent cannot enlarge his powers by his own acts. They must be included in the acts or conduct of the principal. When the agency is

limited, it is the duty of the person dealing with the agent to enquire into the nature and extent of the authority conferred, and to deal with the agent accordingly. Clark, Cont., 734; *Ferguson v. Mfg. Co.,* 118 N. C., 946; *Biggs v. Ins. Co.,* 88 N. C., 141. Railroads have the right, as before stated, to make a separation between the different departments of their business, and, when this is done, the section master has such general authority only as is incidental to the duty assigned to him, and no power whatever as to the transportation of passengers, and notice of this limited authority will be implied from the natural and apparent divisions of the business. "Thus, it will be seen that, in the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment." Wood, Master and Servant, 546. For illustration, a clerk to sell goods suspects that goods have been stolen, and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the (513) master, either express or implied.

We will now refer to two exceptions:

First exception: Plaintiff proposed and was allowed, under defendant's objection, to prove a conversation soon after the accident, between the section master and the conductor of the train. This was no part of the *res gestæ,* and was incompetent. *Southerland v. R. R.,* 106 N. C., 100.

Third exception: Defendant asked the witness Vaughan: "What were the rules and regulations of the company in regard to persons, not employees of the company, riding on the hand-cars, and what was the witness' custom in regard thereto?" Plaintiff's objection was sustained and defendant excepted. The plaintiff, having certainly implied notice of the limited authority of the section master, still had the right to show express authority from the rules and regulations of the company that he (the section master) had authority to receive passengers on his car, and that he occasionally did so, and for a similar reason, the defendant had the right to show that, by said rules, the foreman's authority was limited, and what was his custom. The exclusion of this evidence was erroneous.

We need not examine the other exceptions. *Shaw v. Williams,* 100 N. C., 272; 1 Am. and Eng. Enc. Law, 351. See on this subject *R. R. v. Bolling,* 59 Ark., 395; *Eaton v. R. R.,* 57 N. Y., 382.

Error.

Cited: S. c., 122 N. C., 907; *Summerrow v. Baruch,* 128 N. C., 204; *Daniel v. R. R.,* 136 N. C., 521, 526; *Jackson v. Tel. Co.,* 139 N. C., 354; *Dover v. Mfg. Co.,* 157 N. C., 327.

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J. B. STANLEY, ADMINISTRATOR OF J. T. STANLEY, DECEASED, v. THE DURHAM & NORTHERN RAILROAD COMPANY.

Action for Damages—Injury to Person on Track—Negligence and Contributory Negligence.

1. A person walking on a railroad track is not bound to be on the lookout for a danger which he has no reasonable ground to apprehend, and has a right to suppose that the railroad company will take care to provide against injuring pedestrians by the use of proper lights and signals; hence,

2. Where, on the trial of an action for damages for injuries resulting in the death of plaintiff's intestate, who was killed by the defendant's train, it appeared that the intestate was walking at night on the railroad track, on which persons were accustomed to walk, and was killed by being struck by a train which carried no light and gave no signal, it was error to instruct the jury that plaintiff could not recover if his intestate could have discovered the train by ordinary watchfulness and precaution, and by using his senses, since the failure of the defendant's train to carry a light was a continuing negligence and the proximate cause of the injury.

ACTION, for damages, tried before *Coble, J.*, and a jury, at March Term, 1896, of DURHAM. There was a verdict for the defendant and plaintiff appealed, assigning as error the instruction referred to in the opinion of the Court.

Messrs. F. A. Green, J. W. Graham, and Boone & Bryant for plaintiff (appellant).

Messrs. L. R. Watts, MacRae & Day, J. B. Batchelor and Winston & Fuller for defendant.

MONTGOMERY, J. The plaintiff's intestate, in the night time, was walking along the defendant's tracks between Durham and East Durham, the public being accustomed to use the same as a walking way, when he was run down by the company's engine, which was moving with a
(515) box car in front, and hurt so badly that he died from the injury.

The box car in front of the engine obscured the headlight so that the track was not lighted in front of the moving train. The testimony as to whether there was a watchman and light on the box car was conflicting and contradictory. The following issues were submitted to the jury:

1. Was the death of plaintiff's intestate caused by the negligence of defendant?

2. Was plaintiff's intestate guilty of contributory negligence?

3. Could the defendant, notwithstanding previous negligence of the plaintiff's intestate, have by the exercise of ordinary care and prudence avoided injury to him?

4. What damage is plaintiff entitled to recover?

A part of his Honor's charge was as follows: "If the jury should answer the first issue 'Yes,' that the defendant was guilty of negligence, still this would not excuse the plaintiff's intestate from using ordinary care and due diligence with regard to his own safety. If he could, by the use of ordinary watchfulness and precaution, have discovered the approach of the car and engine in time to have gotten off the track and saved himself, and could have done so and did not, then he contributed to his own injury, and the jury would answer the second issue 'Yes.' If by using his senses, he could have seen or heard the train coming and failed to do so, but walked thoughtlessly and carelessly or recklessly along the track, then he was guilty of negligence and contributed to his own injury."

This was error. The plaintiff was not required to be on the lookout for his safety, if there was no light on the box car or other proper signal given to warn him of his danger. It was not incumbent on him to be on the lookout for a danger which he had no reasonable ground to apprehend to exist. He had a right to suppose that the com- (516) pany would take care to provide against injuring pedestrians on the track by providing proper lights and signals; and to feel secure in acting upon that supposition. And if this light was not furnished (and there was testimony going to show that it was not), the company was not only negligent, but its negligence was a continuing one. The jury found that the defendant was guilty of negligence for its failure to have a light on the car in front of the engine. On account of that failure, the plaintiff's intestate was put off his guard and cut off from the opportunity to see his danger, and the failure was a continuing negligence of omission of duty on the part of the company, the performance of which would have enabled the defendant to have had the last clear opportunity to prevent the injury, and this negligence was therefore the proximate cause of the injury. *Lloyd v. R. R.*, 118 N. C., 1010; *Mesic v. R. R., ante,* 489.

The charge of his Honor was otherwise a clear and full exposition of the law of negligence as applicable to the facts of the case and, if *Lloyd's case, supra,* had been published at the time of the trial, his Honor would not have fallen into the error herein pointed out.

New trial.

Cited: *Purnell v.* R. R., 122 N. C., 840, 845; *Norton v. R. R., ib.*, 936; *Lea v. R. R.*, 129 N. C., 463; *Smith v. R. R.*, 131 N. C., 622; *Reid v. R. R.*, 140 N. C., 150; *Heavener v. R. R.*, 141 N. C., 247; *Gerringer v. R. R.*, 146 N. C., 34; *Edge v. R. R.*, 153 N. C., 215; *Exum v. R. R.*, 154 N. C., 415; *Hammett v. R. R.*, 157 N. C., 324; *Shepherd v. R. R.*, 163 N. C., 52; *Talley v. R. R., ib.*, 571, 572, 579; *Hill v. R. R.*, 166 N. C., 596, 598; *McNeill v. R. R.*, 167 N. C., 396, 399.

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T. B. BURNETT v. WILMINGTON, NEW BERN AND NORFOLK RAILWAY COMPANY.

Action for Damages — Trial — Witness — Corroborative Testimony — Opinion Evidence — Experts — Hypothetical Questions — Instructions — Exceptions.

1. It is competent to corroborate a witness by showing that he has previously made the same statement as to the transaction as that given by him in his testimony.
2. In such case it is not necessary to ask the witness to whom such former statement, offered in corroboration, was made.
3. A "broadside" exception "to the charge as given" is valueless.
4. Where, on the trial of an action, there was no evidence to show any impairment of plaintiff's hearing, it was error to admit a hypothetical question to a physician as to the cause of an injury complained of in an action, which question was based upon plaintiff's "sight and hearing being impaired."

ACTION, for damages for personal injuries resulting from defendant's negligence, tried before *Coble, J.*, and a jury, at Fall Term, 1896, of NEW HANOVER. There was a verdict, followed by a judgment, for the plaintiff and defendant appealed.

Mr. Thomas W. Strange for plaintiff.
Messrs. A. M. Waddell and J. D. Bellamy for defendant (appellant).

CLARK, J. The first assignment of error is unfounded. It is competent to corroborate a witness by showing that previously he had made the same statement as to the transaction as that given by him on the trial. *Johnson v. Patterson,* 9 N. C., 183; *S. v. Twitty, ib.,* 449; *S. v. George,* 30 N. C., 324; *S. v. Dove,* 32 N. C., 469; *Bullinger v. Marshall,* 70 N. C., 520; *S. v. Laxton,* 78 N. C., 564; *S. v. Parish,* 79 N. C., 610; *Jones v. Jones,* 80 N. C., 246; *S. v. Blackburn, ib.,* 474; *Roberts*
(518) *v. Roberts,* 82 N. C., 29; *S. v. Boon,* 82 N. C., 637; *McLeod v. Bullard,* 84 N. C., 515, 529; *Davis v. Council,* 92 N. C., 725; *S. v. Brewer,* 98 N. C., 607; *S. v. Jacobs,* 107 N. C., 873; *S. v. Freeman,* 100 N. C., 429; *S. v. Ward,* 103 N. C., 419; *S. v. Morton,* 107 N. C., 890; *S. v. Brabham,* 108 N. C., 793; *Hooks v. Houston,* 109 N. C., 623; *Gregg v. Mallett,* 111 N. C., 74; *S. v. McKinney, ib.,* 683; *Byrd v. Hudson,* 113 N. C., 203. Indeed, the witness himself is competent to testify to the consistent statements previously made by him. *S. v. George, supra; March v. Harrell,* 46 N. C., 329; *S. v. Mitchell,* 89 N. C., 521; *S. v. Whitfield,* 92 N. C., 831; *MacRae v. Malloy,* 93 N. C., 154; *S. v.*

Rowe, 98 N. C., 629; *S. v. Rhyne,* 109 N. C., 794; *Sprague v. Bond,* 113 N. C., 551; *Wallace v. Grizzard,* 114 N. C., 488; *S. v. Staton, ib.,* 813.

In view of these, and yet other decisions continuously from those of the first Chief Justice of this court above cited from 9 N. C. Reports, down to the present, uniformly sustaining the competency of such evidence, it admits of a mild surprise that such exception should be again presented to this court.

It is true that the Judge should explain to the jury that such evidence is merely corroborative, and not substantive evidence *(Sprague v. Bond, supra),* but there is no exception that the court failed to instruct the jury that it was merely corroborative evidence, and the presumption is that the charge was unexceptionable in that respect. *Byrd v. Hudson,* 113 N. C., 203; *S. v. Brabham,* 108 N. C., 793 (on p. 796); *S. v. Powell,* 106 N. C., 635. The "broadside" exception "to the charge as given," is valueless for any purpose. *McKinnon v. Morrison,* 104 N. C., 354, and cases there cited and numerous cases cited in Clark's Code (2 Ed.), pp. 382, 383, and in supplement to same, p. 64; *S. v. Page,* 116 N. C., 1016; *Kendrick v. Dellinger,* 117 N. C., 491; *S. v. Downs,* (519) 118 N. C., 1242.

Nor is there any precedent or any support in reason for the earnest contention of counsel that the witness, when on the stand, should have been asked as to whom he had made corroborative statements. When it is sought to contradict a witness by showing statements made by him inconsistent with his evidence it is competent on his cross-examination, in order to put him on his guard, to ask him if he has not made such inconsistent statements; but even then this is not essential, when the evidence is material to the issue. *Radford v. Rice,* 19 N. C., 39; *S. v. Patterson,* 24 N. C., 346; *Black v. Baylees,* 86 N. C., 527; *S. v. Davis,* 87 N. C., 514; *S. v. Mills,* 91 N. C., 581; *S. v. Morton,* 107 N. C., 890.

It is only when a collateral question is asked as to declarations to show temper, bias or disposition of the witness that the preliminary question whether he has made such statement must be asked and time and place must be given. *S. v. Brabham,* 108 N. C., 793 (on p. 796); *Radford v. Rice, supra; S. v. Patterson,* 24 N. C., 346; *Edwards v. Sullivan,* 30 N. C., 302; *S. v. Sam,* 53 N. C., 150; *S. v. Kirkman,* 63 N. C., 246. Indeed, as to other collateral questions, his answer is conclusive. *Clark v. Clark,* 65 N. C., 655; *S. v. Elliott,* 68 N. C., 124; *S. v. Patterson,* 74 N. C., 157; *S. v. Roberts,* 81 N. C., 605; *S. v. Glisson,* 93 N. C., 506; *S. v. Ballard,* 97 N. C., 443; *S. v. Morris,* 109 N. C., 820; 1 Greenleaf Ev., section 449.

In deference to the request of counsel and the earnestness of argument we give the above *resumé* of principles applicable to corroborative and

(520) impeaching evidence, as settled by the uniform decisions of our court. There are many other decisions to the same purport, but these are sufficient to show that the practice is reasonably well settled.

On the second exception we are with the appellant. It was error to ask the expert, Dr. Russell, a hypothetical question as to the cause of injury described, based upon plaintiff's "sight and hearing being impaired to such a degree that he has been unable to attend to his regular business, such troubles starting immediately after receiving the injury described and continuing almost unceasingly." There was no evidence tending to show such, or, indeed, any impairment of plaintiff's hearing, and his own testimony flatly contradicted it. He said: "I have not been hard of hearing for ten years." The hypothetical evidence was calculated to mislead the jury, and it was error to admit it over the defendant's exception. Rogers' Expert Test., section 78; *Ray v. Ray,* 98 N. C., 566. This renders it unnecessary to consider the other exceptions.

New trial.

Cited: Rittenhouse v. R. R., post, 546; *S. v. Webster,* 121 N. C., 587; *S. v. Brown,* 125 N. C., 608; *Carr v. Smith,* 129 N. C., 234; *S. v. Williams, ib.,* 583; *Ratliff v. Ratliff,* 131 N. C., 431; *Jones v. Warren,* 134 N. C., 392; *Cuthbertson v. Austin,* 152 N. C., 338; *Chrisco v. Yow,* 153 N. C., 435; *Allred v. Kirkman,* 160 N. C., 394.

CAROLINA CENTRAL RAILROAD COMPANY v. WILMINGTON STREET RAILWAY COMPANY.

Railroads—Intersection—Street Railway Crossing Railroad Bridge—Additional Servitude.

The running of street cars by an incorporated street railway company over a bridge already constructed by a railroad company within the city limits and sufficient for the ordinary uses of the public, imposes an additional servitude upon the bridge, for which the street railway company must render compensation by contributing to the expense of maintenance and by providing necessary conveniences at the intersection, as required by section 1957 (6) of The Code.

(521) ACTION, heard on complaint and demurrer, before *Starbuck, J.,* at April Term, 1896, of NEW HANOVER. His Honor sustained the demurrer and plaintiff appealed.

Mr. Iredell Meares for plaintiff (appellant).
Mr. John D. Bellamy for defendant.

MONTGOMERY, J. Upon entering the City of Wilmington, the plaintiff company, before it could lay its track across Fourth Street, at a point then within the city limits, was compelled to cut through a considerable embankment, thereby necessitating the building of a bridge over the cut in order that travel and transportation should not be obstructed or delayed over the street. The territory within the city limits and contiguous to the bridge has never been built up, nor have streets been actually laid off there. The highway which, at the bridge, is called Fourth Street, was the old public road leading out from the city before the city limits were extended. The bridge, when it was built, was, and is now, sufficient for the ordinary purposes of travel by foot and horse and vehicle transportation. The defendant railway company has commenced to run street cars over the bridge, and has determined to run them in sections of from two to four cars at a time. The defendant company refuses to unite with the plaintiff in the maintenance of the bridge in order to meet, as the plaintiff contended, the larger servitudes imposed upon it by the defendant company's cars, and to provide the necessary conveniences at the intersection as required of them by sub-section 6, section 1957, of The Code. The plaintiff alleges further in the complaint, "that if the said defendant Street Railway Company is allowed to operate its cars over the said bridge, there is great danger of the same giving way and accidents being thereby caused; and in (522) the event of such accidents the plaintiff may be involved in vexatious litigation and actions for alleged damages to its loss and injury by reason of the fact that the said bridge is inadequate to support the running of the heavy cars defendant Street Railway Company proposes to run and operate over said bridge." The complaint concludes with a prayer for judgment that the defendant company be enjoined from carrying out its proposed action.

A demurrer was filed and the ground assigned is that the complaint shows that the plaintiff company laid its track, dug the cut and built the bridge across Fourth Street after the limits of the city had been extended beyond the bridge, and that neither the proposed action of the defendant company nor its action in the past imposes, or will impose, any additional servitude upon the bridge or upon the street of which said bridge forms a part, and that, therefore, no cause of action is set out in the complaint of the plaintiff. The demurrer was sustained.

The demurrer raises the question whether or not the running of street cars by an incorporated street railway company over a bridge already constructed by a railroad company within the city limits and sufficient

for the ordinary uses of the public, imposes an additional servitude upon the bridge. It would seem that the principle of law underlying the question, stripped of unnecessary verbiage, is a simple one. In the solution of the matter it is only necessary to consider two propositions; first, the nature of the liability to the public, imposed upon the plaintiff company at the time of the construction of the bridge; and, second, what continuing liability, if any, was and is imposed upon the plaintiff as to the maintenance of the bridge.

The law undoubtedly imposed upon the plaintiff company, at the time the bridge was built, the obligation to put up such a structure as would be sufficient for the then needs of the public as to travel and trans-
(523) portation over the street or highway. It is also well settled by the authorities that the plaintiff company was under the further obligation of maintaining a bridge of such proportions and strength as would meet the continuing demands of the public in reference to travel by foot and horse and the ordinary vehicle transportation over the street. The growth in population and the building up of cities and trade, while probably increasing the expenditures of the plaintiff company in maintaining the bridge to meet changing conditions, also increase the business and profits of the plaintiff company, and thereby compensate it for its additional outlay on account of the added burden of servitude which these things produce. But does the obligation imposed upon the plaintiff extend any further than to maintain a bridge equal to the demands of the public for foot and horse travel and ordinary vehicle transportation? Can the obligation be extended to include the use of the bridge for the running of heavy street cars over it by a corporation formed for the profit of its stockholders and whose chief purpose is private gain and not for the public good? It seems to us that to state the question is to answer it in the negative. Street railways are, in a certain sense, highways, but not in the strict sense are they public ways; for their owners have private rights of property in the franchise and they are operated for the private benefit of the stockholders. The public benefit from street railways is only incidental. It is beside the question to argue that, because the laying of a street railway track and the running of street cars do not impose any additional servitude upon the rights of the abutting proprietors in the land used for a public street, therefore the running of street cars over a bridge constructed by another corporation and sufficient for all other purposes than the running of street
(524) cars over them, does not impose additional servitude upon the bridge. There is no analogy in the two propositions and the same law is not applicable. The abutting owners along a street have either granted easements over the street or have been compensated for the taking of their property for the public uses; and under the circumstances

they will not be allowed to complain of those modes of travel or transportation over the streets which have been sanctioned by the proper authorities, or to demand additional compensation for such uses to which the street is put unless such uses materially impair the rights of the abuttors and are made necessary for the sole use and benefit of the street railway company. Elliott on Roads and Streets, 558. In all cases where the abutting proprietors dedicate the street, or are paid for the property to be used as a street, there is a presumption that they intend that the street may be used by street railways, provided the ordinary and usual street uses are not destroyed or impaired to the real detriment of the public. The presumption does not apply to ordinary railroads, however. In Dillon's Municipal Corporations, section 722, the author writes: "Such proprietor must be taken to contemplate all improved and more convenient modes of use which are reasonably consistent with the use of the street by ordinary vehicles and in the usual modes." But the plaintiff has received no benefit or compensation in any shape from the defendant company for the use of the bridge by defendant's street cars, nor has the defendant company shared the expense of building or maintaining the bridge; and the plaintiff company, therefore, owes the defendant no duty to furnish at plaintiff's cost and risk a safe passage for defendant's street cars over the bridge to the end that the defendant company may conduct its business, profitable only to its own stockholders, without risk or expense. That would simply be an appropriation of the property of one to the benefit of another without (525) compensation, and that could not, of course, be allowed.

We are of the opinion that the plaintiff stated a good cause of action in its complaint, and that there was error in the ruling of the court.

Error.

Cited: Hester v. Traction Co., 138 N. C., 291.

SUSAN M. FULP, ADMINISTRATRIX OF WESLEY FULP, DECEASED, v. THE ROANOKE AND SOUTHERN RAILROAD COMPANY.

Action for Damages—Railroad Crossings—Negligence—Contributory Negligence.

1. Where, in the trial of an issue as to whether defendant railroad company negligently killed the intestate of plaintiff, the Court, after properly instructing the jury that the burden of showing the negligence was on the plaintiff, told the jury that if defendant's engineer gave a warning whistle at the crossing, or if the intestate was down upon the track, drunk

or unconscious, so that no signal given at the usual safe and ordinary distance would have aroused him in time for him to avoid the result, there was no negligent killing. *Held*, that such charge was erroneous for the reason that it connected the intestate's negligence with that of the defendant so that it cannot be seen whether the jury passed on defendant's negligence, and for the further reason that it put upon plaintiff the burden of proving that her intestate was not negligent.

2. On the trial of an issue as to contributory negligence of a person killed on a railroad track by a train, the trial judge instructed the jury that, if the intestate failed to note the approach of the train because he was drunk and was killed in consequence, he was guilty of contributory negligence. *Held*, that such charge was erroneous for the reason that it did not require the jury to pass upon the question whether, notwithstanding intestate's negligence, the defendant could, by the exercise of proper care, have averted the killing.

(526) ACTION, for damages for the alleged negligent killing of the plaintiff's intestate by defendant, tried before *Hoke, J.*, and a jury, at December Term, 1896, of FORSYTH. There was a verdict for the defendant, and from the judgment thereon plaintiff appealed.

Mr. J. S. Grogan for plaintiff (appellant).
Messrs. Watson & Buxton for defendant.

FURCHES, J. This is an action for damages, in which the plaintiff, administratrix, alleges that the defendant negligently ran over and killed her intestate, Wesley Fulp. The killing was admitted to have been done by a freight train on defendant's road, in the night time, near a public crossing about one mile north of Denny. The train that killed the intestate was going south, and struck the intestate "thirty or forty" yards north of the crossing. There was a curve in the road just before reaching the crossing. Lacy, the engineer, was introduced by the defendant and testified: "I was engineer. I had twelve or fifteen freight cars that night. It was a few minutes after schedule time. I didn't know anything of having injured any one until next morning. I was in my proper place—could not have seen persons going along the track further than fifty yards, because the headlight would help me no further than that. The signs the next morning showed that the man was on the left side of the track. There were no signs on the cow-catcher to show that it had struck him, but back of the cow-catcher and attached to the frame of the trucks on bolts that project downward, lower than the cow-catcher. The cow-catcher would pass over a man lying down inside of the rail, but these bolts would not. These bolts on the left side had blood on them and fibres of clothing, showing they had struck the deceased and that he was lying down. I could not have seen a man
(527) lying on the left side of the track that night, from my position

on the engine. I sounded the whistle and rang the bell before reaching that crossing—it is a part of my duty."

Another witness testified that the engineer could not have stopped the train after turning the curve "before running sixty or seventy yards past the crossing." But Lacy, the engineer, and witness of defendant, does not say a word as to whether he could have stopped the train or not.

A witness (Charles Marshall) testified that he lived on the road between Walnut Cove and where the intestate was killed; that the intestate was at his house that night just after dark; was drinking; threw up at his house; wanted witness to go with him to show him the way to his mother's, but witness refused to do so; deceased left and went towards the road; he told him not to do so; heard the whistle of the engine at Walnut Cove; deceased went on; this was about fifteen minutes before the train passed; deceased had walked a quarter of a mile after this before he was killed by the defendant's train.

It was the duty of the engineer to sound the whistle for this crossing, and there was evidence tending to show that he did not sound the whistle, while there was evidence tending to prove that he did sound the whistle, and the court properly submitted this question to the jury under the first issue.

The Court submitted the following issues to the jury, and they were answered as indicated:

"1. Was the plaintiff's intestate negligently killed by the defendant company? Answer: No."

"2. Was the intestate guilty of contributory negligence? Answer: Yes."

"3. What damage is the plaintiff entitled to recover?"

The Court charged the jury that the burden of proof to establish the first issue was upon the plaintiff, and the burden to establish the second issue was upon the defendant. This was correct, and is (528) not complained of by the appellant, and we cite no authority to sustain a ruling that we consider correct and of which there is no complaint.

But the Court further charged upon this *first* issue: "To recover on this issue the plaintiff must satisfy the jury from the greater weight of evidence that there was a failure to sound the whistle, and that such failure caused the killing, and if the defendant did give the warning whistle, or if at the time the intestate was down upon the track drunk or unconscious, so that no signal given at the usual safe and ordinary distance would have aroused the intestate in time to have enabled him to avoid the result, there was no negligent killing and the issue should be answered 'No.'" Plaintiff excepted.

The Court then proceeded to charge the jury on the second issue, telling them that the burden to establish *this* issue was upon the defendant. And, among other things, he charged them as follows: "If the intestate was going along the railroad on his route of travel in the night time, and about the schedule time of trains, more especially if he was warned that a train was near, and was run over and killed at a point away from the crossing, this would be a negligent act, and, if killing followed as a consequence, (this) issue should be answered 'Yes.'" Plaintiff excepted.

"Or, if the intestate's failure to note the approach of trains was in whole or in part, because he was drunk, and was run over and killed in consequence, this would be contributory negligence and the jury should answer the second issue 'Yes.'" Plaintiff excepted.

The Court nowhere in the charge given to the jury places any responsibility on the defendant, except it was the defendant's duty to sound the whistle at the crossing. And while the Judge submits this to the jury, he connects it with the drunkenness and negligence of the (529) intestate, so that we are unable to see whether the jury passed upon the question of sounding the whistle or not. And he says, in his charge upon the first issue, and as a part of the same sentence in which he charges negligence, if the defendant did not sound the whistle, "or if at the time the intestate was down upon the track drunk or unconscious so that no signal given at the usual safe and ordinary distance would have aroused the intestate in time to have enabled him to avoid the result, there was no negligent killing and the issue should be answered 'No.'" This instruction was given in the charge upon the first issue and is erroneous:

First—For the reason that it so connects the intestate's negligence with the negligence of the defendant, as to whether the defendant sounded the whistle or not, that it cannot be seen whether the jury passed upon the defendant's negligence or not.

Second—For the reason that it put the burden on the plaintiff, of proving that the intestate was not guilty of contributory negligence, though he had charged that the burden of proving the intestate's negligence was on the defendant.

The charge on the second issue is in conflict with *Pickett v. R. R.*, 117 N. C., 616; *Lloyd v. R. R.*, 118 N. C., 1010, and every case on this subject to be found in our reports, except it may be *Smith v. R. R.*, 114 N. C., 728, and cases there cited, and this case has been expressly overruled.

There was *no* evidence showing or tending to show but what the intestate was killed within thirty or forty yards of the crossing. Indeed, the defendant proved this. So there was no evidence to justify the Court

in charging that if the intestate "was run over and killed at a (530) point away from the crossing, this would be a negligent act, and killing followed as a consequence, this issue should be answered 'Yes.'" And this instruction is erroneous for that reason—that it was without any evidence to support it.

But the great error of the charge is, that it is in violation of that great principle in favor of human life, so thoroughly settled in this State and in every jurisdiction, that the jury shall pass upon the acts of the defendant, where negligence is alleged, and upon the contributory negligence of the intestate, if that is alleged. This has not been done in this trial. We have shown that it has not been done, as to sounding the whistle, in a sufficiently intelligible way to be understood whether it was passed on or not.

But more than that, the court below does not require any care on the part of the defendant. There is not one word said in the charge as to the defendant's duties, except what is said about sounding the whistle. The jury is not told that, though the intestate may have been guilty of negligence by going on the defendant's road whether drunk or sober, it was still the duty of the defendant's engineer to be in his place, on the lookout, and if he saw the intestate or could by due diligence have seen him in time to stop the train and save the life of the intestate, it was his duty to do so; and if he did not, he was guilty of negligence—"the last clear chance,"—and the defendant would be liable. *Pickett v. R. R., supra,* and cases there cited; *Lloyd v. R. R., supra.*

Instead of giving this charge, as pointed out in so many cases in our own reports, he charged the jury that "if the intestate's failure to note approaching trains was in whole or in part because he was drunk, and was run over and killed in consequence, this would be contributory negligence, and the jury should answer the second issue 'Yes.'" This puts the whole case upon the intestate's being drunk. And if this charge were sustained, it would be a free license to every rail- (531) road company in the State to run over and kill every drunken man that got on its road, whether the conductor saw him or not—a doctrine, it seems to us, too shocking to be insisted upon.

It is true that the engineer (Lacy) says that he was at his post, and that the head light enabled him to see for fifty yards. But the intestate was on the *left hand side* of the track, but between the rails, which are about four feet apart. And on this account, he (the engineer) being on the *right hand side,* could not see the intestate, and ran over and killed him, and did not know he had done so until the next morning. And suppose he did swear to this state of facts, was his word to be taken as absolutely true, so as to render it unnecessary to submit the question to the

jury? Why should his testimony not be submitted to the jury, as is the testimony of other witnesses?

For the errors pointed out there must be a

New trial.

Cited: Powell v. R. R., 125 N. C., 372; *Cox v. R. R.*, 126 N. C., 106; *Whiteside v. R. R.*, 128 N. C., 235; *Stewart v. R. R., ib.*, 521; *Bogan v. R. R.*, 129 N. C., 157; *Jeffries v. R. R., ib.*, 240; *Clegg v.* R. R., 132 N. C., 294; *Butts v. R. R.*, 133 N. C., 83; *Stewart v. R. R.*, 136 N. C., 388; *Peoples v. R. R.*, 137 N. C., 97; *Stewart v. R. R., ib.*, 691; *Stewart v. Lumber Co.*, 146 N. C., 63; *Exum v. R. R.*, 154 N. C., 417; *Holman v. R. R.*, 159 N. C., 46; *Shepherd v. R. R.*, 163 N. C., 521.

THOMAS J. WILSON, ADMINISTRATOR OF RICHARD WILSON, DECEASED, v. THE WINSTON-SALEM RAILWAY AND ELECTRIC COMPANY.

Practice—Appeal—Statement of Case on Appeal—New Trial.

Where the case on appeal states that appellant's requests for instructions to the jury were given "in substance" and such requests are in conflict with the general tenor of the charge, a new trial will be granted, it being impossible to determine which or what part of the requested instructions were given.

ACTION for damages for the alleged negligent killing of the plaintiff's intestate and son, tried before *Hoke, J.*, and a jury, at January 1897, Special Term of FORSYTH. There was a verdict for the plaintiff, (532) and from the judgment thereon the defendant appealed.

Messrs. Watson & Buxton and Glenn & Manly for plaintiff.
Messrs. Jones & Patterson for defendant (appellant).

FURCHES, J. On the trial of this action the defendant submitted a number of written prayers for instructions, covering about six pages of printed matter. And the case on appeal says "the court gave defendant's prayers for instruction *in substance* except the fifth prayer, which the court declined to give and the defendant excepted."

When the case was called for argument the defendant moved for a *certiorari* to the Judge who tried the case, upon the ground that the case on appeal was defective and apparently contradictory; that, if the pray-

ers asked were given, they were in conflict with the other part of the charge as set out in the record. The motion was resisted by the plaintiff, and the defendant then proposed to withdraw the motion if the plaintiff would agree that the defendant's prayers, except No. 5, were given. But plaintiff declined to agree to this proposition. The defendant then proposed to withdraw the motion for a *certiorari* if the plaintiff would agree that none of the defendant's prayers were given, and the plaintiff declined to accept this proposition.

Under the rules of this court, the defendant, having no intimation from the Judge who tried the case that he would make any alteration in the case on appeal as settled by him, and now before the court, the motion of defendant for a *certiorari* was refused and the case was argued as presented by the record.

When the Judge who tries a case says he gave the prayers for (533) instruction, or that he refused to give the instructions asked, we understand what he means, and this is binding on us, and we try the case according to what he says.

But, where a number of prayers are asked that are obviously in conflict with the charge as set out in the record, and the Judge says that he gave them "in substance," what can we say? That they were given in whole or in part, and if in part, what part? The counsel cannot agree about it, and we have no means of determining this dispute between them. If the court modifies instructions asked, giving a part and rejecting a part, the part given should be set out and distinguished from the part rejected. This would present the legal question to us, that we might pass upon it. But where the court says the prayers were given "in substance," how do we know whether they were or were not? If this were allowed, it would make the Judge, who tried the case, the Judge of what is material to the rights of the parties, and what should go into the record, though it was a matter that transpired on the trial, and would authorize the Judge to give such parts of his charge as *he* thought material, whether the appellant thought it material or not.

This cannot be so. The case on appeal should be a brief and concise statement of the case as tried, and should clearly set forth all the legal questions in dispute, excepted to by the appellant, with a sufficient statement of facts or of the evidence to present in an intelligible manner the various questions of law. And, as we are on this subject, we feel it necessary to call the attention of trial judges to the loose and unsatisfactory manner in which many cases on appeal come to this court. For instance, in a number of cases that come here, it is said "here the clerk will copy the Judge's notes of evidence" (that is not so in this case). These notes are taken in the hurry of the trial and usually consist of catch words and disconnected sentences. These are in- (534)

telligible to the Judge who takes them and would enable him, by exercising a small degree of industry, to write out that part of the evidence necessary to properly present the case on appeal. But, besides the great amount of labor this throws upon us, we are often uncertain as to what the evidence is, after we have done the best we can to understand it. We do not think a Judge or lawyer ought to feel that he has discharged his duty by such work as this.

There were many interesting questions presented by counsel on the argument of this case but, as we cannot dispose of the case upon its merits and, as they may not arise on another trial, we have not considered any of them.

For the reasons assigned there must be a

New trial.

Cited: Bennett v. Tel. Co., 128 N. C., 104.

G. D. HAMPTON v. THE NORFOLK AND WESTERN RAILROAD COMPANY.

Action for Damages — Trial — Evidence — Photographs as Evidence — "Broadside" Exception.

1. Where, in the trial of an action for injuries, it became material to show the location of a path existing two years before the trial at the time of and on the lot where the accident occurred, there was evidence of changes in the situation and that the lot had been fenced shortly after the accident, a photograph of the location, taken just before the trial, was properly rejected as evidence, it being inadmissible, whether offered as substantive evidence or as an unauthorized map. (Clark, J., dissenting).

2. A "broadside" exception to the charge, without pointing out the error complained of, will not be considered.

(535) ACTION, for damages, tried before *Green, J.*, and a jury, at February, 1897, Term, of FORSYTH. The facts appear in the opinion. From a judgment for the plaintiff the defendant appealed.

Messrs. J. S. Grogan and A. E. Holton for plaintiff.
Messrs. Watson & Buxton for defendant (appellant).

FURCHES, J. This is an action for damages against the defendant. The complaint states that the injury complained of was received in 1894, but it does not appear from the evidence whether it was in 1894

or 1895. The defendant's road runs through the City of Winston, along Tenth Street, which had been excavated to a depth of about thirty feet at the point where the injury was received.

It is in evidence that the plaintiff, on the night of the injury, went to Watlington's store, which fronts on Liberty Street, and purchased about sixty pounds of groceries, put them in a bag and started home, and by some means missed his way. The night being dark, he fell into this deep cut and received the injury complained of. It appears that the rear end of Watlington's store is about thirty feet from Tenth Street, but the plaintiff testified that he had gone about 150 yards before he fell into the cut—thus traveling nearly parallel with defendant's road. He also testified that he struck a path, after leaving the store, which he followed until he fell into the cut; that it was so dark he could not see the path, but he could feel it, so as to know he was in a path.

The plaintiff alleged that the injury was caused by the defendant's negligence in not fencing, and keeping fenced, this deep and dangerous cut in a city like Winston, while the defendant alleged that it was a back lot where the plaintiff fell, fenced on the front by the owner and that the defendant was guilty of no negligence in not fencing it. (536) The defendant also denied that there was any path running through said lot, as the plaintiff had testified.

Upon these points there was much evidence on both sides. Watlington and others testified that there was no fence, and Watlington also testified that he had usually kept some empty barrels standing along the street to prevent persons going from the store back to the defendant's road, but he had sold them a short time before and the way was open from Liberty Street back to the defendant's road.

B. F. Copple, J. W. Stout, A. H. Gilman and Watlington testified that there was a path, as testified to by the plaintiff. While A. W. Morton and F. A. Nading testified that they lived near by and "never knew of any passway," etc., and L. Norvell, and probably others, testified that there was a wire fence at Watlington's store at the time of the injury.

Without undertaking to give all the evidence, we have stated it sufficiently to present the contention of the parties.

The defendant offered a map on the trial, made by one of the defendant's employees, which was allowed to be used without objection, though it was made by defendant's employees and not under order of court. The defendant also, during the trial, offered in evidence a photograph, which was objected to, and defendant introduced A. J. Farrell, who testified: "I am a photographer. I took the pictures last Friday; they are correct as the ground view is." Ruled out and the defendant excepted. This trial took place in February of this year (1897), and there

is evidence showing there have been changes made in the fencing since the injury was received, and that the defendant has since enclosed this cut.

This is the only exception taken during the trial. But the defendant asked several written instructions, which were not given. And
(537) the defendant, after appealing from the judgment in favor of the plaintiff, assigns the following grounds of error:

"1. The refusal of his Honor to allow the photographs offered to be used as evidence."

"2. The refusal of his Honor to give the special instructions prayed for by the defendant."

"3. The instructions as given were calculated to mislead the jury, and are erroneous in law."

Neither of these assignments can be sustained. The photographs were not evidence *per se*. They did not represent the plaintiff, the fall or the injury. At most, they could only supply the place of an unauthorized map, which is not evidence, and which the court may refuse to allow in evidence. *Burwell v. Sneed,* 104 N. C., 118. And when such maps are allowed, they are not evidence, and can only be used by a witness to explain his evidence to the jury. *Dobson v. Whisenhant,* 101 N. C., 647. There was no such purpose as this manifested in this case. It seems to have been the idea of the defendant that they were, of themselves, substantive evidence. If we are in error in this, it is because the defendant has failed to make manifest anything to the contrary.

We have no doubt but what a photograph, taken soon after the occurrence, might be used, as an unauthorized map may be used. *Riddle v. Germanton,* 117 N. C., 387. But, where it appeared to the court that the photograph had been taken two years or more after the injury was received, and where there was evidence of changes in the situation, and where it was material to establish a path (as in this case) as existing two years ago, but which was necessarily effaced by the lapse of time, the ground soon after the injury was received having been fenced up, and the defendant having the use of a map of its own make,
(538) which was shown to have been made soon after the plaintiff was injured, it seems to us to have been altogether proper to exclude the photograph, whether introduced as original, independent evidence or as an unauthorized map.

The second assignment cannot be sustained. These prayers are long, confused and argumentative—each containing some proposition that the court could not properly give. *S. v. Neal, post,* 613; *R. R. v. Wainwright,* 9 Ga., 255.

The third assignment is what is termed a "broadside" exception to the charge, without pointing any error, and cannot be sustained. This

has been so often decided by this court that it seems to us, if the learned counsel had thought there was error in the charge, they would have complied with this oft-repeated rule. *Barcello v. Hapgood,* 118 N. C., 712; *S. v. Downs,* 118 N. C., 1242; *McKinnon v. Morrison,* 104 N. C., 354, and cases cited in Clark's Code (2 Ed.), pp. 382, 383. There is no error and the judgment is affirmed.

CLARK, J., dissenting. A "photograph of the place of accident was offered but ruled out, and the defendant excepted." The photographer testified that the views were correct and taken from three different standpoints. Another witness (Thomas) testified "there is very little change in the ground from the time of the accident." This is the first time this point has been presented in this court, but it has often arisen elsewhere and the decisions have been quite uniform in admitting such evidence. The nature of the locality was a material point in the trial. The testimony of many witnesses was offered for the purpose of conveying to the minds of the jury a picture of the *locus in quo.* This necessarily conveyed to them an idea of it, which was more or less imperfect.
A plat made by one of the parties was admitted. This was compe- (539) tent as an aid to making clearer the testimony of the party offering it. *Justice v. Luther,* 94 N. C., 793; *Dobson v. Whisenhant,* 101 N. C., 645. A map, not made under the order of the court, is really only the declaration, so to speak, of the party making it; its reliability depends entirely upon his accuracy and conscientiousness, and is therefore only admissible as his evidence, and because it may convey to the eyes of the jury somewhat more accurately the description which the witness was endeavoring to convey to their ears by his oral testimony. In many instances a photograph will be greater assistance to the jury than a plat. It is a picture of the place made automatically, the spot being reflected as in a mirror and the image chemically made permanent. If the jury could go out to view the spot in all cases where the nature of the locality is material, as in this, they would get a much more accurate idea than the language of any witness, however graphic, could convey to them. There are a vast number of cases in which photographs would greatly aid a jury which is unable to view the spot or subject-matter, because changed or too inconvenient to visit.

Whether the jury should be permitted to view the place of the accident or crime, "rests in the discretion of the Trial Judge; on some occasions it may be very useful, indeed, almost necessary. It was permitted in the trial of the *Cluverius case,* 81 Va., 787, and there are many precedents elsewhere for such practice. It was allowed in this State on the trial (for murder) of *Gooch,* 94 N. C., 987, and has been done in many other cases." *Jenkins v. R. R.,* 110 N. C., 438. A photograph

offers nearly every advantage which could be obtained by a visit of the jury to the spot, and is without the objections to a "jury of view," which are that it is frequently impracticable, owing to the dis-
(540) tance of the locality, loss of time and expense, besides the opportunity of irregularity in the conduct of the jury. The photograph brings the spot to the jury, and in many cases a stereopticon has been used in the court room to enlarge the picture, a more correct and vivid idea being thus conveyed to the minds of the jury than could be done by any language of witnesses, even when aided by the plat made by the order of the court.

It is true, a photograph taken by order of the court would stand upon a better footing than one made *ex parte,* but frequently a photograph must be made, if at all, at once—before there is any action pending—for instance, to represent the figure and position of one found slain, the locality of a railroad wreck, and in many other instances in which the value of the photograph as evidence depends upon its being taken before there has been any change after the occurrence in the locality or object whose representation it is intended to perpetuate and present to the jury. Accordingly, upon *prima facie* evidence of the photograph being a representation of what it is claimed to be, the courts admit it, subject to cross-examination as to the point of view from which it was taken, the skill of the artist, etc.; in short, like any other testimony, to be weighed by the jury.

In an action against the town to recover damages for injuries caused by a defect in a highway, a photograph of the place is admissible, if verified by proof that it is a true representation. *Blair v. Pelham,* 118 Mass., 420, citing *Marcy v. Barnes,* 16 Gray, 161; *Hollenbeck v. Rowley,* 8 Allen, 473; *Cozzens v. Higgins,* 1 Abb., N. Y., 451; *Ruloff v. People,* 45 N. Y., 213; *Udderzook v. Com.,* 76 Pa. St., 340; *Church v. Milwaukee,* 31 Wis., 512. Whether it is sufficiently verified is a preliminary question of fact for the Judge. *Com. v. Coe,* 115 Mass., 481; *Walker v. Curtis,* 116 Mass., 98.

(541) Photographic pictures of the place where a homicide was committed are competent when it is shown that there was no material change in the aspect after the homicide and before the photograph is taken. *Keyes v. State,* 122 Ind., 527, citing *People v. Buddensieck,* 103 N. Y., 487; *Cowley v. People,* 83 N. Y., 464; *Reddin v. Gates,* 52 Iowa, 210, and other cases.

A photograph of the broken trestle and wrecked train, taken about two hours after the accident and verified by the person by whom it was taken, is admissible in evidence. *R. R. v. Smith,* 90 Ala., 25, citing *Luke v. Calhoun,* 52 Ala., 115; *Locke v. R. R.,* 46 Iowa 109, and many other cases.

In *Dyson v. R. R.,* 57 Conn., 10, which was an action for an injury at a railroad crossing, a photograph was admitted in evidence, "the change in the appearance of the locality made by the falling of the leaves from the trees being open to explanation," citing *Randall v. Chase,* 133 Mass., 210, and other cases.

In *People v. Buddensieck,* 103 N. Y., 487, 500, which was a trial for homicide, the court says the photograph "no doubt carried to the minds of the jury a better image of the subject-matter than any oral description by eye witnesses could have done. * * * No doubt the court, in its discretion, might have allowed the jury to visit and view the premises, as it was asked to do by the prisoner's counsel, but it was not bound to do so."

Photographs have been admitted to show the appearance of the plaintiff's back three days after an assault and battery. *Reddin v. Gates,* 52 Iowa, 213. Long ago, the poet Horace, spoke of the greater effect of that which is seen than of that which is described by words:

"Segnius irritant animos demissa per aurem
Quam quae sunt oculis subjecta fidelibus."

Where, however, a photograph was taken by an amateur two (542) months after a railroad accident, and there was evidence that it did not correctly represent the condition and surroundings as they were at the time of the accident, it was properly excluded. *R. R. v. Monaghan,* 140 Ill., 474. The material point in that case was whether the view of the engineer had been obstructed by box cars standing on the side track, which had been removed when the photograph was taken.

Where the plaintiff testified that the photograph offered by him represented fairly the *locus in quo* of a railroad accident, though he did not take it and did not know from what point it was taken, the photograph was admitted (*Archer v. R. R.,* 106 N. Y., 589), the court saying that such pictures, like maps and other diagrams, "serve to explain or illustrate and apply testimony, and are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute. Of course, its value, like the value of other evidence, depends upon its accuracy, of which there was some evidence."

The decisions admitting photographs as proper and useful evidence are numerous and almost uniform. Among the latest cases may be cited *Turner v. R. R.,* 158 Mass., 261; *Omaha v. Beeson,* 36 Neb., 361; *R. R. v. Moore* (Tex.), 15 S. W., 714.

The text-books are to the same effect. 1 Thompson Trials, section 869; 2 Jones Evidence, section 597; 2 Rice Evidence, p. 1170; Bradner Evidence, p. 140. Indeed, the court, in its discretion, may permit the photographs to be enlarged on examination in the court room by a

stereoscope or other magnifying glass. *Rockford v. Russell*, 9 Bradw. (Ill.), 229; *Barker v. Perry*, 67 Iowa, 146; *German School v. Dubuque*, 64 Iowa, 736, and the jury can take the photographs to their
(543) room. Thompson Trials, *supra*. The law avails itself of every advance in science which renders the investigation of truth more accurate, and recent authorities have admitted as aids to a court in its search after truth the Roentgen or X-ray photographs, "their admission being opposed on the familiar principle, so often appealed to in the courts of this country, that this kind of evidence was unknown to the learned lawyers of the Heptarchy, and therefore was no evidence at all." 31 Am. Law Review, 268. Doubtless in the near future cinematoscopes may be used in the court room whenever the object shall be to convey to the minds of the jury a true picture of living action, as the movements of a horse, of a train, an assault and battery, or a riot and the like. Law, like medicine, must make use of every improvement that will secure greater certainty in attaining its object.

This being the first case of the kind here, a review of the authorities and reasoning sustaining the admission of such evidence has been not inappropriate. The best evidence, of course, would be a view of the premises themselves by the jury, if it is practicable and convenient, and if it can be had before there has been any change; but even then this lies in the discretion of the Trial Judge. The description of the place by the testimony of witnesses is a substitute and, as aids to such testimony, a map or diagram is competent, even if made *ex parte*, and for a stronger reason a photograph, in which the locality delineates itself automatically, so to speak, is admissible. Photographs have become exceedingly valuable helps in cases of homicide, collision, accident and, indeed, in all cases where the jury need to be informed as to the *locus in quo*. For that reason, they will doubtless be hereafter largely used in trials here, as they have been elsewhere, although the majority of the court has deemed the photograph not admissible in this case.
(544) In the present case the description of the *locus in quo* was material, as shown by the prolix and somewhat conflicting oral evidence resorted to in the effort to convey a comprehension of it to the jury, in which effort the photograph was an aid to which the jury were entitled, most especially as there was evidence that the locality had not changed. The photographer was also introduced and testified to the correctness of the photographs, taken from three different points. There was no contradictory evidence as to this, and the exclusion was not, and could not have been, upon the preliminary question that there was no evidence to identify the photographs or a change in the aspect of the ground, but it was upon the broad ground that they were not admissible in evidence. In this, I think, there was error.

Cited: S. v. Webster, 121 N. C., 587; *Andrews v. Jones,* 122 N. C., 666; *Pierce v. R. R.,* 124 N. C., 99; *Vanderbilt v. Brown,* 128 N. C., 502; *Davis v. R. R.,* 136 N. C., 116; *Martin v. Knight,* 147 N. C., 578; *Pickett v. R. R.,* 153 N. C., 149; *Bank v. McArthur,* 165 N. C., 376; *Long v. Byrd,* 169 N. C., 660; *Lupton v. Express Co., ib.,* 676.

JENNIE T. RITTENHOUSE, ADMINISTRATRIX OF THOMAS D. RITTENHOUSE, v. WILMINGTON STREET RAILWAY COMPANY.

Action for Damages—Street Railways—Trial—Issues—Negligence and Contributory Negligence—Voluntary Risk—Fellow Servant—New Trial.

1. Where an issue submitted to a jury will enable a party to present every phase of his case, it is needless to subdivide it into several issues.
2. "Voluntary assumption of risk" being embraced in an issue as to contributory negligence, it was not error, in the trial of an action for damages where the trial judge submitted an issue as to contributory negligence of plaintiff's intestate, to refuse to submit an issue tendered by defendant as to whether the plaintiff's intestate "voluntarily assumed" the risk of an injury.
3. Where a witness was sought to be impeached on cross-examination, it was error to exclude a written statement signed by him immediately after the transaction testified to, which was offered to corroborate his testimony on the trial. That such statement was not written by himself is not material; it is sufficient if he signed it after reading it, or hearing it read.
4. It was proper on a trial to refuse to give an instruction prayed for, which assumed as a fact a matter which was in controversy.
5. A motorman and track foreman of a street railway are fellow-servants.
6. The "Fellow-servant Act" (ch. 57, Pr. Laws of 1897), does not apply to an action for injuries received before its passage, and in such case a servant cannot recover for injuries where his violation of his master's orders contributed to such injuries.
7. Where a new trial is granted by this Court in an action for damages, but the answer to the issue as to damages is not complained of, it is in the discretion of the appellate court whether, on a new trial, the issue as to damages shall be retried.

ACTION, for damages for injuries to plaintiff's intestate result- (545) ing in his death, tried before *Coble, J.,* and a jury, at Fall Term, 1896, of NEW HANOVER.

Mr. Thomas W. Strange for plaintiff.
Mr. George Rountree for defendant (appellant).

CLARK, J. We do not think it was error to refuse to admit the fourth issue tendered by the defendant. It is true that in strict parlance, and logically, there is a distinction between contributory negligence of the intestate and his voluntarily taking a risk which he knew to be dangerous. "Carelessness is not the same thing as intelligent choice," and most respectable authorities have pointed out the distinction. *Bowen, L. J.*, in *Thomas v. Quartermaine,* 18 Q. B. D., 685, 697; *Minor v. R. R.,* 153 Mass., 398. But upon the issue of "contributory negligence" both phases of the matter, negligence and voluntary assumption of risk, could be submitted to the jury, and the charge shows that the Judge did so submit this case. The defendant was not cut off from presenting
(546) any phase of his defense, and it can serve no good purpose to more minutely divide the issues. *Humphrey v. Church,* 109 N. C., 132; *Denmark v. R. R.,* 107 N. C., 185. It would rather serve to confuse the jury. The jury readily comprehend that, by the issue of contributory negligence, they are asked to find whether the defendant's fault was the proximate cause of his injury, and it is immaterial whether that fault was carelessness or a reckless assumption of risk, provided the jury are given to understand (as they were in this case by the evidence, the argument of counsel, the prayers for instruction and the charge of the Court) that the issue was broad enough to cover both phases. "Reckless assumption of risk" has always been taken in our courts as being embraced in the issue of contributory negligence. *Burgin v. R. R.,* 115 N. C., 673; *Doster v. R. R.,* 117 N. C., 651; *Turner v. Lumber Co.,* 119 N. C., 387. No harm has come from this course, and there is no need of further refinement.

It was error to exclude a written declaration of the witness Sheehan offered to corroborate him. *Burnett v. R. R., ante,* 517, and a summary of cases there cited. It made no difference that such declaration was not written by the witness. That it was read over to him and signed by him made it his as fully as if he had written it.

The seventh prayer for instruction was properly refused, as it assumed as a fact, though it was controverted, that the bad condition of the track was due to the negligence of C. H. Gilbert, and overlooked the further contention that the defendant was negligent in placing such a man, claimed to be unreliable, in charge of the track, and the evidence tending to show that neither he nor any one else was really charged with the regular and careful supervision and inspection of it. Freed from these controverted questions of fact, it is sufficient to say that if Gil-
(547) bert was responsible for the condition of the track, the intestate motorman and he were fellow servants. *Ponton v. R. R.,* 51 N. C., 245; *Kirk v. R. R.,* 94 N. C., 625, cited and approved in *Hobbs v. R. R.,* 107 N. C., 1; *Walker v. R. R.,* 128 Mass., 8; *Johnson v. Tow*

Boat Co., 135 Mass., 209; *Howd v. R. R.,* 50 Miss., 178; *R. R. v. Tendal,* 74 Am. Dec., 259. The Act of 1897 (inadvertently printed among the Private Laws of 1897, chapter 56), which provides that in actions against a railroad company for death or injuries sustained by an employee, the negligence of a fellow servant shall not be a defense, though valid as to injuries occurring after its ratification, is not and cannot be retroactive, and at the time of the accident which caused the death of the intestate the company was not liable for the negligence of his fellow servant. *Hagins v. R. R.,* 106 N. C., 537; *Hobbs v. R. R., supra.*

It is also proper to say, as it may be of assistance upon another trial, that if Rittenhouse was running his car rapidly over the bridge, contrary to Rule 38 of the company, and the jury shall find that this was the proximate cause of injury, the plaintiff cannot recover. It is settled law that a servant cannot recover where his violation of his master's orders contributed to the injury. Bailey Master's Liability, 89, and note; *Russell v. R. R.,* 47 Fed., 204; *Mason v. R. R.,* 114 N. C., 718.

There being no exception to the finding upon the third issue, as to the quantum of damages, the appellant defendant requested that, if a new trial were awarded, it should only be granted upon the other issues, as was the case in *Tillett v. R. R.,* 115 N. C., 662. Whether in such cases the new trial shall be partial or not was held in *Nathan v. R. R.,* 118 N. C., 1066, to be in the discretion of the court, and in this case the majority of the court are of opinion that the new trial should be unrestricted and upon all the issues. (548)

New trial.

Cited: Bank v. School, 121 N. C., 108; *Patterson v. Mills, ib.,* 266; *Coley v. Statesville, ib.,* 316; *Pleasants v. R. R., ib.,* 495; *Strother v. R. R.,* 123 N. C., 200; *Wright v. R. R., ib.,* 281; *Benton v. Collins,* 125 N. C., 90; *Lloyd v. Hanes,* 126 N. C., 363; *Wright v. R. R.,* 128 N. C., 78; *McDougald v. Lumberton,* 129 N. C., 202; *Thomas v. R. R., ib.,* 395; *Dorsett v. Mfg. Co.,* 131 N. C., 261; *Pressly v. Yarn Mills,* 138 N. C., 420; *In re Herring,* 152 N. C., 259; *McAtee v. Mfg. Co.,* 166 N. C., 458.

FRANK ALLEN v. THE CAROLINA CENTRAL RAILWAY COMPANY.

Practice—Pleading—Demurrer—Motion to Make Pleading Definite.

1. The purpose of The Code practice being to have controversies tried on their true merits and without unnecessary costs and delay, it provides for amending and perfecting the pleadings on motion in apt time addressed to the discretion of the Court, or by the Court *ex mero motu.*
2. Where a complaint in an action for negligence was defective in not definitely and sufficiently setting out the negligence complained of, objection thereto should have been taken, not by demurrer, but by motion to have the plaintiff make his complaint more definite.

ACTION, heard on complaint and demurrer, before *Norwood, J.,* at October Term, 1896, of MECKLENBURG. The complaint was as follows:

"The plaintiff complains and alleges:

"First—That the defendant, at the time hereinafter stated, was and still is, a corporation duly created and organized under the law, and was and still is a common carrier of goods, wares, merchandise and passengers, and operated a railroad between the City of Charlotte, North Carolina, and the City of Wilmington, in said State, and used for this purpose railroad tracks, side tracks, engines, cars, etc., for the necessary conduct of its business as a railroad.

"Second—That, on or about 16 June, 1893, the plaintiff, while in the employ of the defendant, was injured by a brake on one of the (549) cars of the defendant breaking. That the brake was defective, which was unknown to the plaintiff, which, by reasonable care, could have been discovered by the defendant. That the plaintiff served the defendant as a coupler and shifter, and was ordered by the conductor to put on the brake, which he did, in a careful and cautious manner. That the defendant, by reasonable diligence, might have known of the defectiveness and unsoundness of the brake.

"Third—That the plaintiff used due care and caution in putting on the brakes, which he was ordered to do by his superior and boss, the conductor of the train, whom he was bound to obey. That upon his putting on the brake it broke, throwing him violently to the ground below. That he was knocked senseless, and was and is permanently injured. That his injuries received were no fault of his, but on account of the imperfect machinery, carelessness and negligence of the defendant. That by reason of the negligence of the defendant, as aforesaid, plaintiff was damaged five thousand ($5,000) dollars.

"Wherefore, plaintiff demands judgment against the defendant:

"1. For the sum of $5,000.

"2. For cost of action."

The demurrer was as follows:

"The defendant demurs to the complaint filed in this action, and for cause of demurrer says that the negligence alleged is not sufficiently and legally set out."

The demurrer was overruled with leave to answer, but defendant appealed.

Messrs. Clarkson & Duls and W. R. Henry for plaintiff.

Messrs. Burwell, Walker & Cansler for defendant (appellant).

FAIRCLOTH, C. J. This case stands upon complaint and demurrer, and the ground of defense is "that the negligence alleged is not sufficiently and legally set out." The purpose of The Code is that controversies shall be tried on their true merits, and to this end it prescribes the mode, order and forms of pleading, with provisions for perfecting the pleadings in apt time, by striking out or amending the same. (550)

Where there is a defective cause of action, although in due form, the plaintiff cannot recover unless the Court in its discretion, on reasonable terms, allows an amendment. When a good cause of action is set out, but defective in form, the Court may require the pleadings to be made definite and certain by amendment. The Code, secs. 259 and 261. For this purpose, however, the objector must move in apt time. It is too late after demurrer or answer. *Stokes v. Taylor,* 104 N. C., 394. This motion is addressed to the discretion of the Court. *Conley v. R. R.,* 109 N. C., 692; *Smith v. Summerfield,* 108 N. C., 284.

The Court may *ex mero motu* direct the pleadings to be reformed. *Buie v. Brown,* 104 N. C., 335. See generally Clark's Code, p. 207, sec. 261.

The demurrer to the sufficiency of the cause stated brings to this court a question of form or uncertainty in the pleadings, and not the merits of the action, and thus costs and delay are incurred, which might have been avoided by a proper motion below, as we are to assume that the Judge would have granted the proper motion, certainly until it appears otherwise.

Without commending the form in which the plaintiff has stated his case in the complaint, we think the defendant's remedy was by motion and not by demurrer. The case is remanded in order that the parties may proceed as they are advised. We must sustain the judgment below, but we do so without prejudice to the rights of either party to plead *de novo.* (551)

Remanded.

Cited: Martin v. Bank, 131 N. C., 124; *R. R. v. Main,* 132 N. C., 453; *Jones v. Henderson,* 147 N. C., 125; *Womack v. Carter,* 160 N. C., 290; *Hensley v. Furniture Co.,* 164 N. C., 152.

W. R. McILHANEY v. THE SOUTHERN RAILWAY COMPANY.

Action for Damages—Railroads—Injury to Person on Track—Contributory Negligence.

On the trial of an action for damages for injuries caused by the alleged negligence of defendant railroad company, it appeared that a street in Charlotte was entirely occupied by the tracks of the defendant company and of the Seaboard Air Line, the spaces between which were frequently used by pedestrians, and that, on a dark night and for his own convenience, the plaintiff was walking on one of the tracks of the Seaboard Company and, seeing an engine just in front of him, he stepped on defendant's track and was struck by a train moving backwards. He saw the train, but could not tell whether it was moving or not. He was familiar with the surroundings and knew the risks of walking in that street. *Held*, that it was error to refuse an instruction that, if the jury believed that plaintiff would have been safe if, after stepping from the Seaboard track, he had stopped in the space between that track and the defendant's track, it was negligence for him to go further and that he could not recover.

ACTION, tried for damages for injuries resulting from the alleged negligence of defendant railroad company, tried before *Starbuck, J.*, and a jury, at March Term, 1896, of MECKLENBURG. The facts appear in the opinion. There was a verdict for the plaintiff, and from the judgment thereon, defendant appealed.

Messrs. Burwell, Walker & Cansler for plaintiff.
Messrs. G. F. Bason and J. W. Keernans for defendant (appellant).

(552) MONTGOMERY, J. That section of A street, in Charlotte, between Fifth and Trade streets, is entirely occupied by two tracks of the defendant company and two tracks of the Seaboard Air Line Co., with spaces of from five to seven feet between the tracks. The spaces between the tracks were paved with coal dust and afforded a good walking way—one better than the sidewalks. The tracks were used by the respective railroad corporations for receiving their trains, shifting their cars and other similar purposes. The freight depot was there also.

The night on which the plaintiff was injured was a dark one—so dark that the crossties could not be seen. It was raining and there were no lights on the street. For his own convenience he was walking upon one of the tracks of the Seaboard Air Line, and, seeing an engine just in front, stepped off and upon the space between the tracks, which he had left, and the defendant's track. The engine was exhausting steam, and the plaintiff, to escape injury from that source, got upon the track of the defendant. Instantly, almost, he was knocked off the track and his leg broken by the rear box car of a train moving backwards, at the rate of between two and four miles an hour.

He testified that when he got upon the defendant's track, and, looking, saw about fifteen feet off, the box car, there was no light on the car, and no bell being rung, and that he could not tell whether the car was moving or not.

The defendant introduced testimony going to show that there was a watchman on the lookout with a light at the end of the car.

The following issues were submitted to the jury: 1. Was plaintiff injured by defendant's negligence as alleged? 2. Did plaintiff, by his own negligence, contribute to his injury as alleged in the complaint? 3. If plaintiff, by his own negligence, contributed to his own injury, could defendant by the exercise of ordinary care, and notwithstanding plaintiff's negligence, have prevented the injury to plaintiff? (553) 4. What are plaintiff's damages?

The case, as appears from the record, was well tried and the charge was very full and clear and able. But we are of the opinion that a new trial must be had, because of the failure of his Honor to give an instruction prayed by the defendant, which is in these words: "If the jury believe that plaintiff would have been safe if, after stepping from the Seaboard track, he had stopped in the space between that track and the defendant's track, it was negligence for him to go further and place himself on defendant's track, and the answer to the second issue should be 'Yes.'" The plaintiff was acquainted with the surroundings at the section of A street where he was hurt, and he knew for what purposes the four railroad tracks on that street were used. Although the public were accustomed to use the street and the tracks for walking ways, yet the plaintiff must have known that such use was at all times attended with some risk. And this risk was necessarily increased with the darkness of night. The use to which this street was put was a standing warning to pedestrians to be most careful when they undertook to walk through it. By plaintiff's own testimony it was so dark that he could not tell whether a box car fifteen feet off was moving or not, although he says that he stopped and looked at it particularly before he went forward. It was early in the night, being about 8 o'clock, and he had seen at least one engine and train and hands at work, and might have reasonably supposed that the usual work of the railroad would continue for some time. When, under these circumstances, the plaintiff left the safe walking way where he was, a place prepared by the defendant, and where no harm could have come to him had he continued in it, the night being dark and it raining, with no lights on the street, and put himself (554) on the defendant's track, he was negligent and contributed to his own injury. This is not the case of one attempting to pass at a railroad crossing in a city. If a person should approach a crossing in the night time, and, after looking and listening, should see a moving train or car

upon the track apparently at a standstill, without a light on the end, or without the engineer or watchman making some other sufficient signal, or without the engineer, he, without culpability, might attempt the crossing, and if injured by the train he would be entitled to recover damages for the injury. *Mayes v. R. R.*, 119 N. C., 758; 52 N. Y. Court of Appeals, 215. But it must be borne in mind that the place where the plaintiff was injured was not a crossing, but upon a street filled up with four railroad tracks and constantly used for railroad purposes. The facts concerning plaintiff's conduct were undisputed, and we think but a single inference could be drawn from them by fair minded men, and that is that a prudent man would not have acted as the plaintiff did on the occasion of his injury. The jury found the defendant to be negligent and the plaintiff not guilty of contributory negligence, and under instructions from his Honor did not consider the third issue.

In the next trial it may be necessary for the jury to consider that issue, if the testimony is unchanged.

New trial.

Cited: S. c., 122 N. C., 996, 999.

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C. W. HODGES v. THE SOUTHERN RAILWAY COMPANY.

Action for Damages—Railroads—Injury to Passengers—Stepping from Train—Negligence and Contributory Negligence.

Where, in the trial of an action for damages, it appeared from the testimony of plaintiff, who was a passenger on defendant's train, that after the name of the station at which he was to stop had been called, at night, and the porter had opened the door, plaintiff went out on the steps while the train was still moving, and that the porter then said, "All right, sir," and that plaintiff then stepped off, not knowing that the train was moving, and was injured: *Held*, (1) that the evidence was sufficient to be submitted to the jury to show defendant's negligence, and (2) that such testimony showed that the plaintiff was not chargeable with contributory negligence.

ACTION, for damages, tried before *Norwood, J.*, and a jury, at March Term, 1897, of MECKLENBURG. At the conclusion of the testimony his Honor expressed the opinion that in no aspect of the testimony could the plaintiff recover, and in deference thereto plaintiff submitted to a nonsuit and appealed.

Messrs. Burwell, Walker & Cansler for plaintiff (appellant).
Mr. George F. Bason for defendant.

DOUGLAS, J. In this case, the Court below, at the close of the evidence, having intimated an opinion that the plaintiff was not in any aspect of the evidence entitled to recover, the plaintiff excepted and submitted to a nonsuit. We think there was error.

Taking the evidence of the plaintiff as true, and it must be so taken for the purpose of this appeal, there was sufficient evidence to go to the jury as to the negligence of the defendant. Viewed in the light of the same testimony, the action of the plaintiff was not con- (556) tributory negligence *per se*. His station having twice been called he went to the front end of the car to get off. The porter opened the door for him, and the plaintiff stepped down to the last step of the car. While the plaintiff was standing there, the porter, who was standing behind him with a light, said "All right, sir." The plaintiff then stepped off and was injured. Under the circumstances the plaintiff had a right to suppose that the remark of the porter was addressed to him, and he was not necessarily negligent in acting upon it. It was dark, and he could not tell whether the train was moving. The porter must have known that the plaintiff was standing there for the purpose of getting off at the proper time, and if the expression "All right" meant anything, it meant that it was right for him to get off. It was not only an implied invitation to get off, but it was equivalent to an assurance that he could safely do so. There was, therefore, no negligence *per se*, if any at all. *Lambeth v. R. R.*, 66 N. C., 494; *Nance v. R. R.*, 94 N. C., 619; *Watkins v. R. R.*, 116 N. C., 961; *Hinshaw v. R. R.*, 118 N. C., 1047.

We have considered only the plaintiff's evidence, with such of the defendant's evidence as was favorable to the plaintiff, and this is all that could properly have been considered by the Court below, otherwise the Court would have been compelled to pass upon the *weight* of the evidence, which is exclusively within the province of the jury. *Wittkowsky v. Wasson*, 71 N. C., 451; *S. v. Powell*, 94 N. C., 965; *S. v. Chancy*, 110 N. C., 507; *Spruill v. Ins. Co.*, at this term.

For error in the intimation of his Honor a new trial is ordered.

New trial.

FAIRCLOTH, C. J., dissents.

Cited: S. c., 122 N. C., 993; *Cable v. R. R., ib.*, 895; *Thomas v. Club*, 123 N. C., 288; *Cox v. R. R., ib.*, 607; *Coley v. R. R.*, 129 N. C., 413; *Gordon v. R. R.*, 132 N. C., 570; *Darden v. R. R.*, 144 N. C., 3; *Kearney v. R. R.*, 158 N. C., 555; *Thorp v. Traction Co.*, 159 N. C., 37; *Carter v. R. R.*, 165 N. C., 252.

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E. F. WITSELL v. WEST ASHEVILLE AND SULPHUR SPRINGS RAILWAY COMPANY.

Action for Damages—Street Railways—Injury to Passenger—Evidence —Declaration of Employee of Defendant as to Condition of Track, Car, etc.—Res Gestæ—Negligence—Safe Appliances—Instructions.

1. In the trial of an action for injuries caused by the derailing of a street car because of excessive speed in going down a steep grade, statements made to a witness by the motorman of the street railway company, immediately preceding the accident, as to the condition of the track and the want of sand and as to the car being overloaded and behind time, were competent as part of the *res gestae* and also as fixing the company with knowledge of facts requiring a greater degree of care and providence than ordinary.

2. Inasmuch as the jury, under the practice in this State, respond to issues submitted and do not find a general verdict, it is not error, in the trial of an action involving several issues, to refuse to charge that, on certain showing, the "plaintiff cannot recover."

3. An exception "to the giving of the special instructions prayed for, etc., from one to fourteen, both inclusive," is a specific exception to each and every one of the fourteen special instructions so numbered, and is as available as if a separate exception was made *seriatim* to each instruction.

4. In the trial of an action for injuries caused by the alleged negligence of a street railway company in not providing proper appliances, etc., it was error to charge that a street car company must provide "all known and approved machinery necessary to protect its passengers," the true rule being that it is negligence not to adopt and use all approved appliances which are in general use and necessary for the safety of passengers.

ACTION, tried before *Bryan, J.*, and a jury, at December Term, 1896, of BUNCOMBE, for damages sustained by the plaintiff as a passenger on the street railway, which, it was alleged, negligently permitted its car to run down hill at a rapid speed and without proper appliances, whereby the car was derailed and the plaintiff injured. The usual issues as to negligence, contributory negligence and amount of damages were submitted. Verdict and judgment for the plaintiff. Appeal by the
(558) defendant, who assigned the following errors: 1. To the admission by the Court of the testimony of J. D. Davis, to which objection and exception were made at the trial. 2. To the refusal of the Court to give the first and fourth special instructions requested by the defendant. 3. To the modification or qualification of the second instruction prayed for by the defendant. 4. To the giving of the special instructions prayed for by the plaintiff, from one to fourteen, both inclusive. 5. To the judgment of the Court.

Messrs. L. M. Bourne and T. H. Cobb for plaintiff.

Messrs. Merrimon & Merrimon and Davidson & Jones for defendant (appellant).

CLARK, J. The statements and declarations of the motorman, made to plaintiff just preceding the accident as to the condition of the track, as to his not having sand and the car being late and overloaded, and the rapidity of the speed, were competent as part of the *res gestæ* and also as fixing the company with knowledge of facts requiring a greater degree of care and prudence than ordinary. 4 Thompson Corp., secs., 4913, 4914; Morawetz Corp., sec. 540a.

Each of the four special instructions asked by the defendant concludes by asking the Court to instruct the jury that the "plaintiff cannot recover." As the jury now respond to issues and do not find a general verdict, it was not error to refuse these prayers, which would not aid the jury to answer the issues and might confuse them. *Bottoms v. R. R.*, 109 N. C., 72; *Farrell v. R. R.*, 102 N. C., 390; *McDonald v. Carson*, 94 N. C., 497. If a prayer is in part erroneous, the Court may decline it. The Judge is not called upon to sift out the sound part and give it. *S. v. Melton, post*, 591. The plaintiff, having asked fourteen (559) instructions, each one numbered and all of which were given, the defendant excepted "to the giving of the special instructions prayed for by the plaintiffs, from one to fourteen, both inclusive." We cannot concur with the defendant's counsel that this is objectionable as a "broadside exception." It is a specific exception to each and every one of the fourteen special instructions. It puts the Judge on notice to send up the evidence applicable to each, and the opposite party knows that each of the fourteen propositions of law contained in those prayers will be challenged here. When an exception is made "to the charge as given," this, by repeated decisions of this Court, is invalid, except when the charge contains only one proposition of law. When it contains more than one, the appellant must point out each objectionable proposition of law in the charge by an exception embracing it, and the statute gives him ten days after the trial to scrutinize the charge and make his exceptions. The record, as has been repeatedly said, should not be encumbered with any part of the charge or of the evidence which is not required to point out or throw light upon the matters excepted to. To permit a broadside exception "to the charge as given," would require all the evidence and all the charges in every case to be sent up, with great and needless addition to the costs, and would be unjust to the appellee, for it would give him no knowledge of what propositions of law would be called in question upon the appeal so that his counsel might prepare himself thereon. But The Code does not require refinements, and when prayers for instruction

are asked and given, and the opposite party excepts, giving the numbers of the instructions excepted to, this is specific information to the appellee which would not be fuller if a separate exception was made *seriatim* to each instruction given.

(560) The third instruction given at request of plaintiff, "It is the duty of the defendant to provide its cars with all known and approved machinery necessary to protect its passengers from injury," is too broad and exacting. Many appliances and devices "necessary to protect passengers from injury" are not yet invented, and it is little short of requiring the use of them that the company shall adopt all such when invented as soon as "known and approved." Many inventions are "known and approved" long before they come into general use, and to thus require common carriers to adopt the latest and best appliances is too harsh and unreasonable. Janney couplers, Miller platforms, air brakes, electric lighting for cars, and many other improvements were "known and approved" by some, and possibly by many people, before they came into general use.

The rule as to the conduct of common carriers in managing transportation is thus stated by *Burwell, J.*, in *Haynes v. Gas Co.*, 114 N. C., 203, 211: "Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that the neglect of duty in such cases is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance." But this applies to the management and not to the kind of machinery and appliances to be furnished. In *Mason v. R. R.*, 111 N. C., 482, 487, it is said: "It is not the duty of railway companies to furnish machinery of the very best varieties or to attach appliances of the latest and safest kinds, but it is culpable to use cars or engines of any particular pattern which an ordinary inspection would show to be defective"; but this has reference to furnishing machinery and appliances when the complaint comes from an employee who has been injured. To draw the rule as to machinery and appliances which it is negligence not to furnish as to passengers

(561) is more difficult. The rule laid down by his Honor is incorrect.

It would discourage the building of new roads if every corporation is held to so strict a rule that it must keep a lookout for improvements and inventions and, when one such is "known and approved," that it is negligence to fail to buy it. Such rule is unreasonable and compliance with it impracticable. The prompt introduction of so valuable and much needed an improvement as the Janney coupler was beyond the means of many corporations, and when the Act of Congress made their use in interstate commerce imperative, a date was set years ahead for the act to go into operation. The courts cannot act precipitately in such

matters. Before it is negligence not to adopt improved appliances or machinery there must something more appear than that they are "known" and "approved." The correct rule is more nearly this, "It is negligence not to adopt and use all improved appliances which are in general use and which are necessary for the safety of passengers." To require an adoption by any particular defendant, before such appliances have come into ordinary use, as soon as "known and approved," is simply to say that each corporation must have the "latest and best." The burden of looking out and buying each new appliance is too great. The rule has also been thus stated, "It is the duty of the carrier to furnish everything necessary to the security of their passengers which is reasonably consistent with the business of the carrier." 2 Wood Railways, sec. 301; or, "approved appliances in general use." 3 Elliott Railways, sec. 1224; or that "the carrier shall do all that human care, vigilance and foresight can reasonably do, consistently with the mode of conveyance and the practical operation of the road." *Fuller v. Talbott,* 23 Ill., 357. "A company cannot be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. It would (562) be unreasonable, for example, to hold that a road-bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties, subject to decay, would be avoided, but, on the other hand, it is by no means unreasonable to hold that if wood ties are used they must be absolutely sound and roadworthy." *R. R. v. Thompson,* 56 Ill., 138, 142. The carrier must not be lacking in any appliance which sound rules require it should have, but it is not bound to use every means scientific skill might suggest to prevent accidents. *Steinway v. R. R.,* 43 N. Y., 123. On English railways, no railroad tracks are allowed to cross a public road on a grade, but they always cross either below or above it, and flagmen are stationed at short distances along the entire line and there are other precautions which add to the security of travel, but the expense of which few railroads in this country are yet able to bear. If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it. But whether the corporation is negligent not to have it, depends not upon the bare fact that its use would conduce to greater security, as the expensive appliances above mentioned, nor upon its being "known and approved" or "the latest and best," but the more reasonable and just rule is, as above stated, that the carrier must have "all approved appliances that are in general use and which are necessary for safety of passengers." In *Mason v. R. R., supra,* it was declared that the time had then arrived when it was negligence not to have "self-couplers" and "air-brakes" on passenger cars, but that it was too soon to hold it culpable negligence

(563) not to have such appliances on freight cars. The law is reasonable and just, alike to the carrier and the passenger. It does not require the carrier to adopt each appliance as soon as "known and approved," nor will it justify the retention of old appliances when new and better ones are in general use. Pope's well known lines express the safest course:

> "Be not the first by whom the new is tried,
> Nor yet the last to lay the old aside."

While the law does not require the adoption of the "latest and best," self-interest will, in reasonable time, bring all valuable improvements into general use, and then the corporation which is not sufficiently progressive will be moved by fear of liability for negligence from disregarding the interests of the public.

It is not necessary to consider the other points raised by the exceptions, as they may not arise, or may be presented in a different form, on another trial. For error in granting the third prayer for instruction there must be a

New trial.

Cited: Coley v. Statesville, 121 N. C., 316; *Willis v. R. R.,* 122 N. C., 909; *Greenlee v. R. R, ib.,* 979, 981; *Troxler v. R. R.,* 124 N. C., 192, 194; *Lloyd v. Hanes,* 126 N. C., 364; *Bradley v. R. R., ib.,* 740; *Vanderbilt v. Brown,* 128 N. C., 501; *Marks v. Cotton Mills,* 135 N. C., 290; *Bottoms v. R. R.,* 136 N. C., 473; *Earnhardt v. Clement,* 137 N. C., 93; *Avery v. R. R., ib.,* 133; *Satterthwaite v. Goodyear, ib.,* 304; *Stewart v. R. R., ib.,* 695; *Stewart v. Carpet Co.,* 138 N. C., 63; *Hicks v. Mfg. Co., ib.,* 326; *Pressly v. Yarn Mills, ib.,* 413, 423; *Fearington v. Tobacco Co.,* 141 N. C., 83; *Stewart v. R. R., ib.,* 276; *Hemphill v. Lumber Co., ib.,* 490; *Boney v. R. R.,* 145 N. C., 251; *Brittingham v. Stadiem,* 151 N. C., 302; *Helms v. Waste Co., ib.,* 372; *Patterson v. Nichols,* 157 N. C., 414; *Rogers v. Mfg. Co., ib.,* 485; *Kearney v. R. R.,* 158 N. C., 543; *Carter v. Lumber Co.,* 160 N. C., 10; *Kiger v. Scales Co.,* 162 N. C., 136; *Monds v. Dunn,* 163 N. C., 112; *Lynch v. R. R.,* 164 N. C., 251; *Ainsley v. Lumber Co.,* 165 N. C., 126; *Lloyd v. R. R.,* 166 N. C., 33; *Lynch v. Veneer Co.,* 169 N. C., 173; *Deligny v. Furniture Co.,* 170 N. C., 201, 202; *Wooten v. Holleman,* 171 N. C., 465.

STATE v. L. D. MORGAN.

Criminal Law—Taxing Prosecutor with Costs—Liability of State for Costs—Appeal.

1. An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment.
2. While the findings of fact of a justice of the peace in taxing the costs of a criminal action against the prosecutor are reviewable in the Superior Court, the findings of the latter Court are binding and not reviewable here.
3. An appeal does not lie in behalf of the State from the judgment of the Superior Court declining to tax a prosecutor with costs in a justice's court, nor from the finding of the Superior Court judge that the person taxed by the justice with the costs as prosecutor was not such.
4. In a case in which a justice of the peace has final jurisdiction the State can in no event be taxed with the costs.

IN A CRIMINAL ACTION, tried before a Justice of the Peace, the (564) defendant, being taxed with the costs as prosecutor, appealed to the Superior Court, and *Timberlake, J.*, at Fall Term, 1896, of BEAUFORT, reversed the judgment of the Justice and the State appealed.

Messrs. Attorney-General Zeb V. Walser and J. H. Small for the State (appellant).

Mr. Charles F. Warren for the defendant (prosecutor).

CLARK, J. Taxing the prosecutor in a criminal action with costs is in the nature of a civil judgment, from which an appeal lies in his behalf from the Justice of the Peace. *S. v. Powell,* 86 N. C., 640; cited with approval in *In re Deaton,* 105 N. C., 59; The Code, sec. 875.

But while the findings of fact by the Justice in such cases are reviewable in the Superior Court, the findings of fact by the Superior Court are conclusive and not reviewable in this court. *S. v. Taylor,* 118 N. C., 1262; *S. v. Hamilton,* 106 N. C., 660. The reason for the distinction is pointed out in *In re Deaton,* 105 N. C., 59 (on pp. 62, 63).

Besides, no appeal lies in behalf of the State from the Superior Court declining to tax the prosecutor with costs, and still less from the Judge's finding of fact that the person taxed by the Justice of the Peace as prosecutor was not such. The right of the State to appeal in criminal actions is regulated by statute which restricts it to the cases enumerated in The Code, sec. 1237; *S. v. Moore,* 84 N. C., 724. But since the judgment is in the nature of a civil judgment, a better reason why the

(565) State cannot appeal in this case is that it has no interest, for in a case of which a Justice has final jurisdiction the State can, in no event, be taxed with the costs, and the failure to tax them to the prosecutor does not cast them upon the State. The Code, 895; *Merrimon v. Comrs.*, 106 N. C., 369; *S. v. Shuffler,* 119 N. C., 867.

Appeal dismissed.

Cited: S. v. Whitley, 123 N. C., 729; *S. v. Butts,* 134 N. C., 608; *S. v. Bailey,* 162 N. C., 584; *S. v. Trull,* 169 N. C., 370.

STATE v. ROBERT MOORE.

Indictment for Murder—Homicide—Jury, Selection of Special Venire —Submitting to Verdict for Manslaughter — Appeal — Harmless Error.

1. Where, on trial for murder, the jurors were selected for a special *venire* summoned from the general jury list irrespective of their qualifications as freeholders, instead of from a *venire* of freeholders only, as required by sections 1738 and 1739 of The Code, but none but qualified freeholders were empanelled, and there was no challenge to the array: *Held,* that the defendant was not prejudiced by such method of summoning the jurors.

2. Where a prisoner indicted and on trial for murder agreed that the jury should return a verdict of manslaughter, which was done, and the defendant appealed, assigning as error the exclusion of certain evidence: *Held,* that the submission to the verdict of manslaughter was an acknowledgment and confession of the facts which constituted the crime, and an appeal from the judgment thereon cannot bring into question the regularity and correctness of the proceedings.

INDICTMENT for murder, tried before *Meares, J.,* and a jury, at December, 1896, Term, of the Circuit Criminal Court for HALIFAX.

Upon the trial a special *venire* of ninety was drawn from the box under the supervision of the court, as required by section 14, chapter 156, Laws 1895, from which *venire* and the regular jurors a jury (566) was selected. Eight of the special *venire* were called and passed by the State to the prisoner. Upon examination of them, respectively, it was found that two had suits pending and at issue in the Superior Court of Halifax County, five were not freeholders and one had served on the jury in the Superior Court of Halifax within the past two years. The prisoner offered to challenge each of them for the disqualification that his examination disclosed, as contended by the pris-

oner, but the challenges were refused, and the prisoner excepted and then challenged such *venire* men peremptorily.

During the trial the prisoner excepted to the admission of certain testimony.

After the testimony was closed, and one counsel on each side had addressed the jury, a recess was taken, and on the opening of the court next day the counsel on both sides announced in open court that the prisoner's counsel had offered to submit to a verdict of manslaughter, and that the solicitor had agreed to the verdict. The court then repeated to the jury what the counsel on both sides had already stated in their presence, and the jury assented and the verdict of manslaughter was accordingly entered and judgment rendered. Thereupon defendant appealed.

Messrs. Attorney-General Zeb V. Walser and MacRae & Day for the State.

Mr. C. B. Aycock for the prisoner.

MONTGOMERY, J. The prisoner was indicted for murder and tried in the county of Halifax in the Circuit Criminal Court. In cases where a Judge of the Superior Court issues a special writ of *venire facias* only freeholders can be summoned. The Code, secs. 1738, 1739. It was argued here for the defendant that he was entitled to a new (567) trial upon the ground that the jurors who were the triers of the indictment against him were selected from a special *venire* ordered by the Judge and summoned by the sheriff from the general jury list of the county, irrespective of their qualifications as freeholders. The defendant's counsel, while admitting that chapter 156, Laws 1895, which created the Circuit Criminal Court, and provided a method of procuring a special *venire* in cases of capital felonies, was followed in summoning the special *venire,* yet insisted that the act was prejudicial to defendant's rights, in that it denied to persons indicted for capital felonies in the Circuit Criminal Court the same and equal protection which was afforded to persons indicted and tried for the same offences in the Superior Courts, and for that reason was contrary to that portion of section 1 of Art. XIV of the Amendments to the Constitution of the United States, which declares that no State in the Union shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws." Authorities were cited to sustain this position.

It is not necessary for us to make a decision upon the question raised by the argument. It might be that the defendant would have to be sustained in his contention if he had been compelled to take a single juror

who was not a freeholder. But such does not appear to have been the case. It is true that several jurors who were not freeholders were tendered by the State, and that upon objection by the defendant, for cause, the objection was not sustained by the Court. But it appears that all such were rejected by the peremptory challenges of the defendant and that a jury was selected before he had exhausted his peremptory (568) challenges. The jury, so far as we can see from the record, possessed all the qualifications required by the general law, sections 1738, 1739 of The Code, in cases where they are selected from a special *venire,* and if some of them who were summoned by the sheriff did not possess the proper qualifications they did not try this case, and the defendant was therefore not prejudiced by such order of the judge and such action of the sheriff. There was no challenge to the array. The exceptions taken to the refusal of his Honor to admit certain testimony offered by the defendant need not be considered, for the reason that the verdict of the jury returned on the defendant's agreement that they should find him guilty of manslaughter is, in law, an acknowledgment and confession of the facts which constituted the crime, and an appeal from the judgment rendered thereon cannot bring into question the regularity and correctness of the proceedings. *S. v. Warren,* 113 N. C., 683.

No error.

Cited: S. v. Branner, 149 N. C., 563.

STATE v. A. JOURNIGAN.

Indictment for Perjury—Instructions—Expression of Opinion by Trial Judge—Case on Appeal.

1. A charge by the trial judge, in the trial of an indictment for perjury, that perjury was very much a matter of intent, and that as to that the jury must be satisfied beyond a reasonable doubt upon "all the facts and circumstances of the case deposed to by the witnesses," contains no expression of opinion of the judge.

2. In the absence of any allegation or ground to the contrary, a case on appeal certified by the judge presiding at the trial will be taken as correct, where the notes of the evidence and charge were not accessible in making up the case.

INDICTMENT for perjury, tried before *Graham, J.,* and a jury, at Fall Term, 1896, of FRANKLIN. The defendant was convicted and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Messrs. C. M. Cooke & Son for defendant (appellant).

(569)

FAIRCLOTH, C. J. The defendant is indicted for perjury. No exception was taken to the evidence. The Court charged the jury that perjury was very much a matter of intent, and that on that they must be satisfied beyond a reasonable doubt upon "all the facts and circumstances of the case as deposed to by the witness." We see no expression of opinion on the part of the Court in any part of the charge, and the verdict must be taken as conclusive on the question of intent. It is not error, in a civil action, for the Court to instruct the jury that if they believe the evidence the defendant is guilty, although it would be in a criminal action in which the intent is a material element. *S. v. Gaither*, 72 N. C., 458; *Hannon v. Grizzard*, 89 N. C., 115; *S. v. Riley*, 113 N. C., 648. In the latter case the distinction between *civil* and *criminal* actions on this subject is pointed out, and cases cited. The exception to the charge is overruled.

The notes of the court containing the evidence and the charge were, in some way, misplaced and not accessible to the counsel or the court in making up the case, but his Honor certifies the case to this court, saying, "But the facts in the case are comparatively fresh in my mind, and the above is a substantial statement of the evidence and charge." We must take the case to be correctly stated, especially in the absence of any allegation or ground laid to the contrary, except by way of argument to the sufficiency of the case as stated.

Affirmed.

Cited: S. v. R. R., 145 N. C., 578.

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(570)

STATE v. JAMES I. MOORE.

Indictment for Murder—Jury, Selection and Qualification of—Error, Review of—Severance—Exceptions.

1. The action of a trial judge in determining the qualifications of a juryman, if erroneous, is ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant cannot be allowed to take advantage of the alleged error after trial and judgment.
2. The refusal of a trial judge to grant a severance in the trial of two defendants is a matter of discretion and not reviewable on appeal.
3. A "broadside" exception "to the charge as given" will not be considered.

STATE *v.* MOORE.

INDICTMENT for murder, tried at Fall Term, 1896, of FRANKLIN, before *Graham, J.*, and a jury. The defendant was convicted and appealed.

Messrs. Attorney-General Zeb V. Walser and W. M. Person for the State.

Mr. F. S. Spruill for defendant (appellant).

FURCHES, J. This is an indictment for murder, and the Judge trying the case ordered a special *venire* and directed that it should be drawn from the jury box, under section 1739 of The Code. In drawing this jury, upon the testimony of the sheriff and others, the Judge undertook to try and determine who were and who were not freeholders. And when the name of J. H. King was drawn from the box, the Judge found from the testimony of these parties, and from the fact that the tax books did not show that said King had listed any land for taxation, that he was not a freeholder, and rejected his name and refused to allow it to go in the *venire facias*. To this the defendant objected.

The defendant was indicted in the same bill with another de-
(571) fendant (his brother), who was acquitted. And this defendant moved for a severance, which was refused and he excepted.

The defendant made a further exception in the following words: "The prisoner excepts to the charge as given."

These, as far as we are able to ascertain from the record, constitute the defendant's exceptions upon which he grounds his appeal.

The first error assigned, the rejection of the name of J. H. King drawn from the jury box, is not presented in such a way that we can consider it in this appeal. If the action of the judge, in undertaking to determine the qualifications of a juryman at that stage of the proceeding and progress of the trial, was erroneous, as the defendant contends, it was ground for a challenge to the array by a motion to quash and set aside the entire panel. As the defendant did not challenge the array, it is presumed that he was satisfied with it, as it was returned, and he cannot be allowed to take advantage of this objection after trial and judgment in this way. I Burrell L. Dict., pp. 129 and 271; 3 Blackstone Com., 359; *S. v. Murph,* 60 N. C., 129; *Boyer v. Teague,* 106 N. C., on pp. 619 and 620.

The exception to the refusal of the Judge to grant the defendant's motion for a severance cannot be sustained. This is a matter of discretion and not appealable. *S. v. Gooch,* 94 N. C., 987; *S. v. Oxendine,* 107 N. C., 783.

The exception "to the charge as given," is too general and indefinite, and cannot be considered on that account. *S. v. Downs,* 118 N. C., 1242;

S. v. Varner, 115 N. C., 744; *S. v. Nipper,* 95 N. C., 653. But the learned counsel, who argued the case for the defendant, stated that there was nothing in this exception (to the Judge's charge), unless he could induce the court to review and overrule the cases of *S. v. Fuller,* 114 N. C., 885; *S. v. Gadberry,* 117 N. C., 811, and *S. v. Locklear,* 118 N. C., 1154. This we cannot do. (572)

No error.

Cited: S. v. Webster, 121 N. C., 587; *Pierce v. R. R.,* 124 N. C., 99; *S. v. Kinsauls,* 126 N. C., 1096; *S. v. Register,* 133 N. C., 751; *S. v. Holder,* 153 N. C., 607.

STATE v. JESSE HINNANT.

Indictment for Carrying Concealed Weapon—Intent—Question for the Jury.

Where, in the trial of an indictment for carrying a concealed weapon, the defendant admitted that he carried a pistol home "in his pocket," the presumption was, under the statute, that he carried it with intent to conceal it, and it was a question for the jury whether the evidence rebutted such presumption.

INDICTMENT for carrying a concealed weapon, tried before *Graham, J.,* and a jury, at November Term, 1896, of WILSON. The defendant was convicted and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
No counsel for defendant.

FAIRCLOTH, C. J. The defendant was indicted for carrying a concealed weapon. He admitted that he purchased a pistol at a store and put it in his pocket and carried it home.

The only question sent to the jury was the intent with which the pistol was carried. His Honor charged the jury that they were the sole judges of the intent, and that if defendant put the pistol in his pocket only to carry it home he was not guilty, but if they believed from the evidence that he did so with the intent to conceal it while carrying it, he would be guilty; also, that they must not consider the evidence of what occurred at the corn shucking. (573)

The question was properly left to the jury. *S. v. Dixon,* 114 N. C., 850; *S. v. Pigford,* 117 N. C., 748. The statute raises the presumption of criminal intent, and it is for the defendant to rebut the presumption, which, in the opinion of the jury, he failed to do. *S. v. McManus,* 89 N. C., 555; *S. v. Lilly,* 116 N. C., 1049.

No error.

Cited: S. v. Reams, 121 N. C., 557; *Burns v. Tomlinson,* 147 N. C., 635.

STATE v. R. P. HOLMES.

Indictment for Disposing of Mortgaged Property—Sale—Presumption of Fraudulent Intent.

1. The actual sale of mortgaged crops raises a presumption of fraudulent intent.
2. On the trial of an indictment for disposing of mortgaged property, proof that the defendant executed a mortgage on his crops and sold a part thereof, leaving the mortgage unsatisfied (no other facts being before the jury), made out a *prima facie* case and the burden of proving facts negativing such intent devolved upon the defendant.

INDICTMENT under section 1089 of The Code, for disposing of mortgaged property, tried before *McIver, J.,* and a jury, at March Term, 1896, of WAKE.

The execution of the mortgage was admitted. W. W. Holding testified for the State that defendant rented the land described in the indictment of Thomas Honeycutt, for the year 1895, and agreed to pay as rent 800 pounds of lint cotton; that defendant raised on the land corn, cotton, fodder and potatoes; that defendant confessed to the witness that he had sold some of the corn raised on the land; that
(574) there was now due on the debt of the defendant, as secured by the mortgage, about $20; that no part of the crop was applied on the mortgage, nor the proceeds thereof. No other witness was introduced by the State, and the defendant offered no testimony. The defendant requested the Court to charge: (1) That the lien of the landlord, Honeycutt, was superior to that of Holding, Davis & Co.; and, before the jury could convict the defendant, the State must prove to their satisfaction that defendant had raised on Honeycutt's land more of the crop described in the mortgage than was necessary to pay the rent of Honeycutt; otherwise, the lien attempted to be given by the execution of the mort-

gage did not attach, and defendant would not be guilty under this indictment. (2) That it was incumbent on the State to prove that the rent owing Honeycutt had been paid before the corn was sold, and, having failed to do this, the defendant was not guilty. (3) That it was required of the State, in order to convince the jury that the corn was disposed of with intent to hinder, delay and defeat the rights of Holding, Davis & Co., to show that the rent of Honeycutt had been theretofore paid, and that the corn sold had remained after the rent was paid, and that, after selling the corn, there was not enough corn, cotton, fodder, cotton seed and potatoes raised on the land to satisfy the debt of the defendant then unpaid, and as secured by the mortgage. (4) That it was the duty of the State to prove that the rent of Honeycutt had been paid before the corn was disposed of; otherwise, the defendant would not be guilty under this indictment, because the lien of the landlord, Honeycutt, attached before that of Holding, Davis & Co. The Court refused to charge as requested, but told the jury that, if they believed the evidence of the State, the defendant was guilty. The defend-
ant excepted. There was a verdict of guilty, and from the judg- (575)
ment thereon defendant appealed.

Mr. Attorney-General Zeb V. Walser for the State.

Messrs. Shepherd & Busbee and W. L. Watson for defendant (appellant).

CLARK, J. It was in evidence that the defendant, who was the renter, had sold part of the crop which was embraced in a mortgage given by him and that a balance was still due thereon. The defendant offered no evidence. If there had been evidence that defendant had sold the corn to pay the prior lien for rent, *S. v. Ellington,* 98 N. C., 749, or that sufficient of the crop had been retained to pay off the mortgage, *S. v. Manning,* 107 N. C., 910, or tending to show that the sale had been made under circumstances making it justifiable, as, for instance, the sale of perishable property merely to prevent loss, then the intent would have been a matter to have been left with the jury. But such matters of defence were peculiarly within the knowledge of the defendant and should have been put in evidence by him. It would be impossible for the State to anticipate and offer evidence to disprove these and all other possible circumstances which might negative the intent. Upon the facts here found, that the defendant executed the mortgage upon his crop and sold a part thereof, leaving the mortgage still unsatisfied, no other facts being before the jury, the intent to hinder, delay and defeat the mortgage, was the "natural and necessary" consequence of such a state of facts. *S. v. Manning, supra.* The defendant is presumed to have intended the neces-

sary consequences of his own act. The jury could not act upon the surmise that there might be other crops, or that the corn had been sold to pay prior liens or taxes, or other justifiable purposes. His Honor, (576) therefore, properly instructed the jury, if they believed the evidence, to find the defendant guilty. *S. v. Riley,* 113 N. C., 648.

In like manner, upon an indictment for selling liquor without license, if the sale is shown, the burden devolves upon the defendant to show that he had a license to sell. *S. v. Morrison,* 14 N. C., 229; *S. v. Wilbourne,* 87 N. C., 529; *S. v. Emery,* 98 N. C., 668; *S. v. Smith,* 117 N. C., 809. On an indictment for entry on land without license, under The Code, sec. 1120, the burden of showing the license devolves upon the defendant. *S. v. Glenn,* 118 N. C., 1194. So, also, on an indictment for murder, on the trial of which the intent is most essential, if the killing with a deadly weapon is proved or admitted the law presumes malice, and the burden of proving matter in excuse or mitigation devolves upon the prisoner.

Besides, the statute (The Code, sec. 1089) makes the failure to produce the mortgaged property, when demanded by the mortgagee, *prima facie* evidence of the disposition of it "with the intent to hinder, delay or defeat" the mortgagee, *a fortiori* proof of the actual sale of such property raises a presumption of such intent. Formerly it was necessary to allege in the indictment the name of the person to whom the mortgaged property was sold (*S. v. Pickens,* 79 N. C., 652; *S. v. Burns,* 80 N. C., 376), but this is expressly made unnecessary under the amended statute, as it is in The Code.

No error.

Cited: S. v. Blackley, 138 N. C., 623; *S. v. Connor,* 142 N. C., 708.

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(577)

STATE v. HENRY HARRIS.

Indictment for Secret Assault—Insufficient Evidence—Exceptions, How Taken.

1. An exception that there is not sufficient evidence to go to the jury must be taken before verdict, in order that the defect can be supplied if possible.

2. An exception for omission to charge must be made before verdict; otherwise as to exceptions for errors in the charge which, if taken specifically, may be made within ten days after the adjournment of the court.

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3. An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault.

INDICTMENT for secret assault with a deadly weapon, tried before *McIver, J.*, and a jury, at November Term, 1896, of GRANVILLE. The defendant admitted the assault, but denied that it was made in a secret manner. The prosecuting witness, Frank O. Landis, testified that he was in conversation with one Albert Harris when he was struck, and did not see the defendant or know who hit him. He had no warning, and was knocked down insensible. It was also in evidence, by another witness, that defendant struck prosecutor with a large stick from behind. Defendant testified, in his own behalf, that he did not strike with a stick described by the other witness, but did strike with the stick he then held in his hand (which was shown to the court and jury), and was standing behind the prosecutor and gave no notice when the assault was made. The Court charged the jury that they must be fully satisfied the assault was made in a secret manner and with intent to kill, and if, from the testimony, they were satisfied beyond a reasonable doubt that it was made from behind, and in such manner as to prevent prosecutor from knowing who his assailant was, and that the blow was about to be stricken, . then it was a secret assault; and if they were satisfied, beyond a (578) reasonable doubt, that the ordinary consequence of such a blow was to produce death, then the law presumed the intent to kill, and they should convict, otherwise they should acquit the defendant.

There was a verdict of guilty, and the defendant moved for a new trial on the ground that there was not sufficient evidence to go to the jury, showing that the assault was made in a secret manner with intent to kill. The motion was refused and defendant appealed.

Messrs. Attorney-General Zeb V. Walser, Winston & Fuller and J. C. Biggs for the State.

Mr. Joseph B. Batchelor for the defendant (appellant).

CLARK, J. "An exception that there is not sufficient evidence to go to the jury must always be made before verdict, in order that the defect can be supplied if possible"; for the sole object of judicial investigation is to ascertain the truth of the matter at issue. *Sutton v. Walters,* 118 N. C., 495; *Holden v. Strickland,* 116 N. C., 185; *S. v. Hart, ib.,* 976; *S. v. Kiger,* 115 N. C., 746; *Cotton Mills v. Cotton Mills, ib.,* 475; *S. v. Varner, ib.,* 744; *Fagg v. Loan Association,* 113 N. C., 364; *McMillan v. Gambill,* 106 N. C., 359; *S. v. Brady,* 104 N. C., 737; *Battle v. Mayo,* 102 N. C., 413, 438; *Sugg v. Watson,* 101 N. C., 188; *Lawrence v.*

Hester, 93 N. C., 79; *S. v. Glisson, ib.,* 506; *S. v. Keath,* 83 N. C., 626; *S. v. Jones,* 69 N. C., 16. The matter seems adjudicated and is decisive of this case.

It is true that exceptions for error in the charge may be taken, specifically, if made within ten days after the adjournment of the court, *Lowe v. Elliott,* 107 N. C., 718; *S. v. Varner,* 115 N. C., 744; *Blackburn v. Ins. Co.,* 116 N. C., 821; Clark's Code, (2nd Ed.), p. 383, (579) but it is otherwise as to exceptions for omissions to charge, *S. v. Groves,* 119 N. C., 822; Clark's Code (2nd Ed.), p. 382, and permitting the case to go to the jury on insufficient testimony, since these matters must be called to the attention of the court before verdict, that the defect may be cured by calling other witnesses or by charging upon the omitted points. It may be noted that the third head note in *S. v. Hart,* 116 N. C., 976, is misleading by reason of this distinction having been overlooked by the reporter. But even if the exception in this case had been taken in apt time, it could not have availed the defendant. The Judge correctly charged that "if the assault was made from behind and in such a manner as to prevent the prosecutor from knowing who his assailant was, and that the blow was about to be stricken, it was a secret assault," *S. v. Jennings,* 104 N. C., 774, and the evidence fully authorized the charge. *S. v. Jennings* has been cited and approved in *S. v. Patton,* 115 N. C., 753; *S. v. Shade, ib.,* 757; *S. v. Gunter,* 116 N. C., 1068. Attempts to commit any of the four capital offences were formerly felonies, but during the prosecution for "Kuklux" troubles the offence of assault with intent to commit murder was reduced to a simple misdemeanor. The Act of 1887, Ch. 32, restored the grade of the offence to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. *S. v. Telfair,* 109 N. C., 878.

No error.

Cited: S. v. Furr, 121 N. C., 608; *S. v. Wilson, ib.,* 657; *S. v. Huggins,* 126 N. C., 1056; *S. v. Williams,* 129 N. C., 582; *S. v. Jarvis, ib.,* 699; *Hart v. Cannon,* 133 N. C., 14; *S. v. Holder, ib.,* 712; *Printing Co. v. Herbert,* 137 N. C., 319; *Jones v. High Point,* 153 N. C., 373; *S. v. Whitfield, ib.,* 628; *S. v. Houston,* 155 N. C., 433; *S. v. Hawkins, ib.,* 473; *S. v. Leak,* 156 N. C., 646; *Riley v. Stone,* 169 N. C., 424.

(580)

STATE v. JAMES PERRY.

Indictment for Carrying Concealed Weapon—Statute, Construction of —Premises of Defendant.

1. The use of the words, "on his own premises," and not being "on his own lands," in section 1005 of The Code, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives.
2. The exception in the statute (section 1005 of The Code) does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use the lines of travel.
3. The superintendent of a turnpike company owning a turnpike nine miles long and open to public travel, when on such turnpike, is not within the exception to section 1005 of The Code, although he has absolute control of all the property of the company.

FAIRCLOTH, C. J., and DOUGLAS, J., dissenting.

CRIMINAL ACTION, tried before *Meares, J.*, at the January Term, 1897, of the Circuit Criminal Court in NEW HANOVER.

The defendant was indicted under The Code for carrying a concealed weapon, he not being an officer of the law, in the military or marine service of the United States or of the State of North Carolina. The following facts were found as a special verdict:

"The defendant was the general manager and supervisor of the Wilmington Seacoast Turnpike Company, and had absolute control of all the property of said company and resided upon the property of said turnpike company, upon which he was found in possession of the weapon concealed about his person; he being at that time upon the premises and the property of the said company.

"The turnpike road leads from the City of Wilmington to Wrightsville Sound, a distance of nine miles, and is the only property that the said company owns in New Hanover County." (581)

The above facts were submitted to the court, and upon them the court found that the defendant was guilty as charged in the bill of indictment, and was fined the sum of $20 and the cost of the action, from which judgment the said defendant appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Mr. Herbert McClammy for defendant (appellant).

CLARK, J. The Code, sec. 1005, makes it a misdemeanor for any one to carry a concealed weapon, except when on "his own premises," and

provides that if any one "not being on his own lands" shall have about his person a deadly weapon of the kind enumerated in the statute, such possession is *prima facie* evidence of concealment. Certain classes of persons, as soldiers, certain officers on official duty, &c., are exempted from the operation of the statute. The use of the words "on his own premises" and "not being on his own land," shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises where they are not likely to be thrown in contact with the public nor tempted on a sudden quarrel to use, to the detriment of others, the great advantage a concealed weapon gives to one who unexpectedly pulls it out upon his defenseless neighbor. In construing a criminal statute the evil to be remedied must be considered.

S. v. Terry, 93 N. C., 585, holds that "on his own premises" does not require that the person shall have legal title to the land, but that any one in possession as a tenant, or even as an overseer or agent, would have the same right as the owner. This is because he is in possession as the representative of the owner and with his rights. But it was never
(582) intended by that decision to extend the constructive possession to the superintendent of a public turnpike nine miles long. Even were the turnpike the property of the defendant, still as he has thrown it open to the public and invited their use of it, it is not "his own premises" in the sense of the statute, which hangs not upon the legal title (*S. v. Terry, supra*), but upon the right of the person to treat it as "in his possession" and who, therefore, is privileged to keep other persons off and to carry concealed weapons thereon. He can carry weapons openly thereon like any one else who desires to do so. The statute never intended that railroad and turnpike superintendents and presidents and vice-presidents and others having supervision of like property should be placed on a different footing from other citizens (not officers on duty, etc.). The statute clearly does not contemplate that in the crowded cars and thoroughfares the corporation officials shall have leave to carry concealed weapons about their persons while all other citizens traveling thereon dare not do the same under fear of criminal punishment. "On their own premises" and "on their own lands" do not apply to officials of such corporations as invite the public to use their lines of travel. The stockholders themselves are not authorized to carry concealed weapons when on the cars or right of way of a railroad or turnpike, and certainly their overseer or superintendent can have no greater right in this respect. Neither stockholders nor their overseers nor agents have any more right to carry concealed weapons thereon than any one else, and there is no reason they should. The reasoning in *S. v. Terry, supra,* rested not upon the person being an overseer or superintendent, but upon his being in possession in lieu of the owner, and hence it was held that Terry, a mere

farm laborer, having no possession, was guilty in carrying the (583) concealed weapon on his employer's farm. The illegality of carrying concealed weapons is the rule, and the exception as to officers on duty is for manifest reasons, and the exception as to a person "on his own premises" is for reasons above given. If the defendant had merely been occupying a part of the turnpike company's land for his residence, as to such lot and its curtilage he was a tenant, and as to them he was "on his own premises" and privileged to carry a concealed weapon thereon. But the defendant's counsel argued the case on the ground that the special verdict intended to raise the question of the defendant's right to carry a concealed weapon anywhere upon the turnpike property, nine miles in length, upon the ground that he is superintendent of the property and has a residence upon a small part thereof, and we so understand it. As to that part of the property beyond what he occupies as a residential lot, the defendant is not "on his own premises" within the purport of the statute, and has no more privilege to carry a concealed weapon than the public, who have as much right thereon, as a public highway, as himself. A road overseer has no more right to carry concealed weapons than the hands who work under him, yet while working the road he is superintendent of it in the same sense that the defendant is superintendent of the turnpike.

No error.

FAIRCLOTH, C. J., dissenting. The turnpike company's right of way leads from Wilmington to Wrightsville Sound, a distance of nine miles, and the company had no other property in the county. The defendant was the general manager and supervisor of the turnpike company and had absolute control of all the property of said company, and resided upon the property of said turnpike company, upon which he was found in possession of the weapon concealed about his person, he being at that time upon the premises and the property of the said com- (584) pany.

I cannot agree with the majority of the court. I will state my reasons. I think the case should be remanded to find the specific facts, *i. e.*, whether the defendant resides on the turnpike and whether he was on it or at his immediate residence when the pistol was found on his person. I do not think criminal statutes should be strictly construed against the citizen. In *S. v. Terry,* 93 N. C., 585, the defendant was a hireling on the prosecutor's land where he had the concealed weapon, slept and lived in his father's house on another's land. He was held to be guilty. The court said in that case, "What is meant *by his own premises* and *his own land,* is not that he must have a legal title to the land, for we think one who is in the occupation of land, or a tenant at will or at sufferance,

would, in the meaning of the statute, be the owner thereof. So would an agent or overseer, or any one who is vested with the right of *dominion or superintendence over it.*"

A road overseer is only authorized and required to keep his road in good repair, but the defendant is authorized, and it is his duty, to superintend, keep in repair and prevent trespasses on the turnpike. The defendant "had absolute control of all the property of said company." It appears to me that he had the right "of dominion or superintendence over it," as the court declared in *S. v. Terry, supra,* as against the public. Railroad presidents and superintendents do not have "absolute control of all the property of (their) company." They are limited by the rules and regulations of the company to their own departments as general agents. I think a new trial should be ordered.

DOUGLAS, J., dissenting. I feel compelled to dissent from the
(585) opinion of the court, both as to its reasoning and its conclusion, and on two separate and distinct grounds.

Section 1005 of The Code; under which this defendant is indicted, makes it a misdemeanor for any one to carry a deadly weapon concealed about his person, "except when on his own premises," and further provides that "not being on his own lands," such possession shall be *prima facie* evidence of concealment. However necessary and salutary this statute may be, and that such it is cannot be denied, it is, nevertheless, a *penal* statute and should be strictly construed in favor of the defendant. The special verdict finds as follows: "The turnpike company's right of way leads from Wilmington to Wrightsville Sound, a distance of nine miles, and the company had no other property in the county. The defendant was the general manager and supervisor of the turnpike company and had absolute control of all the property of the company, and resided upon the property of the turnpike company, upon which he was found in possession of the weapon concealed about his person, he being at that time upon the premises and the property of said company." The finding might very well be construed to mean that when found with the concealed weapon he was upon the "premises" he occupied as a residence. If so, he would clearly not be guilty, and it would, therefore, be our duty either to give to the defendant the benefit of the doubt, or at least to remand the case so that it may be specifically found whether or not he was on the immediate premises occupied by him as a dwelling. In no event can we adjudge him guilty upon a doubtful state of facts, under one construction of which he would be clearly innocent.

By taking the finding in its strongest sense against the defendant, I
am still inclined to the opinion that he is not guilty. He was cer-
(586) tainly somewhere on the company's property, of all of which he

"had absolute control." In *S. v. Terry,* 93 N. C., 585, this court said: "What is meant by 'his own premises' and 'his own land,' is not that he must have a legal title to the land, for, we think, one who is in the occupation of land as a tenant at will or at sufferance would, in the meaning of the statute, be the owner thereof. So would an *agent* or overseer, or any one who is vested with the right of *dominion* or *superintendence* over it." Can there be any greater right of dominion or superintendence than that of "absolute control"? This is not a public road, free to the public at large. It is the property of the turnpike company, and can be used by the public only upon the payment of toll. It is thrown open to the public only as a toll bridge or stage coach or a public inn. That portion of the public only is invited who are willing to pay for the invitation. All others would be liable to ejectment. It is evidently the duty of the defendant, not simply to keep the road in repair, but also to collect tolls from those who use it and keep off those who will not pay. He is in no sense on a level with a mere overseer of the public road, who considers his obligations as fully met by periodically throwing a few shovels of dirt into the more prominent mud holes, and who certainly cannot be said to be in possession. The stockholders of a railroad company have no right to carry concealed weapons on the cars or the track, because they do not directly own either, and have no possession or control by virtue of their shares. Their ownership extends directly only to their shares of stock. The property itself is owned by the company, a distinct person, artificial it is true, but none the less real in law. Being an artificial person, it can hold actual possession of its property only through an officer or agent. Under the authority of *S. v. Terry, supra,* I think that such an agent should, for the purpose of this statute, be regarded as the owner. I do not think that railroad superin- (587) tendents and directors have a right to carry concealed weapons at will over the entire right of way of the company, but I *do* think that a conductor or express messenger, in charge of a train or a particular car, has the right to carry weapons in the manner most convenient for the protection of the lives and property directly committed to his care. In *Britton v. R. R.,* 88 N. C., on p. 544, this court has held that "the carrier owes to the passenger the duty of protecting him from the *violence* and *assaults* of his *fellow passengers or intruders,* and will be held responsible for his own or his servant's neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented, and while not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passengers against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties"—citing

R. R. v. Burke, 53 Miss., 200; *R. R. v. Hinds,* 53 Pa. St., 512; *R. R. v. Pillow,* 76 Pa. St., 510; *Flint v. Transportation Co.,* 34 Conn., 554; Thompson on Carriers, 303.

If a railroad company or any other carrier is held to such a high degree of care, it should have all the powers necessary and proper to fulfill this obligation. As the maxim *respondeat superior is* rigidly applied, the agent must have the powers and authority of the owner in the protection of its property and the performance of its duties. The same rule would apply to express messengers, but under this rule the messenger would not be allowed to carry his concealed weapon outside of his car, or the conductor beyond the limits of his train or the platform
(588) immediately adjacent thereto. Mail agents are, apparently, protected by the very terms of the Act, being "civil officers of the United States in the discharge of their official duties." For these reasons I think that a verdict of not guilty should be ordered.

Cited: S. v. Anderson, 129 N. C., 522; *S. v. Bridgers,* 69 N. C., 309.

STATE v. FRANK ASHFORD.

Indictment for Obtaining Money Under False Pretenses—Variance—Appeal—Error in Record.

1. Section 957 of The Code authorizing this Court to give such judgment as it shall appear, "on an inspection of the whole record," ought to be rendered, refers to such matters only as are necessarily of the record, as the pleadings, verdict and judgment; hence, where there were no exceptions on the trial, the fact that the indictment charged the defendant with obtaining "money" under false pretenses, while the proof was that he obtained "goods," is not ground for reversal by this Court of the judgment against the defendant.

2. A general exception, without specifying error, will not be considered by this Court.

INDICTMENT for obtaining money under false representations, tried before *Coble, J.,* and a jury, at Spring Term, 1897, of ANSON. The defendant was convicted and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Mr. H. E. Faison for defendant (appellant).

FAIRCLOTH, C. J. The defendant was indicted for obtaining "money" under false representation and the proof was that he obtained "goods and

merchandise" under such representation. There were no excep- (589)
tions at the trial. After verdict the defendant moved in arrest of judgment. On the argument here it was insisted that the court, by looking through the whole record, would see that the judgment was such as should not in law be rendered under The Code, sec. 957. No error was pointed out to the court by the defendant. The point made is that money was charged in the indictment and goods and merchandise only were shown by the proof. The above section refers only to such matters as are necessarily of the record, as the pleadings, verdict and judgment. If error in these matters is apparent, the court *ex mero motu* will arrest the judgment. When other matters are relied upon, they must be pointed by an exception on the trial or in the case on appeal. *S. v. Cowan,* 29 N. C., 239; *S. v. Potter,* 61 N. C., 338; *S. v. Jones,* 69 N. C., 16; *S. v. Craige,* 89 N. C., 475. A general exception, without specifying error, will not be considered in this court. *Grant v. Hunsucker,* 34 N. C., 254; *Thornton v. Brady,* 100 N. C., 38; *McKinnon v. Morrison,* 104 N. C., 354, and numerous cases cited.

Affirmed.

Cited: Pierce v. R. R., 124 N. C., 99; *S. v. Gibson,* 169 N. C., 322; *S. v. Gibson,* 170 N. C., 699.

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(590)

STATE v. THOMAS BOGGAN.

Indictment for Carrying Concealed Weapons — Practice — Evidence — Election.

1. While the rule is that where the State charges one offense and proves other offenses of the same kind, the defendant may require an election at the close of the State's evidence as to which it will rely upon, yet where the same offense is proved at different intervals by different witnesses, he is not entitled to demand an election on the part of the State; hence,

2. On a trial for carrying concealed weapons the State may show that defendant was seen at different places, by different witnesses, at short distances apart.

INDICTMENT for carrying concealed weapons, tried before *Coble, J.,* and a jury, at Spring Term, 1897, of ANSON. The defendant was convicted and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Mr. R. T. Bennett for defendant (appellant).

FAIRCLOTH, C. J. The defendant, being indicted for carrying a concealed weapon on his person, was seen with the pistol at three different places on the railroad track by at least three different witnesses at short distances apart. At the close of the State's evidence, the defendant made a motion that the State be required to elect on which of these charges it relied. This was refused and the defendant excepted.

The exception is not available. The rule is that where the State charges an offence and proves other offences of the same kind the defendant may require an election at the close of the State's evidence, but where the same offence is proved at different intervals by different witnesses, he is not entitled to an election on the part of the State. This would be an election of evidence and not of different offences. If
(591) that was allowed, the defendant might be prosecuted for the several offences, when he had committed only one. *S. v. Williams,* 117 N. C., 753; *S. v. Parish,* 104 N. C., 679.

No error.

STATE v. ALLEN MELTON.

Indictment for Bigamy—Bigamy—Evidence—Wife Competent Witness to Prove Marriage—Record of Marriage—Admissions—Witness—Slave Marriages—Exception.

1. In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence.
2. The record book of marriages for the county is admissible to prove a marriage.
3. The original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage, though neither the justice nor the witnesses attesting the certificate as being present at the marriage are present in court.
4. In the trial of an indictment for bigamy, the admission by defendant of his former marriage is competent evidence against him, though such statement may have referred to the relations which he and his former wife sustained to each other, as man and wife, in slavery times.
5. Where a defendant charged with bigamy, upon the preliminary examination before a justice of the peace, and after being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the Superior Court, as to his guilt.

6. Where, on the trial of a defendant for bigamy, one witness testified that defendant had been married to his first wife thirty-nine years and had admitted two years before the trial that he had another wife living, and it appeared that the defendant had testified on the preliminary examination before a justice of the peace to such first marriage while he and she were slaves, it was proper to refuse an instruction that, on the evidence, the jury could not convict.

7. Where persons were married while slaves and continued to live together as man and wife after the abolition of slavery, they were, by virtue of chapter 40, Acts of 1866, legally married and no acknowledgment before an officer was necessary.

8. An exception "to the charge as given" is invalid and will not be considered.

9. An indictment for bigamy need not contain an averment that the defendant had not been divorced from his first wife, since that is a matter of defense.

FAIRCLOTH, C. J., and DOUGLAS, J., dissenting.

INDICTMENT for bigamy, tried before *Coble, J.*, and a jury, at (592) January Term, 1897, of ANSON.

Mr. Attorney-General Zeb V. Walser for the State.
Mr. R. T. Bennett for appellant.

CLARK, J. In an indictment for bigamy the first wife is a competent witness to prove the marriage. The Code, sec. 588; *S. v. McDuffie,* 107 N. C., 885, 890. Indeed, marriage and public cohabitation as man and wife are public acknowledgments of the relation and do not come within the nature of the confidential relations between them which the policy of the law has always forbidden either to give in evidence. This disposes of the first four exceptions.

The fifth exception to proving the second marriage by the record book of marriages for the county is not well taken. The same is true of the sixth exception, which was to the admission of the original marriage license signed by the justice solemnizing the same, nor was it necessary that the said justice, nor the witnesses attesting the certificate as being present at the marriage, should be in court. The "witnesses (593) of the law," who must be in court, or their absence accounted for, are the subscribing witnesses to a deed, bond or will, and that is because they are selected to prove the execution of such instrument. But here it is not the execution of the certificate which is to be proved. The certificate filed in the register's office and the registration thereof are both record evidence of the marriage, and the regularity is presumed from such evidence till "the contrary be shown." *S. v. Davis,* 109 N. C., 780.

The seventh exception was that a witness testified that "the defendant and Harriet Melton were married about 39 years; that they were married

about five miles from Chesterfield C. H., South Carolina; that about two years ago the defendant stated that he had another wife, his present wife being present at the time; that defendant and Harriet Melton were slaves when they were married." The admission by the defendant of his former marriage is competent evidence against him. *S. v. Wylde,* 110 N. C., 500, and numerous cases there cited. In the preliminary examination before the justice the defendant asked to be allowed to testify, and the justice, having given him the ordinary caution and also having told him that whatever he would say could be used against him in a higher court, the defendant testified that he had been married in Chester County, S. C., to Harriet Melton while they were slaves and had raised some children by her, and that in 1894 he married Delia Ann Teel in North Carolina. These admissions were competent to go to the jury. *S. v. Wylde, supra,* 2 A. & E., 196, and cases cited.

The defendant prayed the Court to instruct the jury "that the marriage of the slaves and their living together in the relation of husband and wife while in a state of slavery, did not constitute the relation of
(594) husband and wife in North Carolina; that the omission of the State to introduce any evidence of the law in South Carolina before the jury, leaves the jury to be governed by the decisions and laws in this State, and by that law this marriage in South Carolina was not a valid one; that upon the whole evidence in this case the State cannot convict." The defendant excepted to the refusal of this prayer. If any part thereof was incorrect, it was not error to refuse it.

The witness, Streator, having testified that the defendant two years ago admitted, in the presence of his second wife, that he had another wife living, this admission was competent to submit to the jury, who will "determine whether what he said was an admission that he had been legally married." *Regina v. Simonds,* 1 Car. & Kir., 164, and *Miles v. U. S.,* 103 U. S., 304, and other cases cited in *S. v. Wylde, supra.* This admission does not specify the name of the first wife, nor does the indictment set out her name and it is not necessary that it should. *S. v. Davis,* 109 N. C., 780; Wharton Cr. Law, 1714, and cases there cited. It was, therefore, not error to refuse a prayer which contained the instruction "that upon the whole evidence the State cannot convict."

The witness Streator testified that the defendant and Harriet Melton had been married 39 years, and that defendant two years ago admitted, in the presence of his second wife, that he had another wife living, and the defendant before the Magistrate testified that he had married said Harriet in South Carolina while they were slaves and had raised several children by her. The prayer for instruction is further erroneous in that it asked the Court to charge that such a marriage was invalid in North Carolina. There was ample evidence to justify the jury in finding that

the cohabitation continued after 1866, for there was further evi- (595) dence that they "lived together many years and had several children"; that two years ago he admitted having another wife, and also evidence from the defendant tending to show that the marriage was between 1861 and 1865. Indeed, the relation having begun is presumed to continue till evidence to the contrary, and persons married in North Carolina while slaves, who continued to cohabit after the abolition of slavery, were *ipso facto* legally married (Act 1866, chap. 40) and no acknowledgment before an officer was essential. "The marriage was complete before the prescribed acknowledgment" made before the Clerk, even if such acknowledgment were not made at all. *S. v. Whitford,* 86 N. C., 636; *S. v. Adams,* 65 N. C., 537; *Long v. Barnes,* 87 N. C., 329; *Jones v. Hoggard,* 108 N. C., 178; *Kirk v. State,* 65 Ga., 159. By these authorities, if the defendant and Harriet, having married in South Carolina while slaves, had cohabited in North Carolina after 1866, as there was evidence to show they did in South Carolina, they could not have been convicted of fornication and adultery, the validity of the marriage dated back to its inception and their children had all the rights of legitimates. Our statute of 1866, owing to the peculiar status of slave marriages, adopted as to such marriages the rule which has long prevailed in Scotland, New York and several other States (and which was the rule of the civil law and of the Canon law till the Council of Trent), that consent, followed by cohabitation, constitutes a legal marriage. 14 Am. and Eng. Enc., 515. The defendant's prayer was, therefore, further erroneous in virtually asking the court to take the case from the jury by telling them that upon the facts in evidence they should find that there was no valid prior marriage "according to the laws and decisions of this State." If, in the absence of proof, marriage between slaves is to be deemed invalid in South Carolina because invalid in North Carolina, for the same reason, in the absence of proof, the continued cohabitation of such parties after 1866 constituted legal marriage (596) because such is the law here.

The exception to the "charge as given" has been uniformly and repeatedly held, indeed, in more than fifty decisions of this court, to be invalid. The Legislature has, besides, given the appellant in all cases ten days, after the adjournment of court, in which to ponder over and set out his assignments of error to the charge, though all other matters must be excepted to at the trial. *Lowe v. Elliott,* 107 N. C., 718; *Blackburn v. Ins. Co.,* 116 N. C., 821. When, after ten days allowed for specific exceptions to the charge, the only error assigned is "to the charge as given," at most we can only take the appellant as excepting to it because it did not contain his prayer, or for containing the opposite instruction, and no further; that is, he simply duplicates his exception for

the refusal to charge as prayed. It was not necessary that the indictment should contain an averment that the defendant had not been divorced from his first wife, as that matter of defense, for though appearing in the section denouncing the offense (The Code, 988) it is in the *proviso* thereof. *S. v. Norman,* 13 N. C., 222; *S. v. Davis,* 109 N. C., 780.

No error.

FAIRCLOTH, C. J., dissenting. I cannot assent to the conclusion of the court in this case. I do not question the competency of either wife to prove the fact of marriage. I do not doubt the competency of the defendant's admissions, whatever they are. I do not doubt that it is the province of the jury to determine the question of marriage under proper instructions *as to the law* arising upon the facts as shown by the evi-
dence. My contention is that when two aspects of a case are pre-
(597) sented by the proofs, the court should "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon" (The Code, 413), and that he should do so upon each aspect of the case presented by the evidence.

"Where the evidence presents the case in two aspects, it is proper for the Trial Judge to charge the jury upon the law as it arises upon both aspects, and then leaves the question of fact to be passed on by the jury." *Spence v. Clapp,* 95 N. C., 545.

"Where the evidence presents the case in two aspects, the Trial Judge should charge the jury in both aspects of the case." *S. v. Gilmer,* 97 N. C., 429; *S. v. Brewer,* 98 N. C., 607; *S. v. Matthews,* 78 N. C., 523; *S. v. Dunlop,* 65 N. C., 288; *S. v. Cardwell,* 44 N. C., 245.

"Where a defendant asks a special instruction to the jury upon an aspect of the case which is presented by the evidence, which the court does not give, it is error, and entitles the defendant to a new trial." *S. v. Gaskins,* 93 N. C., 547; *Bailey v. Pool,* 35 N. C., 404.

The common law of England was imported into the States of this Union, and this court has repeatedly held that it is presumed to continue in such States until it is shown by proper evidence that it (the common law) has been changed by statute. It is true that slavery was largely regulated by statutes, especially the restrictions imposed on it, but still the common law applied to slaves in many respects. They were tried for murder and other high crimes according to the facts and upon the same common law principles of evidence as other classes. It was by the same law that their marriages were allowed no legal significance.

"The marriage of slaves in this State, consisting of cohabitation
merely, by the permission of their owners, does not constitute the
(598) relation of husband and wife so as to attach to them the privi-

leges and disabilities incident to that relation by the common law. Hence it was held that a slave, who was the wife of another slave, might give evidence against him even in a capital case." *S. v. Samuel,* 19 N. C., 177.

The State introduced Harriet Melton, who testified that she and the defendant were both slaves, and that they were married "during slavery times" in South Carolina; that after the marriage she lived with him, the defendant, many years in South Carolina and had children by him; that defendant was at the time of the marriage "a slave for years thereafter." There was evidence, and it was admitted, that in 1894 the defendant married Delia Ann Teel in North Carolina, and that about two years ago he said, in the presence of his last wife, that he had another wife. The Justice of the Peace was allowed to testify orally as to the trial before him, and said if his statement showed that defendant said he married Harriet between 1861 and 1865, it was true. Another witness said he knew the defendant and Harriet; that they were married as slaves in South Carolina; "that they were married about 39 years." There was no proof, except by inference from the above, that the defendant and Harriet ever lived together or cohabited after slavery was abolished. By our Act 1866, chapter 40, when emancipated slaves, who had previously lived in slavery as man and wife, should continue to live together in that relation, they should be deemed to have been lawfully married, and were punishable for failure to register their intention of so continuing. The Code, sec. 1842.

There was no evidence received or offered, at the trial, of the law in South Carolina concerning the marriage relation of emancipated slaves, either before or since emancipation; nor was the jury instructed as to the law on the subject, but left to determine whether the defendant and Harriet Melton were "legally married" without any ref- (599) erence to their status before or after emancipation.

If there had been no legislation in South Carolina (and none was shown) on the present status of slave marriages, then the common law presumption remains, and perhaps the defendant in that State, instead of being a husband, was guilty of fornication and adultery, if cohabitation continued after he became a free man.

The defendant asked for this special instruction: "That the marriage of slaves and their living together in the relation of husband and wife while in a state of slavery did not constitute the relation of husband and wife in North Carolina; that the omission in this case, on the part of the State, to introduce any evidence of the law of South Carolina before the jury, leaves the jury to be governed by the decisions and law in this State, and by that law this marriage in South Carolina was not a valid one; that upon the whole evidence in this case the State cannot convict." This

was refused, and his Honor instructed the jury that "the State must satisfy them from the evidence beyond any reasonable doubt that the defendant *was legally* married to Harriet Melton as charged; * * * that the defendant was married to Harriet Melton, and that during the life of said Harriet he married Delia Ann Teel, then the jury will find the defendant guilty." The latter part of the instructions asked, being as distinct as if they had been numbered 1 and 2, is too general to be considered and may be disregarded.

The jury then had to consider and determine whether the defendant and Harriet were *legally* married. The fact that parties contract in marriage may be found by the jury, but whether the marriage is legal or not is for the court. The special prayer called attention to the fact (600) of agreement to marry and their relations in slavery, and it was important for them to know whether those facts constituted a *legal* marriage. They were not informed. They were not informed, even, what acts and facts after emancipation would constitute a legal marriage. When the defendant admitted he had another wife, did that mean his wife in slavery or his wife by continuance in the marriage relation after slavery, if there was any difference in South Carolina? That was for the jury, with proper directions from the Court as to the law applicable to each condition. Suppose the jury thought the admission that he had another wife had reference to his slave wife, as he might naturally have done, still the jury were at liberty to find him guilty for aught that appears in the charge, and the refusal to give them the special prayer. The jury do not know and cannot know the law of South Carolina without the aid of the Court on this or any other question.

I think his Honor should have explained the law on each phase of the question presented by the evidence. The element of slavery and its changes does not enter into the authorities relied upon by the Court.

DOUGLAS, J. I concur in the dissenting opinion of the Chief Justice.

Cited: S. v. Witsell, ante, 559; *S. v. Call,* 121 N. C., 649; *S. v. Wilson, ib.,* 656; *S. v. Misenheimer,* 123 N. C., 761; *S. v. Newcomb,* 126 N. C., 1106; *S. v. Goulden,* 134 N. C., 744, 746.

(601)

STATE v. A. J. CRAINE.

Indictment for Murder—Homicide—Evidence—Dying Declarations—Instructions to Jury—Remarks of Counsel—Discretion of Trial Judge.

1. Where deceased made statements in contemplation of impending death, such declarations did not subsequently become incompetent because, contrary to his expectations, he lived five months afterwards.
2. On the trial of a defendant for murder, an affidavit made by the deceased before a magistrate immediately after receiving wounds from which he subsequently died, was admissible as corroborative of declarations, made on the same afternoon, in contemplation of death, although he expressed no expectation of death at the time of making such affidavit.
3. Where, on the trial of one for murder, there was no testimony tending to show that the killing was done in self-defense, it was proper to refuse instructions based upon that purely hypothetical state of facts.
4. Comments of counsel, in the argument to a jury, are under the supervision of a trial judge, and this Court will not interfere with the exercise of his discretion unless it plainly appears that he has been too vigorous or too lax in exercising it to the detriment of the parties.
5. Where, upon an indictment for murder, the prisoner is convicted of a lesser offense, if upon appeal a new trial is granted the case goes back for trial *de novo* upon the charge of murder.

INDICTMENT for murder, tried before *Norwood, J.*, and a jury, at Fall Term, 1896, of YANCEY. The defendant was convicted of manslaughter and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
No counsel contra.

CLARK, J. The deceased having been under the impression at the time of impending death, his statement then made is competent as dying declarations (*S. v. Peace,* 46 N. C., 251), and this evidence did not subsequently become incompetent because, in fact, contrary to his (602) expectations he lived five months afterwards. *Com. v. Felch,* 132 Mass., 22; *S. v. Smidt,* 73 Iowa, 469; *Reg. v. Reamy,* 7 Cox C. C., 209; *Fulcher v. State,* 28 Texas App., 465; I Roscoe Cr. Ev., 57; 1 Bishop Cr. Pr., section 1212 (4). The deceased was stabbed at 3 P. M., and on that same afternoon he made the oral dying declarations given in evidence and also an affidavit before a Justice of the Peace for the arrest of the prisoner, in which he gave the same statement as to the manner of his being stabbed—in the back while running away from the prisoner. This statement made so nearly at the same moment would be competent

as corroborative of his dying declaration, though, as in *S. v. Peace,* it did not appear whether the deceased had expressed his expectation of dying before or after he made it. *S. v. Arnold,* 35 N. C., 184; *People v. Bemmerly,* 87 Cal., 117. Indeed, the contemporaneous written affidavit signed by the deceased is valuable to the jury as corroborative of the accuracy of the memory of the witness, who gave in evidence the oral declarations of the deceased made the same afternoon. If the deceased had given a different account of the transaction in his affidavit that afternoon, the prisoner should surely have had the benefit of it, and, on the other hand, that he made the same narration in his affidavit as in his oral statement is proper to go to the jury in corroboration. The other matters in the affidavit were not injurious to the prisoner, and their admissions, if error, were harmless to him. *Whitford v. Newbern,* 111 N. C., 272. There was no evidence tending to show that the killing was done in self-defense and the Court properly refused the prayers for instruction based upon that purely hypothetical state of facts. *S. v. Chavis,* 80 N. C., 353, and numerous cases cited in Clark's Code (2 Ed.), p. 398.

(603) The comments of counsel are under the supervision of the presiding Judge, and unless it is clear that he has been too rigorous or too lax in exercising his discretion to the detriment of parties, this Court will not interfere. *Goodwin v. Sapp,* 102 N. C., 477.

The prisoner was only convicted of manslaughter, but the evidence disclosed a bald case of murder without any extenuating circumstances. The appellant ought to congratulate himself that we have not found error which would send the case back for a new trial. It was clearly intimated by *Smith, C. J.,* in *S. v. Grady,* 83 N. C., 643, 649, approving *Ruffin, C. J.,* in *S. v. Stanton,* 23 N. C., 424, that where the indictment is for murder and the conviction is for a lesser offense, the verdict having been set aside by the prisoner's own action in appealing, a new trial, if granted, must necessarily be for the offense set out in the bill of indictment.

No error.

Cited: S. v. Groves, 121 N. C., 569; *S. v. Freeman,* 122 N. C., 1016; *S. v. Tyson,* 133 N. C., 696; *S. v. Teachey,* 138 N. C., 597; *S. v. Exum, ib.,* 607, 614; *S. v. Matthews,* 142 N. C., 622; *Bowman v. Blankenship,* 165 N. C., 522.

STATE v. ROY SINCLAIR.

Indictment for Assault with a Deadly Weapon—Deadly Weapon—Province of the Court to Determine What is a Deadly Weapon.

1. Whether an instrument used in an assault is a deadly weapon is a question of law where there is no dispute about the facts, and as the jurisdiction of the Court depends upon the determination of the question, it is proper for the trial judge to determine such matter when necessary.
2. In determining whether a weapon used in an assault is a deadly weapon, it is necessary to take into consideration the size and nature of the weapon, the manner in which it is used, the size and strength of the assailant and the assaulted.
3. A deadly weapon is not one that *must* kill or that *may* kill, but it is one which would likely produce death or great bodily harm, used by the defendant in the manner in which it was used.
3. A piece of pine weather-boarding fourteen to eighteen inches long, three-quarters of an inch thick, six inches wide at one end and tapering to a point at the other, was not a deadly weapon in the hands of a feeble fifteen-year-old boy weighing eighty pounds, who held it by the small end and struck with its edge the leg and back of a grown man of average size who was held by two other men.

INDICTMENT for assault with a deadly weapon, tried before (604) *Norwood, J.*, and a jury, at Fall Term, 1896, of YANCEY.

Defendant pleaded former trial and conviction before a Justice of the Peace. It was admitted by the State that the defendant had been formerly tried and convicted regularly before the Justice of the Peace, who had assumed jurisdiction and disposed of the case, but the State alleged that a deadly weapon had been used and that, therefore, the Justice had no jurisdiction. The only question before the court was whether or not the weapon used by the defendant was a deadly weapon in his hands. (The evidence introduced necessary to an understanding of defendant's exceptions appears in the opinion of the court).

There was a verdict of guilty, motion for a new trial overruled, and the court adjudged that defendant pay a fine of one penny and costs. Defendant appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Messrs. Covington & Redwine for defendant (appellant).

FURCHES, J. This is an indictment for assault and battery with a deadly weapon. The defendant pleaded former trial before a Justice of the Peace and conviction. It was admitted that the defendant had been so tried and convicted. But the State insisted (605)

that the assault was made with a deadly weapon and that a Justice of the Peace had no jurisdiction of the offense.

This is the only question in the case, and depends upon the fact as to whether the instrument used, the manner in which it was used, the party who used it, and upon whom it was used, made it a deadly weapon or not.

"The defendant, at the time of the assault, was only fifteen years old, weighed seventy-five or eighty pounds, and was a feeble, sickly boy. The assailed was a grown young man of about the average size, and at the time was being held by two men, each one holding him by the arm. The weapon used by the defendant was a piece of pine weather boarding, which had come off a house near by, which had been in use several years, was five to six inches wide at one end, and gradually tapered down to a point at the other end and three-quarters of an inch thick, and from fourteen to eighteen inches long. The defendant held this plank by the small end and struck the assailed with the edge of it on the back of the leg, making a blue spot on the back which was sore for two or three weeks. His Honor held that this plank was a deadly weapon *per se* and so instructed the jury."

As to whether an instrument used in an assault and battery is a deadly weapon or not, is generally a question of law. *S. v. Huntley,* 91 N. C., 617; *S. v. West,* 51 N. C., 505; *S. v. Craton,* 28 N. C., 164; *S. v. Collins,* 30 N. C., 407. This question has been submitted to the jury, in a few cases, where the matter was left in doubt by conflicting evidence as to the size of the weapon used and the manner in which it was used, and such submissions to the jury have been approved by this court.

But in this case there is no dispute about the facts, and it appears that the piece of plank was in court on the trial, as a diagram is sent up with the case.

(606) Besides, as this was a question that went to the jurisdiction of the court, it seems to us that it was one which should have been determined by the court, and the court seems to have so understood it. The question then is, did the court correctly decide this question? Was the charge to the jury, that it was a deadly weapon as used, correct? A deadly weapon is not one that must kill, nor is it one that may kill. A gun or a 40-calibre pistol is certainly a deadly weapon in contemplation of law. But they are often used without producing death, while a penknife is not considered a deadly weapon, and yet death occasionally is produced by its use. It does not depend upon the fact as to whether death ensues from its use or not. But the size and nature of the weapon, the manner in which it is used, the size and strength of the party using it, and the person upon whom it is used—these must all be taken into consideration by the court in determining whether it is a deadly weapon or not.

The best definition we can find of a deadly weapon (and it is the one most usually given by the courts) is a weapon that would likely produce death or great bodily harm, used by the defendant, in the manner in which it was used. *S. v. Collins,* 30 N. C., 407, and cases cited, *supra.* Tested by this definition, we are of the opinion that this was not a deadly weapon. Error.

New trial.

Cited: S. v. Archbell, 139 N. C., 539; *S. v. Beal,* 170 N. C., 766.

(607)

STATE v. S. P. COMBS.

Indictment for Breaking Down a Gate Across a Cartway—Indictment, Sufficiency of—Defense.

1. Where a bill of indictment, under section 2057 of The Code, for breaking down a gate across a cartway, described the cartway as running through the land of H, beginning near the house of C, in B township and running in an eastern direction through the lands of said H for the distance of about "one-half mile," and alleged that the cartway was "laid off by the authority of a jury regularly constituted by the board of supervisors in and for said B township": *Held,* (1) that the legality of the establishment of said cartway was sufficiently averred in the bill; (2) that the bill sufficiently locates the cartway, although it does not state its eastern terminus or whether it runs to a public road.

2. The failure to establish a cartway according to law is a matter of defense to be pleaded in the trial of an indictment for breaking down a gate across it.

INDICTMENT for breaking down a gate across a cartway, tried before *Hoke, J.,* and a jury, at Fall Term, 1896, of SURRY.

Mr. Attorney-General Zeb V. Walser for the State.
Mr. A. E. Holton for defendant (appellant).

FURCHES, J. The defendant was indicted for "willfully, unlawfully and maliciously breaking down and injuring certain gates erected across the cartway running through the lands of S. S. Harris, beginning near the house of S. P. Combs, in Bryan township, and running in an eastern direction through the lands of said Harris, for the distance of about one-half mile, said cartway being laid off by authority of a jury regularly constituted by the Board of Supervisors in and for said Bryan

(608) township, contrary to the form of the statute and against the peace and dignity of the State." Upon a verdict of guilty being entered, the defendant moved in arrest of judgment. This motion was overruled. Judgment and appeal by defendant.

This is the only question presented by the appeal, and it was contended on the argument that the bill of indictment was defective, for the reason that it did not state, with sufficient fullness, the manner in which the order to lay out and locate said cartway was obtained, and at whose instance said order was procured, and for that it failed to state its eastern terminus, and whether it ran to a public road. But neither of these objections can avail the defendant. The bill of indictment is in the words of the statute, section 2057 of The Code. And if the cartway had not been located according to law (The Code, sec. 2056, *Collins v. Patterson,* 119 N. C., 602) and was not, in fact, a cartway in law, this was a matter of defense that defendant should have availed himself of on the trial below. The cartway and the gates torn down being definitely located in the bill, the case of *S. v. Crumpler,* 88 N. C., 647, is not in point. Therefore, finding the bill sufficient in form, judgment must be Affirmed.

STATE v. MARY MCRAE.

Indictment for Larceny—Evidence—Recent Possession of Stolen Property—Instructions to Jury.

1. An instruction that, if the stolen coin was sent by the defendant two days after the theft to a bank where it was found and identified by the owner, the law presumed defendant to be the thief and the jury should convict, unless defendant should satisfactorily explain the possession, was erroneous.

2. The presumption of guilt that the law raises from recent possession of stolen property, is strong, slight or weak, according to the particular facts surrounding a given case.

(609) INDICTMENT for larceny, tried before *Norwood, J.,* at Spring Term, 1897, of UNION. The defendant was convicted and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Messrs. Covington & Redwine for defendant (appellant).

FAIRCLOTH, C. J. The defendant stands indicted for stealing $30 in money, and the case shows that it was a twenty dollar gold coin, the prop-

erty of Edwin Eubanks. There was no direct evidence, and the State relies on the proof of recent possession. Many attempts have been made to tell what constitutes recent possession, such as "soon after," "shortly after," "so soon after the theft as to raise a presumption of guilt" and the like; and then presumptions are held to be strong, slight or weak, etc., and each case is at last disposed of on its particular facts.

We have no disposition to try to add to the list of what constitutes *recent possession.* Some of them will be found in *S. v. Jones,* 20 N. C., 122; *S. v. Turner,* 65 N. C., 592; *S. v. Graves,* 72 N. C., 482; *S. v. Wilson,* 76 N. C., 120; *S. v. Patterson,* 78 N. C., 470; *S. v. Smith,* 24 N. C., 402; *S. v. Rights,* 82 N. C., 675; *S. v. Rice,* 83 N. C., 661; *S. v. Jennett,* 88 N. C., 665.

Evidence: Eubanks, the prosecutor, testified that he was a postal route agent from Monroe to Atlanta, Ga. That on 21 January, 1897, at 11 o'clock, A. M., he had the coin in his pocket at the postoffice in Monroe, when he went to his room at Mr. Courtney's and went to bed, slept till dark, dressed and went to a restaurant and stayed about depot till 9 P. M., when he took the train for Atlanta, where he arrived next morning, *when* he missed his gold coin. That the defendant cooked for Courtney, but he did not see her there on the said 21st; that he found and identified his coin by some private mark on 25 Janu- (610) ary, 1897, in the People's Bank, at Monroe.

Wolfe, the cashier, testified that on 22 or 23 January, a boy, Jack Cohen, brought a $20 gold coin to the bank and got change for it; that he put the coin away among similar moneys and he could not say that it was the one identified by Eubanks.

Jack Cohen testified that on 23 January the defendant gave him a $20 gold coin and asked him to get it changed and said she got it from James Davis, a fireman on the railroad. He gave her the change. He said James Davis was on his run and was not at the trial. Defendant offered no evidence. His Honor charged the jury: "If the State has satisfied you beyond a reasonable doubt that the twenty dollar gold piece of the witness Eubanks was stolen on 21 January, 1897; that the coin found and identified by him in the bank was his; that the coin carried by the witness Cohen to the bank on 23 January, 1897, was the coin belonging to Eubanks; and that the witness Cohen got said coin from the defendant on that day, then the burden shifts and the defendant is presumed in law to be the thief, and unless she satisfactorily explains her possession of the coin it is your duty to convict." Defendant excepted and appealed.

We think, upon this evidence, taken as true, his Honor committed error in holding as a legal conclusion that the defendant was guilty.

In all cases, civil or criminal, presumptive evidence is admissible, but in the latter cases such evidence is admitted only so far as it has a natural tendency to produce belief under the circumstances in the case.

Experience, habits of society and natural reasoning are to be con-
(611) sidered, and such presumption as those matters raise must manifest that the stolen goods have come to the possessor by his or her own act or concurrence. The case of *Scipio Smith,* 24 N. C., 402, very well illustrates. The tobacco was stolen on Friday night and found in the defendant's possession next day. The Judge told the jury that that was a case of "strong presumption of guilt," and this Court held that charge to be error. The character and quality of the stolen property are matters proper for the jury to consider and should be so presented to them. Money, as a medium in trade, passes rapidly and frequently from hand to hand, and no one doubts the ownership of the possessor unless some peculiar circumstance is present, as is illustrated here by the action of the cashier. How it would be if it was a personal chattel, as an ox or wagon, would naturally, in the course of common experience, present itself to the mind of a juror, and such matters are proper to be called to his attention. Without any opinion on the question of guilt, we can see how current money may pass several hands in two or three days, without any knowledge or concurrence on the part of the final possessor of the original taking. These are matters to be submitted to the jury as *evidence* with all attending circumstances, but the law will not give them an *artificial* operation, and as a legal conclusion pronounce the defendant guilty. The defendant is presumed to be innocent, and that presumption must be overcome and the jury reasonably satisfied of the guilt of the accused. These and other principles must be explained to the jury and let them intelligently consider of their verdict.

From the record before us it does not appear that they were so explained.

Error.

Cited: S. v. Hullen, 133 N. C., 660; *S. v. Record,* 151 N. C., 697; *S. v. Neville,* 157 N. C., 595; *S. v. Anderson,* 162 N. C., 575.

(612)

STATE v. R. L. KING.

Indictment for Secret Assault with Intent to Kill—Secret Assault, Essential Elements of.

An assault cannot be "secret" in the meaning of the statute unless the person assaulted is unconscious of the presence as well as of the purpose of his adversary.

INDICTMENT for secret assault with intent to kill, tried before *Robinson, J.*, and a jury, at Fall Term, 1896, of GRAHAM. The defendant was convicted and appealed.

Mr. Attorney-General Zeb V. Walser for the State.
Messrs. Shepherd & Busbee for defendant (appellant).

FURCHES, J. This is an indictment for a secret assault with intent to kill. The statute under which the defendant is indicted is highly penal and must be strictly construed. It is held by this court that "an assault cannot be said to have been made in a secret manner, except where the person assaulted is unconscious of the presence as well as of the purpose of his adversary." *S. v. Gunter,* 116 N. C., 1068.

The Court charged the jury in this case that it was sufficient to constitute the crime of secret assault under the statute, if the person assaulted "had no notice of the presence *or* purpose of the defendant," thus making it the duty of the jury to convict the defendant if they found from the evidence that the person assaulted had no knowledge of the defendant's presence, or if he knew of the defendant's presence but did not know of his intention to make the assault; thus making a want of knowledge of the defendant's presence or a want of knowledge of the defendant's intention to assault sufficient to convict. Whereas, there must be a want of knowledge of the defendant's presence and also a want of knowledge of intention to make the assault, to constitute the crime of a secret assault under the statute. There is error. (613)

New trial.

STATE v. OSCAR NEAL.

Indictment for Cruelty to Animals—Killing Chickens—Defense—Evidence—Instructions.

1. The fact that chickens killed by a defendant, charged with cruelty to animals, were killed while destroying peas in the garden of defendant's father, and after prosecutor had been warned to keep the chickens from trespassing on the garden, is not a defense to an indictment for cruelty to animals, under section 2482 of The Code, when the killing was wilful.
2. Trespassing chickens could be impounded at common law.
3. The needless killing of chickens is of itself cruelty within the meaning of section 2482 of The Code, though done without torture.
4. Since the enactment of section 2482 of The Code it has been unlawful for one to gratify his angry passions or love for amusement or sport at the cost of wounds and death to any useful creature, and the wilful and needless killing of chickens is none the less cruelty to them when done under an "impulse of anger."
5. Where, in the trial of an indictment for cruelty to chickens, by killing them, no aspect of the evidence tended to show that the killing was accidental, it was not error to refuse to instruct the jury that, "if the defendant killed the chickens without any intent to wilfully kill them, he would not be guilty."
6. Where an instruction prayed for is correct in part but incorrect as an entirety, the trial judge is not called upon to dissect it and give so much of it as is good.
7. An averment in a bill of indictment that the defendant did "knowingly, wilfully and needlessly act in a cruel manner towards a certain fowl, towit, a chicken, by killing said chicken, the said chicken being a useful fowl," is a sufficiently intelligible charge that the defendant was guilty of cruelty to the useful fowl by needlessly and wilfully killing it.
8. In the trial of an indictment for cruelty to animals by killing chickens, an erroneous instruction that the defendant must have been justified in the killing beyond a reasonable doubt was a harmless error, where there was no evidence tending to show that the defendant was justified.
9. The intent with which one charged with cruelty to animals killed a chicken is immaterial when the killing was needless and wilful.
10. A charge of "needlessly acting in a cruel manner by killing" chickens is a sufficient charge of cruelty and is sustained by uncontroverted proof of impaling one chicken on a sharp stick and beating a hen to death.
11. When a defendant convicted before a magistrate appeals and in the Superior Court an indictment is found, it is immaterial to consider whether the Superior Court or the magistrate had original jurisdiction, as the Superior Court, in any event, had jurisdiction either by the appeal or by the indictment.

(614) INDICTMENT for cruelty to animals, tried before *Norwood, J.*, and a jury, at Fall Term, 1896, of STANLY.

Defendant asked the following special instructions:

"(1). That chickens are not embraced in the list of animals authorized to be impounded under our statute in stock-law territory; and, therefore, if the jury believed that the defendant had notified the prosecutor to keep his chickens from trespassing on defendant's crop, that defendant had made reasonable efforts to prevent the injury to his crop without killing the chickens or otherwise injuring them, but that prosecutor refused or failed to keep up his chickens, and defendant killed them simply to prevent injury to his crop, then the killing would not be wilful, within the meaning of the statute under which defendant is indicted, and defendant would not be guilty. (Not given).

"(2). That chickens are not such animals as were allowed to be impounded at common law, and, therefore, if the jury believe that defendant killed them without needless or wilful torture, but simply to prevent them from destroying his crop, then defendant would not (615) be guilty. (Not given).

"(3). That, in order to convict the defendant, the jury must find that he wilfully killed the chickens, and that the term 'wilfully' implies that the act was done knowingly and of stubborn purpose. (Given).

"(4). That, in order to convict the defendant, the jury must find that the killing of the chickens was the development of a preconceived purpose, and not an impulse of anger excited by unexpectedly seeing a repetition of the annoying trespass; and, therefore, if the jury believe that defendant killed the chickens without wiful torture, and without any purpose to do the prosecutor a wilful injury, but simply to prevent injury to his crop, then defendant would not be guilty. (Not given).

"(5). That the statute under which defendant is indicted relates only to offenses where the injury is directed against the animal killed or wounded, where there is an intent on the part of the offender to wilfully injure, torture, wound or kill the animal, without reference to the owner of the animal; and, therefore, if the jury should believe that defendant killed the chickens without any intent to wilfully injure, wound or kill the chickens, then he would not be guilty. (Not given).

"(6). That in no view of the evidence can defendant J. F. Neal be found guilty. (Given).

"(7). That in no view of the evidence can defendant Oscar Neal be found guilty. (Not given)."

The Judge refused to give the instructions, except the third and sixth, and defendant excepted. Defendant offered to show that the chickens were eating his peas, and that he killed them to prevent them from destroying the same. The solicitor objected to this evidence, and the objection was sustained, and defendant excepted. The Court charged the jury, among other things, that, in order to acquit the defend- (616)

ant, they must believe from the evidence, beyond a reasonable doubt, that he was justified in killing the chickens, and that he would not be justified if he killed them to prevent the destruction of his crop. Verdict of guilty. Motion in arrest of judgment, on the ground that the indictment failed to allege that the killing of the chickens was by torture, cruelty, wounding or mutilation. Motion overruled, and defendant excepted. Motion for new trial for errors assigned as follows: "(1). That the Court erred in refusing to give the first, second, fourth, fifth and seventh instructions asked. (2). That the Court erred in charging the jury that the defendant must be justified in killing the chickens, and that he would not be justified if he killed them to prevent the destruction of his crop." Oscar Neal alone was found guilty. He was adjudged to pay a fine of $1 and costs, and appealed.

Messrs. Attorney-General and J. M. Brown for the State.

Messrs. Adams & Jerome and S. J. Pemberton for defendant (appellant).

CLARK, J. This is an indictment for cruelty to animals, towit: Sundry Stanly County chickens, "tame, villatic fowl," as Milton styles them in stately phrase. The prosecutor and defendant lived very near each other and their chickens were exceedingly sociable, visiting each other constantly. But after the defendants had sown their peas they had no peace, for the prosecutor's chickens became lively factors in disturbing both. The younger defendant, Oscar, as impetuous as his great namesake, the son of Ossian, pursued one of the prosecutor's chickens clear across the lot of another neighbor, one Mrs. Freeman, and intimi-
(617) dating it into seeking safety in a brush pile pulled it out ignominiously by the legs, and putting his foot on his victim's head, by muscular effort, pulled its head off. Then, in triumph, he carried the headless, lifeless body and threw it down in the prosecutor's yard in the presence of his wife, also letting drop some opprobrious words at the same time. The prosecutor was absent. Another chicken Oscar also chased into the brush pile, and, sharpening a stick, jabbed it at said chicken and through him, so that he then and there died, and Oscar, carrying the chicken impaled on his spear, threw it over into the prosecutor's yard. He knocked over another and, impaling it in the same style, also threw its lifeless remains over into the prosecutor's yard, as the Consul Nero caused the head of Asdrubal to be thrown into Hannibal's camp. On yet another occasion Oscar did beat a hen that had young chickens, which, with maternal solicitude, she was caring for, so that she died and the young ones, lacking her care, also likewise perished. The aforesaid Oscar, on other divers and sundry times and occasions, was seen "running

and chunking" the prosecutor's chickens. The other defendant, Oscar's father, proposed to the prosecutor "to strike a dead line, and each one kill everything that crossed the line." The offer seemed too unrestricted and the cautious prosecutor, whose thoughts were "bent on peace," as much as his chickens were on peas, firmly declined the dead line proposition, but Oscar's father said he "guessed he would do that way." As the evidence limited his proceedings to this declaration of war, without any overt act, a *nol pros* was entered as to him, and Oscar was left alone to bear the brunt. "Having," in the language of Tacitus, "made a solitude and called it peace,"* he naturally protests against being now charged with the odium and burdens of war, which his Honor has assessed at a fine of $1 and costs.

Both defendants and Oscar's mother went on the stand. There (618) was no substantial contradiction of the State's evidence, but all three testified that the prosecutor had been notified to keep his chickens out of their pea patch or they would be killed. This is the "round, unvarnished tale" of the evidence.

The defendant's counsel interposed every consecutive defense from a plea to the jurisdiction to a motion in arrest of judgment.

The case was tried before a Justice of the Peace and the defendant appealed. In the Superior Court a bill of indictment was found by the grand jury and the defendant was tried thereon. Therefore, in any aspect, there was jurisdiction. Whether the court acquired it by the appeal or had original jurisdiction by the indictment, it is immaterial to decide.

Chickens come within the very terms of The Code, sec. 2482, describing the creatures intended to be protected from man's inhumanity, "any useful beast, fowl or animal." Pigeons were held to be within it. *S. v. Porter,* 112 N. C., 887.

The defendant offered to show by Oscar himself that "he killed the chickens to prevent them from destroying the peas." This was to show justification and was properly rejected. The defendants had no more right to destroy a neighbor's chickens when thus found damage *feasant* than they would his cattle. The remedy is by impounding them till damage paid, or by an action for damage. Their destruction is not necessary to his rights, *Clark v. Keliher,* 107 Mass., 406, which was a case "on all fours" with this for killing a neighbor's chickens while trespassing after notice to keep them up. In this State, in like manner, it has been held that one has no right to lay poison, though on his own premises, for another's "egg-sucking dog," *Dodson v. Mock,* 20 N. C., 146; nor to kill a "chicken-eating hog" as a nuisance, *Morse v. Nixon,* 51 N. C.,

*"Solitudinem faciunt, pacem vocant." *Agricola,* c. 30.

(619) 293; nor a "breachy-hog" for the same reason. *Bost v. Mingues,* 64 N. C., 44. These cases refer to and distinguish *Parrott v. Heartsfield,* 20 N. C., 110, where it was held lawful to kill a "sheep stealing" dog about to kill sheep. This is because of the fact that such animal could not be easily caught and impounded, nor could he be sold for anything to pay damages. In *Johnson v. Patterson,* 14 Conn., 1, a very long and learned opinion sustains the proposition that one is not justified in strewing poisoned meat on his premises whereby a neighbor's chickens were killed, though notice was given that this would be done if they were not kept off. It is true, these were actions for damages, and not indictments for cruelty to animals, but if, even in such cases, the trespass is no defense, certainly evidence to show the trespass by an animal was incompetent in an indictment whose gist is merely the fact of cruelty or needless killing. *S. v. Butts,* 92 N. C., 784.

The first prayer for instruction was properly refused. If this were stock law territory (which is not in evidence) the killing would be none the less wilful. *S. v. Brigman,* 94 N. C., 888.

The second prayer was also properly refused. Chickens could be impounded at common law, and besides the "needless killing" of the chickens is of itself cruelty, though done without torture. *S. v. Porter, supra.*

The third prayer, that the jury must find that the defendant "wilfully, knowingly and of stubborn purpose killed the chickens" before they could convict, was given.

The fourth prayer was properly refused. The wilful and needless killing of the prosecutor's chickens was none the less cruelty to them because done on an "impulse of anger." Says *Burwell, J.,* in *S. v. Porter,*
(620) *supra:* Since the enactment of this statute it has been unlawful in this State for a man to gratify his angry passions or his love for amusement and sport at the cost of wounds and death to any useful creature over which he has control.

The fifth prayer, which contained this: "If the defendant killed the chickens without any intent to wilfully * * * kill them, he would not be guilty," was properly refused.

There was no aspect of the evidence tending to show an accidental killing. If the rest of the prayer were correct, it being incorrect as an entirety, the court was not called upon to dissect it and give so much as was good.

The sixth prayer was given, and the seventh, from what has already been said, was properly refused.

The Judge stated a correct proposition of law when he told the jury that the defendant was not justified if he killed the chickens to prevent the destruction of his crop, *S. v. Butts, supra,* for he could have prevented it by impounding them, or he could sue for damages. But he

erred in telling them that the defendant must prove justification in the killing. The indictment being that the defendant did "knowingly, wilfully and needlessly act in a cruel manner towards a certain fowl, to-wit, a chicken, by killing said chicken, the said chicken being a useful fowl," etc., this (rejecting refinement, The Code, sec. 1183) is an intelligible charge that the defendant was guilty of cruelty to the useful fowl by needlessly and wilfully killing it. But the burden was on the prosecution to prove the "knowingly, wilfully and needlessly." It was not incumbent on the defendant to prove justification. It is not like the killing of a human being which, if done with a deadly weapon, raises a presumption of malice, *S. v. Rollins,* 113 N. C., 722; nor yet like the proof of a sale of liquor, which, being shown, the burden devolves upon the defendant to show the license, because it is a matter peculiarly in his own knowledge, *S. v. Emery,* 98 N. C., 668; nor like cases (621) where an act is made punishable irrespective of intent in which, the act being shown, the burden shifts to the defendant, *S. v. Glenn,* 118 N. C., 1194, and it was still greater error to charge that the defendant must prove the matter of justification beyond a reasonable doubt. Even where the burden shifts to the defendant, he needs only to prove it "to the satisfaction of the jury." *S. v. Ellick,* 60 N. C., 56; *S. v. Willis,* 63 N. C., 26. But this error in the charge was harmless error, for there was no evidence tending to show that the defendant was justified, and the Court properly told the jury that the killing to prevent the destruction of the peas (the only matter in justification relied on) would not justify the defendant. The Court might properly have told the jury that, if they believed the evidence, they should find the defendant guilty, for there was no conflict of evidence, and it amounted to that, since there was no evidence which made a legal defense.

In response to the third prayer the Court properly instructed the jury that they could not convict unless they found that the defendant "knowingly, wilfully and of stubborn purpose" killed the chickens. This is not a case of "intent," which is an inference of inner motive to be drawn by the jury, *S. v. Coy,* 119 N. C., 901, but of conduct, cruelty, independent of intent if wilful, and the defendant's own evidence proved that the killing was done wilfully, and the charge being substantially that, if the jury believed the evidence, he was guilty, was correct. *S. v. Woolard,* 119 N. C., 779; *S. v. Riley,* 113 N. C., 648.

What has already been said disposes of the motion in arrest of judgment. The defendant understood fully the charge against him, The Code, sec. 1183. The Code, sec. 2490, provides that "cruelty" shall be held to include every act, etc., whereby unjustifiable physical pain, suffering or death is caused. While the indictment is not carefully drawn, and is, indeed, less accurate than the warrant originally (622)

issued by the Justice, the charge of "needlessly acting in a cruel manner by killing," is a sufficient charge of cruelty, and is sustained by the uncontroverted proof of impaling one chicken on a sharp stick and beating the hen to death.

Affirmed.

Cited: Hampton v. R. R., ante, 538; *S. v. Hester,* 122 N. C., 1052; *Vanderbilt v. Brown,* 128 N. C., 502; *S. v. Wiseman,* 131 N. C., 797; *Willeford v. Bailey,* 132 N. C., 404; *S. v. R. R.,* 145 N. C., 578, 580; *S. v. Smith,* 156 N. C., 631; *S. v. McAden,* 162 N. C., 577.

APPENDIX

Correspondence between the House of Representatives of the General Assembly of North Carolina and the Supreme Court of North Carolina.

The House of Representatives of the General Assembly of 1897 adopted the following resolution:

"Resolved by the House of Representatives, That the Chief Justice and Associate Justices of the Supreme Court of North Carolina be respectively requested to examine a bill, now pending before the House of Representatives, entitled, A bill to be entitled An Act to prescribe the terms upon which foreign railroad corporations may become incorporated in this State, and for other purposes, and to communicate through the Speaker of the House of Representatives the opinion of the Court upon the question whether, if the said bill shall be passed by both Houses and ratified, it will become operative before its ratification by the stockholders of the North Carolina Railroad Company, and that the members of the Court be further respectfully requested to so communicate their opinion to the session of the House of Representatives to be held on Saturday, the 6th inst., if they shall find it consistent with their duty to the public to do so.

"Resolved, further, That the Speaker of the House of Representatives be requested to send a copy of the said bill, with these resolutions, immediately upon their adoption, to the Chief Justice of the Supreme Court.

"A. F. HILEMAN, Speaker of the House.

"E. O. MASTIN, Prin. Clerk of the House."

The material part of the bill referred to in the resolution was as follows:

"Section 6. That the lease heretofore executed by the North Carolina Railroad Company to the Southern Railway Company, on 16 August, 1895, be and the same is hereby validated, confirmed and approved, subject to the limitation of time mentioned in section 5. But this section shall not take effect until and unless the Southern Railway Company, lessee, shall on or before 1 April, 1897, make, execute and deliver to the North Carolina Railroad Company, by appropriate instrument, its assent to a remission or modification of the lease executed on 16 August, 1895, as above named, whereby the duration of such lease from the date of its execution shall be reduced from the term of ninety-nine years to a term of thirty-six years, and until and unless the said remission or modification of the lease be accepted and adopted by the Board of Directors of the North Carolina Railroad Company on or before 1 June, 1897."

The reply of the Supreme Court was as follows:

NORTH CAROLINA SUPREME COURT,
RALEIGH, 6 March, 1897.

To the Speaker and Gentlemen of the House of Representatives:

GENTLEMEN:—Your resolution is before us. Precedent and the courtesy due to a co-ordinate branch of the Government impel us to respond to your request. Without expressing any intimation of opinion, either way, upon the question whether the power to lease its road is vested in the North Carolina Railroad

Company by its charter, we are of opinion that the power, if it exists, is now vested in the stockholders, and the provision in section 6 of the bill submitted to us, which makes the validity of a lease dependent upon its acceptance by the Board of Directors, would be an amendment of the charter transferring power from the stockholders, and invalid unless accepted by the stockholders in general or special meeting assembled.

Most respectfully,

W. T. FAIRCLOTH, C. J.

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COLLATERAL ATTACK.

Where a judgment of foreclosure was rendered in an action in which the question of the insanity of the mortgagor was raised, the mortgagor is estopped thereby and such judgment cannot be collaterally attacked thereafter on the ground of his insanity. *Chamblee v. Broughton*, 170.

CONSTITUTIONAL LAW.

1. The equation of taxation being fixed by the Constitution, any sections or parts of sections of an act of the General Assembly which violate or disturb such equation are void, and the courts can lend no aid by judicial decisions, but must declare the offending provisions void. *Russell v. Ayer,* 180.

2. Sections 2 and 3 of chapter 168, acts of 1897 (Revenue Act), fixing the poll tax at $1.29 and the property tax at 46 cents on the $100 valuation, being in conflict with section 1, Article V, of the Constitution, which provides that the poll tax shall be equal to the tax on $100 of property, are both void, and the executive department cannot levy a poll tax at the constitutional ratio to the property tax fixed. *Ibid.*

3. Sections 2 and 3 of chapter 168, acts of 1897 (Revenue Act), being void in so far as they violate the constitutional equation of taxation, the corresponding parts of sections 2 and 3 of chapter 116, acts of 1895, are unrepealed and in full force and effect. *Ibid.*

4. Where an act of the General Assembly authorized a municipality to issue bonds for city purposes with the consent of a majority of its qualified voters therein, but did not provide for the levy of a tax to pay the interest accruing on and the principal of the bonds at maturity, an election held under such act was only an election concerning the issue of bonds, and not concerning the consent of the voters to a levy of taxes to pay the principal and interest. *Charlotte v. Shephard,* 411.

5. The power given by a statute to a city to issue bonds with the approval of a majority of the qualified voters of the city does not confer, by implication, the power to levy a tax to pay them unless the power to levy such tax has been conferred by the act authorizing the issue and ratified by a vote of the people, as required by section 7, Article VII, of the Constitution. *Ibid.*

6. Chapter 7, Private Laws of 1866, chartering the city of Charlotte, authorized the city to issue bonds not exceeding $200,000 for any pur-